STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

DIANE M. KAISER, Charging Party, v. FREMONT UNIFIED DISTRICT TEACHERS ASSOCIATION, Respondent.	Case No. SF-CO-606-E PERB Decision No. 1572 December 24, 2003

Appearances: Diane M. Kaiser, on her own behalf; Priscilla Winslow, Attorney, for Fremont Unified District Teachers Association.

Before Baker, Whitehead and Neima, Members.

DECISION

BAKER, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Diane M. Kaiser (Kaiser) of a Board agent's dismissal (attached) of her unfair practice charge. The charge alleged that the Fremont Unified District Teachers Association (FUDTA) violated the Educational Employment Relations Act (EERA) [1] by breaching its duty of fair representation.

After reviewing the entire record in this matter, including the original and amended unfair practice charge, the warning and dismissal letters, Kaiser's appeal, and FUDTA's response, the Board sustains the dismissal as discussed below.

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

BACKGROUND

According to the charge, Kaiser is employed by the Fremont Unified School District (District) as a teacher. During the 2000-2001 school year, Kaiser was assigned to teach third grade. The District's curriculum included the Packard Grant/Open Court Language Arts Program (Packard Program). Teachers in certain grades were required to utilize this reading program.

Disputes arose during the school year between Kaiser and the principal of the school, Ed Tucker (Tucker), over Kaiser's implementation of the Packard Program in her classroom. As a result of the disputes, Kaiser alleges that Tucker took numerous actions against her. For example, Kaiser alleges that Tucker "fraudulently authored Teacher Comments on [her] first evaluation."

To aid her in her dispute with Tucker, Kaiser requested assistance from FUDTA. On behalf of Kaiser, FUDTA requested and received information concerning the Packard Program. Also, the president of FUDTA, Greg Bonaccorsi (Bonaccorsi), attended a meeting between Kaiser and Tucker described as a "Level I Complaint Meeting." As a result of that meeting, Kaiser alleges that Tucker agreed to refrain from the conduct described above. However, Kaiser alleges that, approximately two weeks later, Tucker engaged in the same conduct. Kaiser asserts that she repeatedly notified Bonaccorsi of Tucker's conduct, but that Bonaccorsi failed to correct the violations made by Tucker.

On April 2, 2001, Kaiser was informed that next school year she was being reassigned from third grade to teach fourth/fifth grade purportedly, because she had not been providing her students with the skills they need for reading. Kaiser informed both FUDTA and Tucker she did not agree with the assignment to teach fourth/fifth grade. On April 23, 2001, FUDTA

filed a grievance challenging the reassignment. Kaiser and Bonaccorsi attended a Level I grievance meeting with Tucker on May 18, 2001. Tucker denied Kaiser's grievance on May 25, 2001.

Kaiser appealed her reassignment to teach fourth/fifth grade grievance to Level II before Cheryl Bushmire (Bushmire), director of certificated personnel. However, the charge alleges that a Level II grievance meeting could not be held all summer, because Tucker was unavailable due to knee surgery. Article 6 of the applicable collective bargaining agreement states, in pertinent part:

> In the event a grievance is filed or unresolved on or after May 1 which, if left unresolved until the beginning of the following school year, could result in harm to a party in interest, the time limits set forth herein shall be reduced so that the grievance may be exhausted prior to the end of the school term. By mutual agreement, the grievance procedure may be continued during the summer.

In early August 2001, Kaiser asked Bonaccorsi to schedule the Level II grievance meeting at the end of August during the Teacher Work Days. Bonaccorsi agreed. During the third week of August, Kaiser left several telephone messages for Bonaccorsi concerning the grievance meeting. When Bonaccorsi failed to respond, on August 28, 2001, two days before teacher work days were to begin, Kaiser sent a memo to Bushmire which stated, in part:

> Due to the delay in the Level II Grievance proceedings, as Ed Tucker, site administrator of Grimmer Elementary School, was unavailable throughout the summer, the difficulty of Greg Bonaccorsi and myself coordinating our communications due to vacations, meetings, etc., and the pending start of the 2001-2002 school year, I am submitting this memo to you.

In the memo, Kaiser further requested that Bushmire maintain Kaiser's third grade assignment until the grievance was resolved. Kaiser alleges Bushmire ignored the request and failed to timely schedule a Level II grievance meeting prior to the start of the 2001-2002 school year.

Kaiser alleges FUDTA breached its duty of fair representation by failing to timely schedule the Level II grievance meeting.

BOARD AGENT'S DISMISSAL

Kaiser's charge alleged that FUDTA breached its duty of fair representation by failing to expedite a Level II grievance meeting with the District. The Board agent first analyzed whether Kaiser's charge, filed on March 4, 2002, was timely. The Board agent found that Kaiser's August 28, 2001, memo to Bushmire indicated that she knew as of that date that Bonaccorsi had failed to secure an expedited Level II grievance meeting. Accordingly, the Board agent dismissed the charge as untimely, since Kaiser waited more than six months after she knew of the FUDTA's alleged breach of the duty of fair representation to file her charge.

KAISER'S APPEAL

On appeal, Kaiser disputes the use of August 28, 2001, as the trigger date for the statute of limitations. Kaiser argues that FUDTA breached its duty of fair representation by failing to expedite her Level II grievance meeting so that it was heard prior to the end of summer. The summer ended on September 5, 2001, when the students returned. Kaiser thus argues that FUDTA had until September 5, 2001, to schedule the grievance meeting and that its failure to do so should be measured from that date. Since FUDTA did not breach its duty until September 5, 2001, Kaiser argues that her charge filed on March 4, 2002, is timely.

FUDTA'S RESPONSE

In response, FUDTA argues that the Board agent utilized the correct date to begin running the statute of limitations. FUDTA asserts that it is clear from Kaiser's amended charge that she knew or believed as of August 28, 2001, that FUDTA had failed to schedule a Level II grievance meeting before the beginning of the school year. That is the date Kaiser

wrote to the District asking to schedule a Level II meeting. The letter was prepared after Kaiser had "left several messages" for Bonaccorsi and had not heard back from him. FUDTA notes that in the letter, Kaiser references the delay in scheduling the grievance meeting and the difficulty of coordinating communications with Bonaccorsi. FUDTA argues that Kaiser cannot now argue that she was unaware of the FUDTA's alleged delays until after August 28, 2001.

Even if Kaiser's charge is timely, FUDTA argues that Kaiser has not alleged a prima facie breach of the duty of fair representation. FUDTA vigorously disputes Kaiser's allegations that it failed to properly assist Kaiser in her grievance. FUDTA further argues that Kaiser has failed to allege any facts from which it could be concluded she was harmed by any supposed delay. According to FUDTA, at most Kaiser has alleged the grievance meeting was not scheduled as quickly as she would have liked during August 2001. FUDTA claims this is not even negligence and cannot constitute the higher standard required to constitute a breach of the duty of fair representation.

DISCUSSION

Statute of Limitations

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." In a claim for breach of the duty of fair representation, the statute of limitations is triggered "on the date when the employee, in the exercise of reasonable diligence, knew or should have known that further assistance from the union was unlikely." (International Union of Operating Engineers, Local 501 (Reich) (1986) PERB Decision No. 591-H; Los Rios College Federation of Teachers, CFT/AFT (Violett, et al.) (1991) PERB Decision No. 889.) In this matter, Kaiser alleges that FUDTA breached its duty of fair

representation by failing to secure her an expedited grievance meeting. Thus, the question is when did Kaiser know, or should have known, that FUDTA had failed to secure an expedited grievance meeting.

The Board finds that Kaiser knew, or should have known, by August 28, 2001, that FUDTA had failed to secure an expedited grievance meeting. It was on that date that Kaiser took it upon herself to write the District requesting such a meeting. According to the charge, Kaiser felt it necessary to write the letter to the District after receiving no reply from Bonaccorsi to her inquiries about whether FUDTA would act to secure a grievance meeting prior to the end of summer. Further, the record indicates that Kaiser had expressed her displeasure with Bonaccorsi's representation as early as June 2001. Given these facts, it appears that the Board agent properly used August 28, 2001, as the date to begin running the statute of limitations.

Duty of Fair Representation

Even if Kaiser's charge is timely, the Board agrees with FUDTA that Kaiser has failed to state a prima facie case. Kaiser alleges that FUDTA denied her the right to fair representation guaranteed by EERA section 3544.9[2] and thereby violated section 3543.6(b)[3].

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[2] EERA section 3544.9 states:

> The employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit.

[3] EERA section 3543.6 states, in 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

The duty of fair representation imposed on the exclusive representative extends to grievance handling. (Fremont Unified School District Teachers Association, CTA/NEA (King) (1980) PERB Decision No. 125; United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258 (UTLA).) In order to state a prima facie violation of this section of EERA, Kaiser must show that FUDTA's conduct was arbitrary, discriminatory or in bad faith. In UTLA, 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 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. (Dismissal letter at p. 5.)

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 at p. 9, citing Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124.]

In this case, Kaiser's only allegation is that FUDTA failed to secure her an expedited grievance meeting. The Board has held that a union's case-handling error (e.g., missing the deadline for filing a grievance) only constitutes negligence and does not rise to the level of

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

arbitrary conduct sufficient to establish a breach of the duty of fair representation. (California School Employees Association (Ciaffoni, et al.) (1984) PERB Decision No. 427.) The courts have recognized an exception to this rule where the union's negligence foreclosed any remedy for the grievant. (See Coalition of University Employees (Buxton) (2003) PERB Decision No. 1517-H (discussing various cases interpreting the meaning of "arbitrary" conduct).) Here, however, there is no allegation that Kaiser's grievance was foreclosed or adversely affected. While FUDTA's alleged handling of Kaiser's grievance may constitute negligence, there is otherwise no allegation of bad faith, discriminatory, or arbitrary conduct. Accordingly, Kaiser's charge must be dismissed for failure to state a prima facie case.

ORDER

The unfair practice charge in Case No. SF-CO-606-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Whitehead and Neima joined in this Decision.

STATE OF CALIFORNIA GRAY DAVIS, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 322-3198
Fax: (916) 327-6377

May 30, 2002

Diane M. Kaiser

Re: Diane M. Kaiser v. Fremont Unified District Teachers Association
Unfair Practice Charge No. SF-CO-606-E
DISMISSAL LETTER

Dear Ms. Kaiser:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 4, 2002. Your charge alleges that the Fremont Unified District Teachers Association violated the Educational Employment Relations Act (EERA)[1] by breaching its duty of fair representation.

I indicated to you in my attached letter dated April 22, 2002, 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 6, 2002, the charge would be dismissed. On May 6, 2002, you filed an amended charge.

As amended, your charge makes following factual allegations. You are employed as a teacher by the Fremont Unified School District at Grimmer Elementary School. During the 2000-2001 school year, you were assigned to teach grade 3.

The District's curriculum included the Packard Grant/Open Court Language Arts Program. Teachers in certain grades were required to utilize this reading program. Maureen Smith, a teacher, was designated as the "Literacy Coach" for the Open Court reading program at Grimmer Elementary School. In or about early October 2000, Ms. Smith placed a memo in each teacher's mailbox requesting information on their progress through the reading program. When you did not respond to Ms. Smith's second memo, Principal Ed Tucker sent you a memo directing you to respond by October 6, 2000.

On October 27, 2000, you met with Mr. Tucker to discuss your evaluation goals for the 2000-2001 school year. During the meeting, Mr. Tucker threatened to assign you to a grade level which did not utilize the Packard Grant/Open Court Reading Program, if you did not fully

[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.

implement the reading program. On one occasion, Mr. Tucker observed you utilizing a publication that was not from Open Court. Mr. Tucker said he would be discussing the teachers' progress in the program with Ms. Smith.

In October 2000, you requested assistance from the Association. You informed the Association that Mr. Tucker was making excessive demands of you concerning the Open Court reading program. You also asserted that Mr. Tucker was violating the collective bargaining agreement by asking Ms. Smith to evaluate the performance of the teachers she visited in their classrooms.

The Association requested that the District provide information concerning the duties of the literacy coach and the information sought by the literacy coach.

On November 7, 2000, Bev Chernoff, District Coordinator of the Packard Grant/Open Court Language Arts Program, explained in a letter to Greg Bonaccorsi, President of the Fremont Unified District Teachers Association and Peg Tracey, Executive Director, that the Packard Foundation required schools to provide certain information to evaluate the Open Court reading program. She stated that the literacy coach was to assist teachers in achieving the goals of the grant program and collect information utilized by the Packard Foundation. The information collected by the literacy coach was not provided to the site principal, was not utilized for teacher evaluations and the literacy coach was not an evaluator.

On January 18, 2001, Mr. Tucker "fraudulently authored Teacher Comments on [your] first evaluation." The charge does not describe Mr. Tucker's comments or explain why they were fraudulent. There is no indication that your evaluation included comments concerning your progress in the Open Court reading program.

On March 14, 2001, you requested a "Level I Complaint Meeting" with Mr. Tucker. During the meeting, you raised concerns about Mr. Tucker's interference with your professional relationships with your students and their parents, your responsibility to evaluate your students, repeated interruption of your classroom lessons, infringing on your preparation periods and his unprofessional attitude toward you. Mr. Bonaccorsi attended the meeting as your union representative.

Mr. Tucker agreed to refrain from engaging in the above complaints. However, approximately two weeks later Mr. Tucker began engaging in the same conduct. You repeatedly notified Mr. Bonaccorsi of Mr. Tucker's conduct. You allege that Mr. Bonaccorsi and Ms. Tracey failed to correct the violations made by Mr. Tucker.

On March 30, 2001, Mr. Tucker made an impromptu 60 minute formal observation of your class. You allege that Mr. Tucker "seriously misrepresented the lesson observed in [your] second evaluation." The charge does not describe any misrepresentation in your evaluation.

On April 2, 2001, Mr. Tucker handed you a memo dated March 30, 2001 which stated that your grade level assignment for the 2001-2002 school year had been changed from grade 3 to

grade 4/5. The memo stated that the change was required because you had not been providing your students with the skills they needed for reading. Your charge alleges that Mr. Tucker had never observed you teaching the Open Court reading program.

You informed both the Association and Mr. Tucker that you did not agree with the assignment to teach grade 4/5.

You allege that Mr. Tucker sexually harassed you on numerous occasions. You notified the Association of Mr. Tucker's conduct. The District's sexual harassment policy states, in part:

> Employees or other individuals who feel aggrieved because of conduct they believe constitutes sexual harassment should directly or through a representative inform the person engaging in such conduct that such conduct is offensive and must stop.

Mr. Bonaccorsi refused your request, as your representative, to inform Mr. Tucker to stop engaging in offensive conduct. However, Mr. Bonaccorsi told you that he had informed Beth Robinson, Assistant Superintendent, of Mr. Tucker's harassing behavior. Your charge alleges that you were forced to inform Mr. Tucker yourself to cease his offensive behavior. On April 2, 2001, you requested that Mr. Tucker cease his abusive behavior.

Ms. Tracey informed you that she had referred your sexual harassment complaint to an attorney. During your first conversation with attorney Margo Feinberg, Ms. Feinberg agreed to represent you. During a subsequent phone conversation with Ms. Feinberg, she told you that Mr. Bonaccorsi did not want her involved. Ms. Feinberg told you that you would have to provide your own representation of your sexual harassment claims.

On April 23, 2001, the Association filed a grievance on your behalf challenging your assignment to teach grade 4/5. You and Mr. Bonaccorsi attended a Level I grievance meeting with Mr. Tucker on May 18, 2001. At the meeting you provided Mr. Tucker with two evaluation forms which included your corrections. Mr. Tucker denied your Level I grievance on May 25, 2001.

You appealed your grievance to Level II before Cheryl Bushmire, Director of Certificated Personnel. Following knee surgery, Mr. Tucker was unavailable to participate in the Level II grievance meeting throughout the summer.

Article 6 of the CBA states, in pertinent part:

> 6.10 In the event a grievance is filed or unresolved on or after May 1 which, if left unresolved until the beginning of the following school year, could result in harm to a party in interest, the time limits set forth herein shall be reduced so that the grievance may be exhausted prior to the end of the school term.

> By mutual agreement, the grievance procedure may be continued during the summer.

In early August 2001, you asked Mr. Bonaccorsi to schedule the Level II grievance at the end of August during the Teacher Work Days. Mr. Bonaccorsi agreed. During the third week of August, you left several telephone messages for Mr. Bonaccorsi concerning the grievance meeting. When Mr. Bonaccorsi failed to respond, on August 28, 2001, two days before Teacher Work Days were to begin, you sent a letter to Ms. Bushmire which stated in part:

> Due to the delay in the Level II Grievance proceedings, as Ed Tucker, site administrator of Grimmer Elementary School, was unavailable throughout the summer, the difficulty of Greg Bonaccorsi and myself coordinating our communications due to vacations, meetings, etc., and the pending start of the 2001-2002 school year, I am submitting this memo to you.

You requested that Ms. Bushmire maintain your grade 3 teaching assignment until your grievance was resolved.

You allege that Ms. Bushmire ignored your request and failed to timely schedule a Level II grievance meeting prior to the start of the 2001-2002 school year. You also allege that the Association breached its duty of fair representation by failing to timely schedule the Level II grievance meeting.

Based on the facts stated above, PERB does not have jurisdiction over the allegations in your charge.

As discussed in the attached letter, 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 six-month 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.)

As I previously explained in my April 22, 2002 letter, your charge was filed on March 4, 2002. PERB may only consider unfair practices which occurred within six months prior to the filing of an unfair practice charge. The statute of limitations in your case began to run on September 4, 2001. Only allegations of unfair practices which occurred on or after September 4, 2001 are timely filed.

Your charge alleges that the Association breached its duty of fair representation when it failed to timely schedule the Level II grievance meeting. You were aware no later than August 28, 2001, however, that Mr. Bonaccorsi had failed to timely schedule a grievance meeting. Since

this conduct occurred prior to September 4, 2001, your charge is untimely filed and is hereby dismissed.

Right to Appeal

Pursuant to PERB Regulations,[2] 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

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

facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 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. (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
General Counsel

By _____
Robin W. Wesley
Regional Attorney

Attachment

cc: Priscilla Winslow

STATE OF CALIFORNIA GRAY DAVIS, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8385
Fax: (916) 327-6377

April 22, 2002

Diane M. Kaiser

Re: Diane M. Kaiser v. Fremont Unified District Teachers Association
Unfair Practice Charge No. SF-CO-606-E
WARNING LETTER

Dear Ms. Kaiser:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 4, 2002. Your charge alleges that the Fremont Unified District Teachers Association violated the Educational Employment Relations Act (EERA)[1] by breaching its duty of fair representation.

Your charge states in its entirety:

> Fremont Unified District Teacher's Association has failed to correct the violations in my contract under Articles 1, 6, 8, 9, 10, 28 and Board Policy 4119 and AR 4119. These violations occurred during my employment with Fremont Unified School District. I will be submitting an amended charge. Attachment/s: A, B.

Attached to the charge is a letter you wrote to Association President Greg Bonaccorsi, dated June 19, 2001. The letter provides a summary of meetings and conversations you had with Mr. Bonaccorsi in May and June 2001.

On March 7, 2002, I called you and spoke you about your charge. You stated that you had additional information and intended to file an amended charge. I explained that you needed to include in your amended charge a detailed statement describing the conduct which you allege demonstrates that the Association breached its duty of fair representation or otherwise discriminated against you. To date, I have not received an amended charge or any further information. As filed, your charge fails to state a prima facie case.

PERB Regulation 32615(a)(5) states that a charge must contain a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." A charging party must allege

[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.

the "who, what, when, where and how" of an unfair practice. Legal conclusions are insufficient to demonstrate a violation of EERA. (State of California (Department of Food and Agriculture) (1994) PERB Decision No. 1071-S; United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision No. 944; Charter Oak Unified School District (1991) PERB Decision No. 873, fn. 6.)

Furthermore, allegations of unfair labor practices under the EERA are covered by a six-month statute of limitations. 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.)

Your charge was filed on March 4, 2002. The statutory limitations period began to run six months prior to the filing of the charge on September 4, 2001. Thus, only alleged unfair practices which occurred on or after September 4, 2001 are timely filed. The letter attached to your charge references meetings and phone conversation which occurred in May and June 2001. This conduct occurred well outside the statutory limitations period and does not demonstrate that your charge was timely filed.

Assuming your charge is timely filed, a charging party must allege facts which demonstrate that the exclusive representative denied the charging party the right to fair representation. The duty of fair representation imposed on the exclusive representative extends to grievance handling. (Fremont Teachers Association (King) (1980) PERB Decision No. 125; United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258.) In order to state a prima facie violation, a 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.]

Your charge does not describe any conduct by union representatives which demonstrates arbitrary, discriminatory or bad faith conduct.

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 May 6, 2002, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Robin W. Wesley
Regional Attorney