STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CORNELIU SARCA, Charging Party, v. CALIFORNIA STATE EMPLOYEES ASSOCIATION, Respondent.	Case No. SA-CO-23-H PERB Decision No. 1813-H January 27, 2006

Appearances: Corneliu Sarca, on his own behalf; Harry J. Gibbons, Attorney, for California State Employees Association.

Before Duncan, Chairman; Shek and McKeag, Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (Board) on appeal by Corneliu Sarca (Sarca). The Board agent issued a partial dismissal (attached) on part of his unfair practice charge. The partial dismissal was appealed and exceptions were filed to the administrative law judge's (ALJ) proposed decision (attached) on the portion of the charge that went forward after a complaint was issued by the Office of the General Counsel.

In most cases, when there is a partial dismissal that is appealed, the complaint is held in abeyance until the Board has acted on the appeal of the partial dismissal. In this case Sarca objected to the complaint being held in abeyance and it went forward. The two portions of the case have been consolidated here. The charge alleged that the California State Employees Association (CSEA) violated Higher Education Employer-Employee Relations Act (HEERA)[1]

[1]HEERA is codified at Government Code section 3560, et seq.

section 3583.5 by denying him the right to challenge the calculation of the 2003-2004 agency fee, incorrectly calculating the agency fee, and denying him a fair arbitration hearing. At the heart of the matter, Sarca argued that HEERA was violated because CSEA was collecting non-chargeable agency fees and maintaining a surplus of funds.

The Board has reviewed the entire record in this matter including the unfair practice charge, as amended, the warning and partial dismissal letters, CSEA's motion to dismiss the complaint, the ALJ's proposed decision and Sarca's appeals.[2]

Sarca's appeal reiterates arguments made to the Board agent contesting the agency fee and the arbitration procedure and result after his objection to the fee amount. He asserts that because the surplus is listed as an asset of CSEA at the end of the fiscal year it could be used for purposes other than those allowed by case law and therefore should be returned to avoid the potential of inappropriate use.

In this case, as the Board agent noted in the warning and partial dismissal letters, an agency fee arbitration was held in November 2003 and each of Sarca's contentions were presented to and rejected by the arbitrator. Although Sarca alleges that the arbitrator conducted the procedure with hostility towards him and excluding his participation, the pages from the arbitration hearing transcript which he provided to the Board agent show that he was allowed to represent himself, in addition to another individual, in the arbitration hearing and he was able to challenge the calculation of the agency fee.

The Board agent correctly noted that Sarca participated in the November 2003 arbitration by questioning witnesses and presenting evidence. The evidence and theories Sarca presented were considered by the arbitrator before the decision was issued. There is no

[2]The response of CSEA was not timely filed and has not been considered. Sarca's response to the late-filed response has also not been considered.

evidence that the arbitration proceedings were not fair and regular or that the decision is repugnant to HEERA with regard to each of Sarca's contentions before the Board.

Sarca argues that he has standing to object and be notified of the arbitration on calculation of agency fees in fiscal year 2004-2005 as well. He bases his position on the fact that when CSEA told him it would not accept agency fees from him in fiscal year 2003-2004 and stopped deducting them, Sarca sent in his personal checks to CSEA for his dues. CSEA did relent and accept fees from him for fiscal year 2003-2004 but advised him that it could stop accepting his fees at any time. That time came in fiscal year 2004-2005. Having paid fees in fiscal year 2003-2004 does not give Sarca standing in fiscal year 2004-2005. The ALJ found that Sarca did not have standing and granted CSEA's motion to dismiss. This was based on Sarca not being allowed to pay agency fees by CSEA for the entire fiscal year of 2004-2005. The ALJ was correct in her application of the law.

The Board finds the Board agent's warning and partial dismissal letters to be free of prejudicial error and adopts them, and the proposed decision of the ALJ which it also found to be free of prejudicial error, as the decision of the Board itself.

ORDER

The unfair practice charge and complaint in Case No. SA-CO-23-H are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Shek and McKeag joined in this Decision.

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

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

February 9, 2005

Corneliu V. Sarca
17950 Lassen Street, B-15
Northridge, CA 91325

Re: Corneliu Sarca v. California State Employees Association
Unfair Practice Charge No. SA-CO-23-H
PARTIAL DISMISSAL

Dear Mr. Sarca:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on July 19, 2004. Your charge alleges that the California State Employees Association violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by denying you the right to challenge the calculation of the 2003/04 agency fee, incorrectly calculating the agency fee, and denying a fair arbitration hearing.

I indicated in the attached letter dated January 10, 2005, that the charge did not state a prima facie case. You were advised that if there were any factual inaccuracies or additional facts that 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 the charge prior to January 24, 2005, the charge would be dismissed. You timely filed an amended charge on January 23, 2005. We discussed your amended charge on February 8, 2005.

In the attached warning letter, I indicated that because CSEA refunded your agency fees in advance of the arbitration hearing, you were not permitted to participate in the arbitration to challenge the amount of the agency fee. I noted that you participated in the hearing, however, as the authorized representative of another agency fee objector.

In the amended charge you attached three pages from the arbitration hearing transcript which appear to indicate that you were allowed to represent yourself in the hearing and challenge the calculation of the agency fee. In fact, during the hearing CSEA attorney Harry Gibbons told you that because you were representing yourself at the arbitration hearing, the Union would reinstate agency fee deductions from your paycheck.

You continue to assert that CSEA must return that portion of the agency fees that are " above and beyond the necessary and reasonable expenses for representation." You cite several

[1]HEERA is codified at Government Code section 3560 et seq. The text of the HEERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

decisions of the U.S. Supreme Court in support of your contention, including Communications Workers v. Beck (1988) 487 US 735. This case holds that union expenditures charged to agency fee payers are limited to those agency fees necessary to finance collective bargaining, contract administration or grievance adjustment. The decision does not, however, address your theory that excess agency fees held in reserve and not expended during the year in which they are collected must be refunded to agency fee payers. As previously discussed, PERB case law is consistent with the rule that the calculation of the amount of an agency fee is based on the expenditures made by a union for chargeable purposes, which include collective bargaining, contract administration and grievance processing. (California State Employees Association, CSU Division (Sarca) PERB Decision No. 1626-H.)

We also discussed your contention that the agency fee payer has the burden of raising an objection, but the union has the burden of proving the correct proportion of the fee. PERB Regulation 32994 supports your statement. Regulation 32994(a) permits an agency fee payer to challenge a union's calculation of the amount of an agency fee. Regulation 32994(b)(6) states:

> The exclusive representative bears the burden of establishing the reasonableness of the amount of the agency fee.

Finally, as discussed in the attached letter, PERB will defer to an arbitrator's decision in an agency fee case and dismiss an unfair practice charge where: (1) the arbitration proceedings were fair and regular, and (2) the decision of the arbitrator is not clearly repugnant to the purposes of HEERA. (ABC Federation of Teachers, AFT Local 2317 (Murray, et al.) (1998) PERB Decision No. 1295; California Nurses Association (O'Malley) (2004) PERB Decision No. 1607-H.)

You participated in the arbitration hearing, questioned witnesses and submitted evidence. Before issuing his decision, the arbitrator considered your evidence and your theory that surplus fees must be refunded. Although you disagree with the arbitrator's decision, there is no evidence that the arbitration proceedings were not fair and regular, or that the decision is repugnant to the purposes of HEERA. In this situation, PERB will defer to the arbitrator's decision and will not relitigate whether the calculation of the agency fee was correct.

Accordingly, as discussed above and in the attached letter, the allegations that CSEA denied you the right to challenge the calculation of the 2003/04 agency fee, incorrectly calculated the amount of the agency fee and denied you a fair arbitration hearing do not state a prima facie case and are dismissed.[2]

[2] The new allegation in the amended charge that CSEA did not acknowledge your letter challenging the amount of the 2004/05 agency fee and, thus, did not notify you of the 2004/05 arbitration hearing and allow you to participate in the hearing, is not addressed in this letter.

Right to Appeal

Pursuant to PERB Regulations,[3] 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. (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. (Regulation 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).)

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

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

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: Harry Gibbons

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

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

January 10, 2005

Corneliu V. Sarca
17950 Lassen Street, B-15
Northridge, CA 91325

Re: Corneliu Sarca v. California State Employees Association
Unfair Practice Charge No. SA-CO-23-H
WARNING LETTER

Dear Mr. Sarca:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on July 19, 2004. Your charge alleges that the California State Employees Association violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by denying you the right to challenge the calculation of the 2003/04 agency fee, incorrectly calculating the agency fee, and denying a fair arbitration hearing.

You are employed by the California State University. Your job classification is included in a bargaining unit which is exclusively represented by CSEA. You elected not to become a member of the Union, thus you are subject to agency fees.

Following receipt of the annual notice to agency fee payers, you filed an objection to CSEA's calculation of agency fees for the 2003/04 fiscal year. An agency fee arbitration hearing was scheduled for November 14, 2003, to consider the objections of all agency fee objectors.

You received a letter dated October 27, 2003, from CSEA attorney Harry Gibbons who informed you that the Union had decided not to collect agency fees from you for 2003/04. CSEA included a refund of the agency fees which had been deducted from your paycheck for the months of July, August and September 2003, plus interest. CSEA instructed the State Controller to stop deducting agency fees from your paycheck effective October 2003. Mr. Gibbons also advised you that as a result of these actions you were not an agency fee payer and you had no right to participate in the agency fee arbitration hearing on November 14, 2003.

On October 30, 2003, you sent a letter to Mr. Gibbons and Arbitrator John Kagel objecting to your exclusion from the arbitration hearing. You stated that under the law you had an

[1]HEERA is codified at Government Code section 3560 et seq. The text of the HEERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

obligation to pay agency fees and CSEA had an obligation to represent you. You stated that you had not cashed CSEA's refund check.

On October 31, 2003, Mr. Kagel issued a statement indicating that because you were not charged agency fees for 2003/04, you had no standing to object to the fees charged to other employees. Accordingly, you would not be allowed to attend the arbitration hearing.

You appeared at the arbitration hearing as the authorized representative of another agency fee objector. During the hearing, you made an opening statement, questioned witnesses and submitted documentary evidence.

In a letter to CSEA dated December 12, 2003, you stated:

> I do not accept your decision to cancel my fee. It is discriminatory and unfair. By law you have to represent me and I have to pay a fair share fee. In my opinion the fee is not fair, it is beyond what are necessary and reasonable expenses for representation presented by you and I intend to pursue in proving my point through any legal venue available.
>
> Enclosed is a check in the amount of $78.63 for the Oct., Nov. and Dec. 2003 fee.

Mr. Gibbons responded to your letter on December 23, 2003, stating that it was not necessary to be an agency fee payer to be represented by CSEA. However, Mr. Gibbons accepted your decision to voluntarily pay agency fees. Mr. Gibbons informed you that CSEA would notify the State Controller to collect fees from you beginning with your February 2004 paycheck.

On February 17, 2004, Mr. Kagel issued his decision finding that CSEA had properly calculated the 2003/04 agency fees. In his decision, Mr. Kagel specifically addressed the objections you raised, which included claims that the calculation should be based on both expenses and income, not expenses alone; the surplus should be returned to fee payers; and that CSEA did not apply the proper accounting and auditing standards to its financial reports. The arbitrator considered each of these issues before rejecting them.

Your charge alleges that you were denied the right to challenge the calculation of the 2003/04 agency fee. Furthermore, your charge alleges that CSEA improperly calculated the amount of the agency fee because the Union did not take into account the surplus in agency fee revenues from the prior year. You assert that the surplus demonstrates that CSEA did not follow proper accounting procedures. You also allege that the calculation of agency fees based exclusively on expenditures is arbitrary, discriminatory and in bad faith.

Finally, the charge alleges that the arbitration hearing was not fair and regular. You allege that the arbitrator ignored your objection that the fee was excessive and did not take the surplus into account. Your charge also challenges the arbitrator's failure to find fault with the method

of auditing CSEA's financial statements. Further, you contend that the arbitrator erroneously concluded that the calculation of the agency fee is based exclusively on expenditures.

Based on the facts stated above, the charge does not state a prima facie case.

HEERA section 3583.5 and PERB Regulation 32990(d) permit an exclusive representative to "initiate implementation of an organizational security provision for the payment of 'fair share' or 'agency shop' fees by covered employees." PERB Regulation 32992 states, in relevant part:

> (a) Each nonmember who will be required to pay an agency fee shall annually receive written notice from the exclusive representative of:
>
> (1) The amount of the agency fee which is to be expressed as a percentage of the annual dues per member based upon the chargeable expenditures identified in the notice;

PERB Regulation 32994 describes an exclusive representative's obligation to provide an agency fee appeal procedure. This provision states, in part:

> (a) If an agency fee payer disagrees with the exclusive representative's determination of the agency fee amount, that employee (hereinafter known as an "agency fee objector") may file an agency fee objection. . . .
>
> . . .
>
> (7) Agency fee objection hearings shall be fair, informal proceedings conducted in conformance with basic precepts of due process.

PERB will defer to an arbitrator's decision in an agency fee case and dismiss an unfair practice charge where: (1) the arbitration proceedings were fair and regular, and (2) the decision of the arbitrator is not clearly repugnant to the purposes of HEERA. (ABC Federation of Teachers, AFT Local 2317 (Murray, et al.) (1998) PERB Decision No. 1295; California Nurses Association (O'Malley) (2004) PERB Decision No. 1607-H.)

The Board has previously held that an agency fee payer has no standing to participate in agency fee arbitration proceedings when a union has refunded their agency fees because there is no possibility that the employee's fees will be misspent. The exclusion of employees from arbitration proceedings who are exempt from paying agency fees does not demonstrate that the arbitration proceedings are unfair, procedurally defective or repugnant to the HEERA. (California Nurses Association (O'Malley), supra, PERB Decision No. 1607-H; Los Rios College Federation of Teachers, Local 2279, CFT/AFT (Deglow) (1992) PERB Decision No. 950.)

At the time of the arbitration hearing, you were exempt from the payment of agency fees. CSEA refunded your agency fees on October 27, 2003, and informed you that you would not be subject to agency fees for the remainder of the year. Under the rule discussed above, because you were not subject to the fees, you had no standing to challenge the calculation of the agency fee in the arbitration hearing. Thus, your exclusion from the hearing because your agency fees were refunded does not demonstrate that the arbitration proceedings were not fair and regular, or were repugnant to the purposes of HEERA.

After the hearing, in December 2003, you insisted on paying agency fees and submitted a check to CSEA to cover agency fees for October, November and December 2003. On December 23, 2003, CSEA accepted your decision to pay agency fees and reinstated you as an agency fee payer. Assuming you were entitled to participate in an arbitration hearing after agency fees were reinstated for the remainder of the year, you actually participated in the November 14, 2003 arbitration as the representative of another agency fee objector. You made an opening statement on the record, questioned witnesses and submitted documentary evidence during the hearing. You presented both evidence and your theories concerning the refund of surplus fee revenues and proper accounting and auditing requirements. This evidence was specifically considered and addressed by the arbitrator in his decision. Thus, there is no evidence that the arbitration proceedings were not fair and regular, or were repugnant to HEERA.

Finally, the issues you brought before the arbitrator are the same issues you raised in a prior charge before PERB. (see California State Employees Association, CSU Division (Sarca) (2004) PERB Decision No. 1626-H.) In CSEA (Sarca), the Board explained that the amount of an agency fee is based on the expenditures made by a union. Until the surplus funds are spent, they are not used as a basis for calculating the amount of agency fees.

Because there is no evidence the agency fee arbitration proceedings were not fair and regular, or were repugnant to HEERA, PERB will defer to the decision of the arbitrator and the charge must be dismissed.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts 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 by January 24, 2005, I shall dismiss your charge.

Sincerely,

Robin W. Wesley
Regional Attorney

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CORNELIU SARCA, Charging Party, v. CALIFORNIA STATE EMPLOYEES ASSOCIATION, Respondent.	UNFAIR PRACTICE CASE NO. SA-CO-23-H PROPOSED DECISION (7/22/05)

Appearances: Corneliu Sarca, in pro per; Service Employees International Union, CSEA, AFL-CIO, CLC by Harry J. Gibbons, Attorney, for California State Employees Association.

Before Ann L. Weinman, Administrative Law Judge.

PROCEDURAL HISTORY

Corneliu Sarca (Sarca), an employee of California State University Northridge, filed an unfair practice charge against California State Employees Association (CSEA) on July 19, 2004, and an amended charge on January 26, 2005, alleging that CSEA incorrectly calculated the agency fees for the fiscal years 2003/2004 and 2004/2005 and denied him a fair arbitration hearing to challenge the calculations. On February 9, 2005, the Office of General Counsel of the Public Employment Relations Board (PERB or Board) issued a partial dismissal letter dismissing allegations regarding the 2003/2004 agency fee.[1] On the same date, the Office of General Counsel of PERB issued a complaint alleging that CSEA denied Sarca the right to challenge the 2004/2005 agency fee by failing to notify him of an arbitration hearing, conduct inconsistent with its duty to comply with PERB Regulation 32994[2] and in violation of sections

[1] Sarca appealed the dismissal; his appeal is pending before the Board.

[2] PERB Regulation 32994 sets forth a procedure allowing employees to appeal agency fees assessed by their exclusive representative, including the requirement that after an

3571.1(b) and 3571.1(e) of the Higher Education Employer-Employee Relations Act (HEERA).[3]

On February 5, 2005, CSEA filed a motion to dismiss the complaint on the basis that CSEA had not collected any agency fees from Sarca for the 2004/2005 fiscal year, but rather had returned Sarca's uncancelled check proffering a portion of the fees, therefore Sarca had no standing to contest the fee calculations or to appear at an arbitration hearing. An informal conference was held on March 24, 2005, but the matter was not resolved.

This proposed decision is in response to the motion to dismiss; no formal hearing has been scheduled or held. The undersigned was assigned this case on June 27, 2005, and the matter was submitted for a ruling on the motion on that date.

FINDINGS OF FACT

The facts are undisputed. Sarca is a higher education employee within the meaning of HEERA section 3562(e). California State University is a higher education employer within the meaning of section 3562(g). CSEA is an employee organization within the meaning of section 3526 (f)(1) and an exclusive representative within the meaning of section 3526 (i).

On June 24, 2004,[4] Sarca received CSEA's June 2004 Notice to Fair Share Fee Payers regarding the 2003/2004 agency fees. The notice required agency fee payers to file objections

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employee has filed an objection to the fee, the representative "shall request a prompt hearing . . . before an impartial decisionmaker" and that such hearings "shall be fair, informal proceedings conducted in conformance with basic precepts of due process."

[3] HEERA is codified at Government Code section 3560 et seq. Section 3571.1 declares it 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," or "(e) Fail to represent fairly and impartially all the employees in the unit for which it is the exclusive representative."

[4] All dates hereafter refer to the year 2004 unless otherwise specified.

and/or challenges to the amount of the agency fee by July 10. Sarca filed an objection and challenge to the agency fee on July 3. On September 2, Sarca sent CSEA a check in the amount of $56.46 for July and August fees. On September 8, CSEA returned the check with a cover letter which stated:

> On September 2, 2004, you sent CSEA check number 1525 in the amount of $56.46. You claim that CSEA must accept the check as payment for your fair share fees for the months of July and August 2004. Until further notice, be advised that CSEA does not wish to collect fair share fees from you. Accordingly, CSEA is returning check number 1525 to you with this letter.
>
> Although CSEA is not collecting fair share fees from you, rest assured that CSEA fully intends to meet the duty of fair representation it owes you under the law.
>
> Finally, please do not send unsolicited checks to CSEA. If you send unsolicited checks, CSEA will shred the checks without further notice to you.

The record does not reveal whether an arbitration hearing was held which Sarca did not receive notice of, or whether no arbitration hearing was scheduled. In any event, Sarca did not have an opportunity to argue the fee calculation before an arbitrator.

ISSUE

Did CSEA unlawfully prevent Sarca from challenging the 2004/2005 agency fee?

CONCLUSIONS OF LAW

In Abood v. Detroit Board of Education (1977) 431 U.S. 209 [95 LRRM 2411] (Abood), the Court held that there are no constitutional barriers to an agency shop agreement between a public employer and a teachers' union which requires every bargaining unit employee to pay his fair share of the union's costs of collective bargaining, contract administration, and grievance adjustment. However, objecting nonmember employees do have the right to "prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive

bargaining representative." (Id, 431 U.S. at 234.) Following this principle in Chicago Teachers Association v. Hudson (1986) 475 U.S. 292 [121 LRRM 2793] (Hudson), the Court set forth procedures requiring unions to explain the basis for its fees, provide prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and place disputed fees in an escrow account pending the decision. In conformity with Hudson, as noted above, HEERA contains specific requirements for unions to send employees annual "Hudson" notices informing them of the fees and of their right to challenge the fee calculations.

However, in Los Rios College Federation of Teachers, Local 2279, CFT/AFT (Deglow) (1992) PERB Decision No. 950 (Los Rios), the Board held that an employee who is not required by the union to pay agency fees has no standing to challenge the fee calculations. There, Deglow had received a Hudson notice and had filed an objection. Thereafter, the union returned to Deglow the fees which had thus far been collected from her for that fiscal year, denied her request to proceed to arbitration, and no further agency fees were collected. Deglow filed an unfair practice charge alleging that the union unlawfully denied her right to a fee determination hearing. In its warning letter, later incorporated into a dismissal letter which was upheld by the Board on appeal, the Board agent cited a non-precedential decision of the administrative law judge in Booth, Ambrose v. Association of California State Attorneys and Administrative Law Judges, Unfair Practice Case No. S-CO-110-S as persuasive. In Booth, Ambrose, the judge reasoned that "because the fees had been returned, there was no real remedy that PERB could afford the parties that they had not already received," and that "since the charging parties in this case have suffered no harm, nor do they have any potential for any harm, they have no standing to challenge the union's refusal to provide them with arbitration."[5] The Board agent in Los Rios also noted that the purpose of Hudson protections was to "prevent

[5] The judge dismissed the case and it was not appealed.

the use of nonmember funds for purposes beyond the union's representational obligations." (citing Cumero v. Public Employment Relations Board (1989 49 Cal.3d 579, 590. [262 Cal. Rptr. 46]) Thus, if the nonmember were not paying any funds, she would have no need of protection.

A similar unfair practice charge was dismissed in Robert J. O'Malley v. California Nurses Association (2004) PERB Decision No. 1607-H (O'Malley). There, O'Malley received a Hudson notice and filed objections, after which the union returned in full the agency fees collected from him for the relevant fiscal year. The union did proceed to an arbitration hearing, however, it challenged O'Malley's standing to participate in the hearing, and the arbitrator agreed. In its decision deferring to the arbitrator's decision and upholding the dismissal, the Board followed the reasoning in Los Rios, citing that portion of the non-precedential Booth, Ambrose case cited above, and stating:

> Once CNA refunded the collected fees in full to O'Malley, CNA could not use the fees in any way, let alone wrongfully use them. There is no possibility for harm to O'Malley that the Board could remedy. To hold otherwise would lead to an absurd result: that individuals may challenge the use of funds no longer in the possession of the exclusive representative or of funds held by the exclusive representative but collected from other employees.

The Board also responded to O'Malley's argument that since the union refunded his agency fees, HEERA section 3583.5[6] would require his termination from the university where he was employed. In that regard, the Board noted that "there is no indication in the charge that either CNA or the University have any interest in terminating O'Malley's employment."

[6] Section 3583.5 requires in part that "(a)ny employee of. . . the University of California . . . who is in a unit for which an exclusive representative has been selected . . . shall be required, as a condition of continued employment, either to join the recognized employee organization or to pay the organization a fair share service fee."

In the instant case, Sarca's check for fees was not even accepted in the first place but was returned uncancelled, and CSEA has made it clear that it does not intend to collect any fees from him. And, like O'Malley, there is no indication here that either CSEA or the University have any interest in terminating his employment. Accordingly, I find that Sarca has no standing to challenge CSEA's fee calculations.

Sarca opposes the motion to dismiss on the following grounds: (1) CSEA did not return "the amount that is above the necessary and reasonable expenses for representation." [Emphasis added.] Sacra appears to argue that CSEA should have returned only the amount expended for non-representational purposes, e.g., political contributions. However, as CSEA returned the full amount of Sarca's check, it would make no sense to fault CSEA for not returning only a portion of the full amount. (2) The fee calculation for 2004/2005 was based on fiscal year 1993, for which Sarca paid fees. The record does not reveal the basis for Sacra's reference to fiscal year 1993. His argument fails in two respects: one, because as analyzed above, Sarca has no standing to challenge the calculations for the 2004/2005 fees; and two, because anything paid in 1993 is far beyond the statute of limitations. (3) O'Malley is not applicable because it refers to "chargeable expenditures" which in this case are not challenged. Here, Sacra appears to suggest that he would make a different challenge to the agency fees than O'Malley made. However, even assuming arguendo that Sarca would make a different challenge, the principle that he lacks standing to make any challenge whatsoever remains. (4) "There is not any legal support for the transfer of the surplus from the restricted refundable trust account of fees as an unrestricted asset of the union." Here, Sarca raises a new issue, i.e., CSEA's accounting practices. There is no statutory guarantee in HEERA or in any of the cases cited above which gives employees the right to challenge a union's accounting practices in an

unfair practice proceeding, nor is it alleged in the complaint. I therefore find Sarca's opposition to the motion lacks merit on each of its grounds.

Accordingly, I do not find that CSEA unlawfully denied Sarca his right to challenge CSEA's agency fee calculations for the 2004/2005 fiscal year.

PROPOSED ORDER

Based on the foregoing findings of fact and conclusions of law and the entire record in this matter, it is found that the complaint in Case SA-CO-23-H, Corneliu Sarca v. California State Employee Association, is without merit and it is hereby DISMISSED.

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

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

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

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Cal. Code Regs., tit. 8, secs. 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 California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required number of copies

and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

Ann L. Weinman
Administrative Law Judge