STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

HAROLDENE F. WUNDER, Charging Party, v. CALIFORNIA FACULTY ASSOCIATION, Respondent.	Case No. SA-CO-24-H PERB Decision No. 1889-H March 1, 2007

Appearances: Haroldene F. Wunder, on her own behalf; Rothner, Segall & Greenstone by Bernhard Rohrbacher, Attorney, for California Faculty Association.

Before Duncan, Chairman; Shek and Neuwald, Members.

DECISION

SHEK, Member: This case is before the Public Employment Relations Board (Board) on exceptions filed by Haroldene F. Wunder (Wunder) to a proposed decision (attached) of the administrative law judge (ALJ). In the proposed decision, the ALJ found that the California Faculty Association (CFA) did not breach the duty of fair representation owed Wunder under the Higher Education Employer-Employee Relations Act (HEERA)[1], when in February, 2004, it decided not to advance her grievance to arbitration. The ALJ thereupon dismissed the complaint and the underlying unfair practice charge.

The Board has reviewed the entire record in this matter, including the unfair practice charge, complaint, stipulated record, Wunder's statement of exceptions and CFA's response thereto. The Board finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and adopts the proposed decision as the decision of the Board itself.

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

ORDER

The complaint and the underlying unfair practice charge in Case No. SA-CO-24-H are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Neuwald joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

HAROLDENE F. WUNDER, Charging Party, v. CALIFORNIA FACULTY ASSOCIATION, Respondent.	UNFAIR PRACTICE CASE NO. SA-CO-24-H PROPOSED DECISION (8/26/05)

Appearances: Haroldene Wunder, on her own behalf; Rothner, Segall and Greenstone by Bernhard Rohrbacher, Attorney, for California Faculty Association.

Before Fred D'Orazio, Administrative Law Judge.

PROCEDURAL HISTORY

Professor Haroldene Wunder initiated this action on August 19, 2004, by filing an unfair practice charge against the California Faculty Association (CFA). On September 28, 2004, the Office of General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint alleging that CFA breached the duty of fair representation owed Wunder in the manner it processed her grievance and by refusing to pursue her grievance to arbitration.

Specifically, the complaint alleges that a CFA representative told Wunder it was not "normal or necessary" for a grievant to attend a grievance hearing; Wunder was not informed of the date of the grievance hearing; and Wunder's request to attend the hearing was not communicated to the representative handling the grievance, despite the fact that a representative later told her that CFA "normally notifies the grievant when the hearing takes place." The complaint alleges, in addition, that CFA appealed the grievance to arbitration after the contractual time for doing so expired, and, contrary to the agreement, Wunder was

informed by CFA that there was no specified time for appealing to arbitration. Eventually, CFA declined to pursue the matter to arbitration.

Pursuant to a pre-hearing motion filed by CFA, the undersigned dismissed all allegations in the complaint as time-barred, except the allegation that CFA refused to advance Wunder's grievance to arbitration. Therefore, the only remaining issue in this proceeding is whether CFA's decision not to proceed to arbitration breached the duty of fair representation.

It is alleged that CFA, by this conduct, breached the duty of fair representation owed Wunder under the Higher Education Employer-Employee Relations Act (HEERA) section 3578 and thereby violated HEERA sections 3571.1(b) and 3571.1(e).[1] CFA answered the complaint on October 20, 2004, generally denying all allegations and setting forth certain affirmative defenses. Denials and defenses will be addressed below, as necessary.

A settlement conference was conducted by a PERB agent on October 22, 2004, but the matter was not resolved. The undersigned conducted a hearing in Sacramento on February 17, 2005. With the submission of the final brief on April 27, 2005, the matter was submitted for decision.

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[1] HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references are to the Government Code. Section 3571.1 states in relevant part that it is 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.
>
> (e) Fail to represent fairly and impartially all the employees in the unit for which it is the exclusive representative.

FINDINGS OF FACT

Professor Wunder is a higher education employee within the meaning of section 3562(f). CFA is an exclusive representative, as defined in section 3562(j), of a systemwide unit (Unit 3) of faculty in the California State University (CSU or University). Wunder is a member of that unit. At all relevant times, CFA and CSU were parties to a collective bargaining agreement covering the faculty unit. The agreement contains a grievance procedure that ends in binding arbitration.

Wunder is a professor in the department of accountancy at CSU's Sacramento campus. She holds an M.A. in accountancy and a Ph.D. with a major in accountancy and a minor in tax and law. Her primary field of expertise is taxation. The roots of this dispute lie in the assignment of Wunder to teach a lower division accounting course which she had not taught in some ten years. She contested the assignment in an appeal to the department that took place prior to the filing of the grievance.

In a May 16, 2003, memo, College of Business Administration Associate Dean Richard Guarino responded, summarizing the circumstances surrounding the assignment as follows. In Fall 2002, Dr. Merle Martin, chairperson of the accountancy department, notified the three faculty members who normally teach tax courses that he would let them agree among themselves how to allocate teaching those courses. Martin said that if they could not agree on how to allocate the courses, he would do so and in the semesters with a low number of tax course assignments he would rotate them through lower division accounting courses. Eventually, Martin established a schedule where the three faculty members were rotated through lower level accounting courses in semesters when there were not enough tax courses to provide each of the three professors with tax courses to teach. As a result, Wunder was assigned to teach Accounting I in Spring 2004. She was notified of the assignment in January

2003. Each of the other professors who regularly teach taxation had been assigned to teach the lower level accounting course before Wunder was assigned to do so.

A portion of the May 16, 2003, memo from Guarino to Wunder captures the essence of the University's position with respect to Wunder's assignment.

> You object to your Spring 2004 assignment because on your scheduling preference, you selected a teaching schedule that did not include Accountancy I. Scheduling preferences are not determinative of final assignments. A Chair may assign a course to a faculty that the faculty has not included in his or her scheduling preference.
>
> You believe you should be given preference regarding the assignment of tax courses because you have brought grants to the department and because your publishing record constitutes ample evidence of your contribution to the Department, College and University. These factors have not been part of the practice used by the Accountancy Department to make teaching assignments in the past and cannot be used as a basis for appealing an otherwise reasonable teaching assignment.

Guarino said that faculty members with a doctorate in accounting, regardless of their specialty, are considered qualified to teach basic concepts of accounting. The memo continued:

> The central issue to be decided is whether you were assigned an unreasonable workload when you were assigned two sections of Accountancy I for the Spring semester of 2004. Article 20.3 b and c [of the collective bargaining agreement] provide that a number of factors shall be considered in making assignments. You argue that Article 20.3b does not limit the degree to which such consideration is given to research, thereby providing department chairs with the latitude to develop teaching schedules that appropriately support productive faculty's research efforts. Your contention is correct but not complete. Although the article does not limit the degree to which consideration should be given to research, it does not provide direction as to what degree research should be given. Latitude provides discretion that allows for decision makers to decide to give more or less emphasis on particular factors. It is up to the chair to consider all of the factors listed and others not listed in making assignments.
>
> Moreover, Section 20.3c provides "prior practices of the University shall be among the primary elements to be considered." The Accountancy Department has a practice of

> assigning full-time faculty with an Accountancy Ph.D. to lower division courses. Nine of the full-time faculty had been assigned to lower division courses in the past five semesters. This included both of your full-time colleagues who also primarily teach tax courses. The policy had been announced at a Department meeting, reflected in the Department minutes, and explained to you in emails.

Guarino concluded:

> Assigning you to a lower division accountancy course on a rotating basis when upper division tax courses are not available to meet the course needs of the faculty who regularly teach tax is not an unreasonable assignment. This is particularly true when the assignment for Spring of 2004 was identified more than one year in advance.

On May 19, 2003, Wunder filed a grievance alleging that she had been assigned courses to teach outside her field for the Spring 2004 semester. The grievance alleged a violation of Article 20, Workload. The relevant provisions of Article 20 are the following.

> 20.1.c: The performance of instructional responsibilities extends beyond duties in the classroom and includes such activities as: preparation for class, evaluation of student performance, syllabus preparation and revision, and review of current literature and research in the subject area, including instructional methodology. Research, scholarship and creative activity in the faculty member's field of expertise are essential to effective teaching. Mentoring students and colleagues is another responsibility that faculty members are frequently expected to perform.
>
> 20.1.d: The professional responsibilities of faculty members include research, scholarship and creative activity which contribute to their currency, and the contributions made within the classroom and to their professions. The professional responsibilities of faculty members are fulfilled by participation in conferences and seminars, through academic leaves and sabbaticals that provide additional opportunities for scholarship and preparation, and through a variety of other professional development activities.
>
> 20.2.b: The instructional assignments of individual faculty members in the classroom, laboratory, or studio, will be determined by the appropriate administrator after consultation with the department chair or designee and/or the individual

> faculty member. The department or other appropriate unit's overall instructional or course assignments shall be consistent with department and student needs.
>
> 20.3.a: Members of the bargaining unit shall not be required to teach an excessive number of contact hours, assume an excessive student load, or be assigned an unreasonable workload or schedule.
>
> 20.3.b: In assignment of workload, consideration shall be given at least to the following factors: graduate instruction, activity classes, laboratory courses, supervision, distance learning, sports, and directed study. Consideration for adjustments in workload shall be given to at least the following: preparation for substantive changes in instructional methods, research, student teacher supervision, thesis supervision, supervision of fieldwork, and service on a University committee.

Wunder alleged, in essence, that she should not be assigned to teach a lower division accounting course, Accounting I, because it is outside her field of expertise, and that she was not consulted by the appropriate administrator prior to scheduling the course as required by the contract.[2] Wunder argued that she was not current in the lower level course and was current in taxation. As a remedy, Wunder sought the assignment of courses in her field of study.

Wunder was represented by Lynn Cooper, chairperson of the CFA Faculty Rights Committee on the Sacramento campus. The two women met before the Level I grievance meeting and discussed the case. In a June 3, 2003, e-mail to Teresa Garcia, CFA's representation secretary who tracks grievances for the union in Northern California, Cooper informed Garcia of the date of the Level I meeting and noted that "I also don't think Wunder has a strong case."

Wunder testified about several comments made by Cooper and about Cooper's conduct at or about the time of the Level I meeting as evidence that CFA did not fairly represent her.

[2] Accounting I is an undergraduate course that covers primarily financial accounting and there are no prerequisites to take the class. The last time Wunder taught the course was 1994.

Wunder said that, upon meeting Cooper for the first time, Cooper asked her if she was a member of CFA. Cooper agreed that she may have asked the question or a similar question. But Cooper also testified that Wunder's membership in CFA was irrelevant because it did not effect the manner in which she was represented. She said CFA is obligated to represent and has represented members and nonmembers alike.

Wunder also testified that Cooper provided her with no advice prior to the Level I meeting and told her "CSU always denies CFA grievances at level one, that is the campus level." Wunder testified on this point apparently to show a defeatist attitude by CFA. In response, Cooper testified that she may have said something similar to Wunder's testimony, but her (Cooper's) comment was based on years of experience handling grievances at Level I. Based on her experience, Cooper said, if CSU believes it will lose a grievance it will seek to negotiate a settlement prior to Level I, so that the grievances that actually reach Level I are typically denied by the University. For this reason, Cooper continued, the grievance procedure is stacked against employees whose grievances reach Level I. CFA enjoys more success in grievances that go beyond Level I.

Wunder further testified that Cooper hugged CSU representative Patricia Clark-Ellis at the Level I meeting. Cooper agreed that she may have hugged Clark-Ellis, but explained that she has known Clark-Ellis for years and actually mentored her as a young faculty member. Cooper said if she gave Clark-Ellis a hug, it was only because she had not seen her in a long time.

Both Cooper and Wunder attended the Level I hearing on July 8, 2003. Wunder testified that she presented the case and Cooper said little or nothing. Cooper, on the other hand, testified that Wunder's testimony in this regard is "absolutely false." Cooper said she participated in the meeting and advanced the arguments given to her earlier by Wunder; that is,

Wunder had been improperly assigned to teach a class without consultation. And Cooper said her advocacy is not always evidence that she believes the grievance has merit. It is not unusual, Cooper credibly testified, for her to present an argument on behalf of a grievant at Level I even though she believes there has been no contract violation. As more fully discussed below, it is unnecessary to resolve this dispute.

Wunder argued at the Level I meeting that Martin and Guarino violated Article 20 of the collective bargaining agreement by improperly assigning her Accounting I for the Spring 2004 semester without proper consultation. Documents in the grievance record show that, beginning in late 2002, Wunder communicated about the assignments with Martin and Guarino on many occasions through memoranda, e-mail and meetings in an attempt to avoid the assignment. However, as described above, Wunder was given the assignment over her protest.

After the Level I meeting, Wunder testified, Cooper told her that "it was the best documented and presented level one grievance that she had encountered," and "most grievants do not submit and present documentation." Cooper conceded that she made these comments to Wunder, but meant only to convey the point that the grievance was well presented and documented, not that the documentation or presentation proved a contract violation. In fact, Cooper testified, she told Wunder prior to the Level I meeting that she did not think a contract violation had occurred.

After the Level I grievance meeting, Cooper informed Garcia by e-mail of her assessment of the case.

> Wunder makes a strong case for why she should not have to teach a particular class that is outside of her field of expertise. I'm not convinced that it is a contract violation. CFA should certainly take it to Level II, if necessary. The University will argue that scheduling is up to the discretion of the chair of the department, and therefore Wunder's concerns are not a violation of the contract, as much as unhappiness with her teaching schedule.

Cooper reiterated in her testimony that Wunder had "presented volumes" as to why she should not have to teach the class, but the assignment still did not violate the agreement. Cooper testified: "I never thought it was a contract violation. I thought it was she didn't want to teach the class because she didn't feel like she should have to teach the class. And she had reasons why she felt that way." However, Cooper continued, although the schedule is to be established after consultation between the department and the faculty member, the department makes the final decision and there are times when the faculty member doesn't like his or her schedule. "I have a night class on Thursday nights. I wish I didn't have a night class on Thursday nights. But . . . it's not a contract violation," Cooper testified. On August 5, 2003, Clark-Ellis denied the grievance. Cooper said she recommended the grievance be taken to Level II merely out of fairness.

Rick Nadeau is CFA's Northern California representative and mainly handles arbitrations and grievances for the union. On August 20, 2003, Wunder delivered to him a detailed 24-page analysis of the Level I denial, which Nadeau read along with other supporting documents. He said Wunder's Level I rebuttal was "a large narrative" that was "almost like a brief."

Among other things, Wunder's rebuttal indicates that Martin had considered faculty preferences in some detail before making assignments, and Guarino had upheld her Spring 2004 assignment despite her assertions that she was not current in Accounting I or II.[3] Wunder adamantly disagreed with Clark-Ellis' decision that the contract had not been violated and

[3] Wunder had submitted several memos to Martin concerning the assignment. At some point in the communications with Martin it appears that he lost patience with the process. Wunder wrote in the rebuttal that on two occasions he abruptly ended conversations, saying "I'm done talking" and referred her to other administrators. At another point in the rebuttal, Wunder wrote that Guarino wanted to remain neutral and serve as a "sounding board" in the discussions.

argued forcefully in the rebuttal to the Level I decision that Clark-Ellis had not adequately addressed the issues raised by the grievance.

A Level II grievance meeting was scheduled for September 16, 2003, at the Office of the Chancellor level. Prior to the meeting, CFA Administrative Assistant for Representation, Dorothy Poole, informed Wunder by letter of August 21, 2003, that "it is your right to attend this meeting; however, due to its nature (an appellate review of the existing record), the grievant's attendance is neither necessary nor usual." Nadeau similarly testified that grievants rarely attend Level II meetings because it is rare that CSU will settle a grievance at that level. Level II is at the Chancellor's office, Nadeau said, and the Chancellor's representative almost always defers to the position taken by the campus at Level I. As a result, grievances that are processed to Level II either are withdrawn or pursued to arbitration, according to Nadeau.

Wunder responded the next day, August 22, informing Poole that she had delivered a written rebuttal to the Level I decision to Nadeau and that she chose not to attend the Level II meeting. Wunder asked Poole to inform her of the date of the Level II meeting, but Poole did not do so.

Nadeau did not speak with Wunder prior to the Level II meeting. However, his October 4, 2003, e-mail to Wunder indicates he had a copy of her response to Level I and read it along with the remainder of the grievance file prior to the Level II meeting. It is not established in the record precisely what would have been gained by a meeting between Nadeau and Wunder. She had done a thorough job of documenting her claims and her arguments were amply set forth in the materials in Nadeau's possession.

The Level II meeting was held on September 16, 2003. In notes written immediately after the meeting, Nadeau set out his preliminary assessment of the grievance.

> Grievant believes CBA 20 [sic] violated when she was assigned a class she hadn't taught in 10 yrs and which is not in her area of

> specialty (taxation). She claims a lack of proper consultation, although chair claims there was a discussion among 3 full professors regarding these assignments and how they could share. Although it is true she was assigned classes outside of her special area of interest – I see no serious contract violation and will not recommend this case to arbitration.

In an October 3, 2003, e-mail, Nadeau apologized to Wunder for lack of notice of the Level II meeting, but noted that the meeting was conducted on that date to take advantage of the availability of CSU representatives. Nadeau wrote in the e-mail that "the University will most likely deny the grievance, so it is very likely you will be required to teach [Accounting I]. You need to be aware that a refusal to teach a course you have been assigned to teach could lead to a disciplinary action." The next step was to await the Level II response from CSU.

Section 10.5.b of the contractual grievance procedure states: "The designated individual in the Office of the Chancellor shall respond no later that fourteen (14) days after the [Level II] conference." However, CSU issued no Level II response to Wunder's grievance.

Grievances not settled at Level II may be appealed to arbitration under section 10.5.c, which states:

> If the grievance has not been settled at Level II, then within forty-two (42) days after receipt of the decision at the previous level or the expiration of the time limits for making such a decision, the CFA, upon the request of the grievant, may request arbitration by giving notice to that effect [to CSU].

In this case, according to section 10.5.c, CFA's appeal to arbitration would have been due on November 21, 2003. However, Nadeau testified that this is "not a timeline that's been applied by either party. And we've actually taken cases to arbitration that went through that process like this one did, like [Wunder's] case did."

Two other witnesses corroborated Nadeau on this point. At about the time of Wunder's grievance, CFA Director of Representation Ed Purcell testified, there were "quite a number of cases" where the University either had not issued a Level II response or had not issued a Level

II response in a timely manner. He said CFA appealed these cases to arbitration in a manner that was not in conformance with the contractual time for appeal, and thus the appeals would be untimely under a strict reading of the terms of the contract. In these cases, however, CSU either had not raised a timeliness objection or if a timeliness defense was raised before the arbitrator, it was unsuccessful.

Testimony by Purcell and Nadeau to the effect that failure to appeal Wunder's grievance to arbitration in strict compliance with section 10.c.5 of the agreement did not create a timeliness issue was corroborated by Garcia. In her unrebutted testimony, she described several grievances that were not appealed to arbitration in accord with the timelines set out in section 10.c.5, and CSU opposed none of them on timeliness issues.[4]

Other sections in the contract cover timelines during the grievance procedure. Section 10.13 provides:

> Wherever a time limit is provided by this Article, the participants at that level may extend the period by mutual consent in writing. . . . . It is understood that the purpose of this procedure is to resolve grievances promptly and that extensions shall be sought only for good cause.

Nadeau testified that this section applies to Level I of the grievance procedure, where the parties typically sign a form tolling timelines. With respect to the application of section 10.13, Purcell testified that "there are occasions when that occurs, and occasions when it doesn't." Asked if section 10.13 was used to extend the time for appealing Wunder's case to arbitration, Purcell said there was no need to do so because the appeal was timely due to CSU's failure to respond to Level II.

Section 10.19 provides:

[4] These are the grievances of Ivy Chen, Leilani Grajeda-Higley and Hilary Holz, which were appealed to arbitration in November 2003.

> Upon the failure of the Employer or its representatives to provide a decision within the time limits provided in this Article, the grievant or CFA, where appropriate, may appeal to the next step. Upon the failure of the grievant or CFA, where appropriate, to file an appeal within the time limits provided in this Article, the grievance shall be deemed to have been resolved by the decision at the prior step.

Nadeau testified about how this section has been applied historically. Previously, he said, CFA waited for a response from CSU before moving the case to the next level, but there were so many late responses from CSU that CFA would not longer insist on a response before appealing. He said this has happened several times, and in practice if CSU does not respond in a timely manner, "we can move it to the next level, and that's what we did."

In a November 6, 2003, e-mail to Garcia, Jane Kerlinger, CFA representative responsible for the Sacramento campus, recommended that Wunder's grievance not be pursued to arbitration. Her rationale is as follows:

> 1. Faculty member claims that she should not be required to teach an introductory accounting class because her overall expertise and value is greater than colleagues in the department with less publishing.
>
> 2. The course in question is apparently unpopular with the faculty in the department; no one wants to teach the class on a regular basis. The course is part of the core curriculum and must be taught in the department.
>
> 3. The faculty member is not claiming that she is not qualified to teach the course (not outside her discipline or area of expertise).
>
> This grievance is better characterized as a departmental scheduling conflict between a faculty member, her colleagues, and her chair; not a contract violation. The claim that someone shouldn't have to teach a course, because they are "too good" is neither a contract issue, nor wise for the union to be involved in internal scheduling disputes. There are no provisions in the contract that excuses [sic] faculty from teaching a course because they don't want to (especially when no one else wants to either).[5]

[5] This was not the first time Kerlinger offered an opinion about Wunder's grievance. She said she had several conversations with Cooper and Nadeau prior to the Level I meeting

Kerlinger made the recommendation after reviewing Wunder's grievance file. Among other things, the file included the grievance record, Wunder's communications with the department and various supporting documents. Because Wunder felt so strongly about her grievance, Keringler testified, she (Kerlinger) gave the recommendation more attention than usual.

On November 20, 2003, Wunder inquired about the status of the grievance. Poole replied the next day that the Level II response was due on October 10, but CSU had not responded and there was nothing the union could do contractually to compel a response. Poole explained that CFA had not completed an internal review of the grievance, and the Level II response is usually part of that review. She said further that it was unlikely the grievance would be resolved, but the matter would be advanced to arbitration "solely to move the process forward" in the absence of the Level II response. "This does not indicate that CFA has made a determination regarding whether nor not to pursue your case to arbitration," Poole wrote.

In another letter to Wunder, dated November 25, 2003, Poole reiterated that CSU had not submitted a Level II response.

> In the absence of that response, today the California Faculty Association requested arbitration on your behalf. Please see the attached copy.
>
> Please be advised that your case was submitted to arbitration <u>solely</u> to adhere to the time limit required for such filing. This does not necessarily indicate that CFA has made a determination regarding whether or not to pursue your case to arbitration. Following this submission, CFA shall make a determination on the disposition of your case.
>
> Because of the large volume of cases we have received, we have not yet completed our thorough review of your case. This process should be completed shortly, however, and we will notify you immediately of the staff decision, as well as the procedure to

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and stated her opinion that Wunder's claims did not constitute a contract violation. Referring to Nadeau, Kerlinger also testified that she "got his sense" that he, too, did not view Wunder's claims as a contract violation.

> appeal to the CFA Representation Committee, should the decision be negative. (Underlining in original.)

Although the November 21 and 25 letters were signed by Poole, they were written for her signature by Garcia as part of her assignment to track grievances. The first was a direct response to Wunder and the second was based on a template used by CFA in responding to employees during the grievance process. Therefore, Garcia said, the language referring to timelines in the second letter is standard and does not necessarily relate to Wunder's grievance.

In a December 4, 2003, summary of the grievance, Nadeau set out his final recommendation:

> Grievant believes that CBA was violated when she was assigned a course she hadn't taught in years and claims she wasn't properly consulted. Dept Chair claims she and two other faculty were asked to share these assignments. Wunder claims she is too valuable and too good to be assigned one of these classes in the spring. In a conversation with me she also told me that she was a true researcher and should not be assigned such a class – that she far excelled her colleagues in the professional achievement area and should not be degraded by this assignment.
>
> I do not see a good or half good contract case here. I agree with the negative recommendation of Kerlinger and FR chair Cooper that we NOT take this case to arbitration. It is a sure loser. (Emphasis in original.)

Nadeau testified that compliance with contractual timelines was not a concern when he made this recommendation. He said he didn't even think about it, and if the grievance had been advanced to arbitration it would have gone "easily."

Purcell is the person who reviews grievances to determine if they merit arbitration. He has worked on a large number of grievances for CFA, and he was the chief negotiator during negotiations for the contract at issue here. In a December 22, 2003, e-mail to Garcia, Purcell said CFA decided not to advance Wunder's grievance to arbitration because it alleged "no viable violation of the contract."

On January 3, 2004, Wunder questioned whether CFA's appeal after Level II was timely. In a January 6, 2004, letter, Poole responded:

> Our filing is timely, because there is no specified time limitation placed upon CFA should the CSU fail to respond within the allotted timeframe. We are not outside the filing timelines, nor did the CSU challenge our filing for timeliness.

In another January 6, 2004, letter, (written by Garcia) Poole informed Wunder that CFA had decided not to appeal her grievance to arbitration because there was "no viable violation of the contract." Poole reiterated the right to appeal the decision to the CFA Representation Committee. Lastly, Poole wrote:

> You should understand that because of strict contractual time limits for the appeal of a case to arbitration, such an appeal to the CSU was made prior to the staff decision to deny arbitration so as to accommodate a possible representation appeal.

Garcia testified that the language quoted immediately above, particularly the reference to "strict contractual time limits," is a template from the CFA office.

In a telephone conversation between Wunder and Poole in early January, 2004, Wunder testified, she asked Poole why her grievance had not been moved to arbitration. She said Poole could not give her an answer and commented that "I'm not an expert in your case. Ed Purcell made the decision not to take the case to arbitration."

Wunder appealed to the CFA Representation Committee in an attempt to overturn Purcell's decision. She argued that CSU's response to the Level I grievance lacked the degree of specificity sufficient to effectively deny the grievance, and CSU's failure to respond to the "well-documented" Level II grievance suggested it had "thrown in the towel." Wunder also cited several alleged contract violations that stemmed from her assignment.

Wunder alleged that the assignment violated sections 20.1.c and 20.1.d of the collective bargaining agreement. Cooper testified that faculty members are responsible to be current in

their "subject area." Faculty members are hired by departments, Cooper said, and even if they have a specialty they should be competent to teach introductory courses. For example, Cooper, teaches in the field of social work and should therefore be able to teach a variety of courses in that field, including the introductory courses. A professor in the biology department who specializes in genetics should be able to teach the introductory biology course, and so on. The same rationale applies to professors in the accounting department, Cooper said. According to Purcell, the term "subject area" is a general one and has not been defined through litigation. In his view, there may be many subject areas in a particular department.

Wunder's appeal also alleged that CSU failed to satisfy the consultation requirement in section 20.2.b. Cooper testified, based on her 29 years as a faculty member at CSU and numerous discussions with other faculty members in administering the agreement, that the duty to consult means that the chairperson of the department will meet with the faculty member and "talk about the schedule." Purcell corroborated Cooper's testimony in this regard, noting that Wunder's grievance file indicated there had been "rather extensive discussions" with Wunder about the assignment. He said the department chairperson or appropriate dean is ultimately responsible for making assignment decisions, and such decisions do not violate the contract unless they are punitive. Nadeau agreed. He said the term "consultation" "has normally meant . . . there was some attempt to communicate with the faculty regarding the needs for this assignment." [6] In Wunder's case, she had many discussions or communications with the department chairperson and the associate dean of the college of business administration, but she argued in her grievance they were not "genuine."

[6] Nadeau further testified that disputes about the interpretation of this provision in the contract have "come up quite a bit" because the budget considerations have caused CSU to hire fewer lecturers to teach introductory courses.

The appeal alleged further that section 20.3.b was violated because the required adjustment to workload in consideration of her research was ignored in assigning her the accounting course. Cooper testified that, based on her experience, consideration for adjustment in workload means that the schedule for a faculty member who has a grant and buys out his or her time will be adjusted. But the practice has not been that a faculty member is entitled to a particular schedule merely because she is conducting research. An exception to the rule may occur when the time during which the research must be conducted conflicts with a particular schedule. It was with this understanding that Cooper wrote the June 3 e-mail mentioned above indicating that Wunder's grievance was not a contract violation.

Purcell similarly testified that section 20.3.b means a determination of workload is to be based on the "total picture," taking into account that different faculty members fill different roles and in making assignments the University must "at least consider the total picture." In Wunder's case, Purcell said, the grievance record showed that there had been discussions about the different elements of her workload and those discussions "constituted consideration." The result did not produce the assignment that Wunder preferred, Purcell said further, but that did not mean the assignment violated the contract.

Lastly, Wunder asserted in her appeal that arbitration was foreclosed because CFA had missed the deadline for appealing to arbitration, and CFA used the claim that there has been no contract violation as a reason to "cover" its failure to timely appeal to arbitration.

On February 25, 2004, Wunder's appeal was denied. Linda Smith, chairperson of the CFA Representation Committee, testified that the committee reviewed Wunder's grievance file and considered whether she was consulted about teaching the accounting course and whether the course assignment itself was appropriate. In this context, the committee was aware that Wunder was a faculty member whose specialty was taxation, and that she had been assigned to

teach financial accounting. The committee -- consisting of four faculty members, Purcell and Nadeau -- unanimously decided that Wunder had been consulted by those who arrange scheduling and that the course was appropriate for her to teach. At no time was the issue of whether the grievance had been appealed to arbitration in a timely manner discussed by the committee in reaching its decision.

In denying Wunder's appeal, Smith wrote that the "University met its contractual obligations, and this decision was made in compliance with CFA representation policy. Therefore, I must inform you that CFA will not move your case to arbitration."

ISSUE

Did CFA breach its duty of fair representation when it declined to take Wunder's grievance to arbitration?

CONCLUSIONS OF LAW

Section 3578 defines the duty of fair representation as follows.

> The employee organization recognized or certified as the exclusive representative shall represent all employees in the unit, fairly and impartially. A breach of this duty shall be deemed to have occurred if the employee organization's conduct in representation is arbitrary, discriminatory, or in bad faith.

It is well settled that a union's duty of fair representation extends to grievance handling. (See e.g., Fremont Unified School District Teachers Association CTA/NEA (King) (1980) PERB Decision No. 125; American Federation of State, County and Municipal Employees, International, Council 57 (Dehler) (1996) PERB Decision No. 1152-H (Dehler).) To establish a breach of the duty of fair representation in a grievance handling context, the charging party must show that the union's conduct was arbitrary, discriminatory or in bad faith.

In United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258, p. 5 (Collins), the Board stated:

> . . . Whether a union has met its duty of fair representation in [grievance processing] depends not upon the merits of the grievance but rather upon the union's conduct in processing or failing to process the grievance. 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. [Citation.]

In order to state a prima facie case that the duty has been breached, the 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. (Dehler at p. 6; accord, Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124.)

The Board has observed, moreover, that "a union's honest, reasonable determination not to pursue a grievance does not breach the duty of fair representation, regardless of the merits of the grievance." (Dehler at pp. 6-7, citing California State Employees' Association (Calloway) (1985) PERB Decision No. 497-H.)

CFA's conclusion that Wunder's grievance lack merit and should not be processed to arbitration did not run afoul of these standards. Wunder insists that her field is taxation and no provision of Article 20 suggests that the responsibilities of faculty extend beyond their "field of expertise." She construes sections 20.1.c and 20.1.d of the agreement as precluding the assignment at issue here. She argues that "assignment to a course outside of [her] field of expertise in and of itself is a contractual violation – and a basis for taking the case to arbitration." CFA's lack of understanding of the agreement, Wunder contends, resulted in a lack of "fair and unbiased representation."

As CFA concluded, however, these provisions did not preclude Wunder's assignment. In fact, the plain language of section 20.1.c and section 20.1.d merely set forth broad instructional and professional responsibilities. While they include research, they do not expressly impose any duty on CSU to make assignments based on an identifiable standard, nor do they even address assignments.

More relevant to the decision not to advance Wunder's grievance to arbitration is section 20.2.b of the agreement. That section provides that instructional assignments "will be determined" by the appropriate administrator "after consultation" with the faculty member, and assignments "shall be consistent with department and student needs." This section does not preclude CSU from assigning Accounting I to Wunder. As Cooper testified, based on some 29 years of experience, section 20.2.b means only that the chairperson or appropriate administrator must meet with the faculty member and "talk about the schedule." Nadeau testified that section 20.2.b requires only "some attempt to communicate" with the faculty member before making an assignment. And Purcell testified that in making the decision not to proceed to arbitration, CFA was aware of the fact that there had been "rather extensive discussions" with Wunder about the assignment. He said further that under the agreement the ultimate assignment decision is left to the appropriate administrator, and assignment decisions do not violate the agreement unless they are punitive.

Granted, section 20.3.b provides that "consideration" shall be given to many factors, including research, in the assignment of workload; and "consideration for adjustments" in workload shall be given for factors such as "research." Like section 20.2.b, however, this section provides only that certain factors be considered. It contains no mandate which may reasonably be construed as precluding CSU from assigning Accounting I to Wunder. Cooper testified that adjustments in workload apply to faculty members who have a grant; that is, a

faculty member who has a grant and buys out his or her time is entitled to a workload adjustment. But under the existing practice, Cooper said, a faculty member is not entitled to a particular schedule merely because she is conducting research. Purcell similarly testified that a determination of workload under section 20.3.b is based on the "total picture," and the only requirement on CSU is to "at least consider the total picture." He said further that Wunder's grievance file showed that there had been discussions about her workload and those discussions met the "consideration" requirement in section 20.3.b.

Nor is CFA's rationale that a faculty member may be required to teach a variety of courses within his or her general subject area unreasonable, even though Wunder may disagree. As Cooper testified, it is not unreasonable for a faculty member to be required to teach introductory courses within a department. She is a member of the social work department and could be required to teach introductory courses, just as a professor whose expertise is genetics could be required to teach an introductory biology course.

Wunder argues, nevertheless, that Purcell made no effort to obtain information about the role of research in assignments, and never even discussed the matter with her prior to the decision not to proceed to arbitration. However, Purcell's conduct in this regard cannot reasonably be found to breach the duty of fair representation in the context of this record. Purcell and the other CFA representatives who participated in the decision not to proceed to arbitration were fully aware of the issues presented by Wunder's grievance, they were familiar with and applied the relevant contractual provisions, they reviewed the grievance record and Wunder's lengthy arguments, and they had the recommendations of Kerlinger and Nadeau. A union does not breach the duty of fair representation by failing to advance every possible argument or exhaust every avenue of inquiry, provided the grievance is not processed in a perfunctory manner and the ultimate decision is not arbitrary, discriminatory or in bad faith.

Although Wunder disagreed with CFA's decision, CFA's "honest, reasonable determination not to pursue a grievance [did] not beach the duty of fair representation, regardless of the merits of the grievance." (Dehler at pp. 6-7, citing California State Employees Association Calloway) (1985) PERB decision No. 497-H; United Teachers of Los Angeles (Clark) (1990) PERB Decision No. 796.)

Wunder next argues that CFA breached the duty of fair representation because Purcell and the committee relied on a recommendation by Kerlinger, and her (Kerlinger's) recommendation shows that she did not understand the grievance. This argument is not convincing. Purcell was fully aware of the issues presented by Wunder's grievance. He testified, "I was aware of the fact that you believed that you were not qualified to or appropriately qualified to teach some of the courses that they were trying to assign to you." The fact that Purcell's testimony is arguably at odds with a portion of Kerlinger's November 6, 2003, recommendation that Wunder "is not claiming that she is not qualified to teach the course (not outside her discipline or area of expertise)," does not alter the conclusions reached above. Wunder's argument is focused on only one part of Kerlinger's November 6, 2003, recommendation. Even if Kerlinger misstated the issue in part of the recommendation, the totality of the recommendation shows that Kerlinger understood the essence of the issue presented by the grievance -- whether it was appropriate under the agreement to assign Wunder an introductory accounting course. In any event, CFA representatives who ultimately decided not to advance Wunder's grievance to arbitration were aware of the issues presented by the grievance. Given the lengthy grievance record and Wunder's thorough explication of her arguments, the claim that CFA misunderstood the grievance is unconvincing.

I find, therefore, that CFA's decision that the grievance lacked sufficient merit to proceed to arbitration was not arbitrary, discriminatory or in bad faith. The decision was

rational and based on honest judgment about the meaning of the agreement. Although the assignment was not one that Wunder preferred, that did not mean that it violated the contract.

Wunder argues further that the decision not to appeal her grievance to arbitration was not based on the merits. She claims the decision was an attempt to cover up CFA's failure to appeal in accord with the timelines in the agreement. This argument is also unconvincing.

The final decision of the CFA Representation Committee was not the first time CFA representatives took the position that Wunder's grievance lacked merit. In fact, CFA representatives adopted this view at almost every step of the grievance procedure. In a June 3, 2003, e-mail to Garcia, Cooper wrote that "I also don't think Wunder has a strong case." After the Level I meeting, Cooper informed Garcia that "Wunder's concerns are not a violation of the contract, as much as unhappiness with her teaching schedule." In a September 16, 2003, assessment of the case, Nadeau wrote that "I see no serious contract violation and will not recommend this case to arbitration." And, in a November 6, 2003, e-mail to Garcia, Kerlinger wrote that the grievance is a mere scheduling dispute, not a contract violation. All of these assessments of Wunder's grievance occurred before the November 21, 2003, so-called deadline to appeal to arbitration and therefore could not possibly have been motivated by a desire to cover up the alleged failure to appeal in a timely manner.

Other evidence supports the conclusion that the decision not to appeal the grievance to arbitration was not due to a missed deadline. According to section 10.5.c, the appeal to arbitration would have been due on November 21, 2003; CFA appealed on November 25, 2005. Under a strict reading of section 10.5.c, the appeal would have been untimely. However, Nadeau and Purcell credibly testified that this is not a timeline that has been followed in practice by either party. Their testimony was corroborated by Garcia, who cited several specific grievances that were not appealed to arbitration in accord with the section

10.5.c timeline. CSU opposed none of them on timeliness grounds. These are the grievances of Chen, Grajeda-Higley and Holz, which occurred at or about the time of Wunder's grievance. Because the practice rendered the timeliness issue irrelevant, it was not considered in making the decision not to proceed to arbitration. As Nadeau testified, if the grievance had been advanced to arbitration, it would have gone easily.

Wunder argues that a conflict between two letters sent by Poole on January 6, 2003, supports her claim that CFA missed the deadline to appeal to arbitration. In the first January 6 letter, Poole said there was no specified time limit to appeal to arbitration if CSU failed to respond after the Level II grievance meeting. In the second letter, Poole said there was a strict contractual timeline to appeal to arbitration.

I find this consistency does not support the claim that CFA missed the deadline to appeal. Poole's first letter on January 6 accurately reflected the existing practice with respect to timelines, as credibly described by Purcell, Nadeau and Garcia. Poole's second letter on the same date does include a reference to a contractual timeline, but it was drafted by Garcia and is based on a CFA template. As such, it is a mere form letter that does not take into account the practice. For this reason, I conclude that any inconsistency between Poole's letters does not undercut the actual practice itself or CFA's good faith reliance on the practice in processing Wunder's grievance.

Nor does section 10.13 of the agreement lead to the conclusion that the appeal to arbitration was untimely. Granted, CFA and CSU did not agree under section 10.13 to extend the time to appeal. However, it cannot be concluded on this record that their failure to do so rendered the appeal untimely. As Nadeau testified, the parties have treated that section as applicable to Level I of the grievance procedure, and, in any event, Purcell confirmed it has not been consistently enforced by the parties. More importantly, I find sections 10.13 and 10.19

provide little help in determining whether CFA breached the duty of fair representation. It is the practice under section 10.b.5 of the grievance procedure that is controlling here. CSU has not insisted on a strict application of section 10.b.5. As both Nadeau and Purcell testified, under that practice there was no need to comply with sections 10.13 or 10.19 or the 42-day deadline in section 10.b.5. CFA's good faith reliance on the practice described by Nadeau, Purcell and Garcia precludes a finding that it breached the duty of fair representation by not appealing in strict compliance with the contractual timelines. (Ruzika v. General Motors Corporation (6th Cir. 1983) 707 F.2d 259 [113 LRRM 2562].)

Wunder next challenges the internal union procedure under which CFA decided not to advance her grievance to arbitration. She argues that Purcell's and Nadeau's participation on the CFA Representation Committee prejudiced her appeal because they had already concluded at earlier stages of the grievance procedure that her grievance lacked merit.

Any duty of fair representation analysis contemplates a wide range of reasonableness afforded a union. The analysis generally does not involve close scrutiny of a union's procedures. (United Teachers of Los Angeles (Valdez) (2001) PERB Decision No. 1453, adopting proposed decision of administrative law judge (ALJ) at p. 47 (Valdez), citing Service Employees International Union, Local 99 (Kimmett) (1979) PERB Decision No. 106.) This is true even if the union "is not kindly disposed" to the grievant." (Valdez at p. 45 of ALJ proposed decision.) The issue is whether a rational basis exists for a union's decision or whether that decision "was reached for reasons that were arbitrary or based on invidious discrimination." (Id. at p. 47 of ALJ decision, citing Sacramento City Teachers Association (Fanning et al.) (1984) PERB Decision No. 428.)

In this case, the CFA Representation Committee considered the entire grievance record, input from a number of CFA representatives in addition to Nadeau and Purcell, the facts

surrounding the course assignment and the relevant provisions of the contract. It is true that Nadeau and Purcell had formed their opinions about the grievance at earlier stages of the procedure, but the evidence does not support a finding that their later participation on the Faculty Rights Committee was arbitrary or based on invidious discrimination. Wunder has not established by a preponderance of the evidence that the process used by CFA was outside the wide range of reasonableness afforded an exclusive representative.

I conclude, therefore, that CFA did not miss the deadline to appeal Wunder's grievance to arbitration and the timeline issue played no role in the decision not to appeal. The committee reviewed Wunder's grievance file, considered whether she had been consulted about the course assignment and whether the assignment itself was appropriate. The committee concluded that Wunder had been consulted, the course was appropriate for her to teach, and the issue of timeliness was not considered.

Lastly, I have noted earlier that allegations in the complaint about CFA's conduct at early stages of the grievance procedure have been dismissed as time-barred. Therefore, claims in the complaint that Wunder was told it is not normal or necessary for a grievant to attend a grievance meeting; that Wunder was not informed of the date of a grievance meeting; or that Wunder's request to attend a grievance meeting was not communicated to the appropriate CFA representative are not addressed here as independent violations.

The same can be said about numerous additional allegations which are not included in the complaint but were advanced by Wunder in her brief as evidence that CFA breached the duty of fair representation during the processing of the grievance at the lower levels.[7] It is

[7] These include, for example, that Wunder was given no advice by Cooper at the Level I meeting; that Cooper told Wunder that CSU typically denies grievances at Level I; that Cooper hugged Clark-Ellis at the Level I meeting; that Cooper conceded Wunder's grievance was well argued and well documented; that Kerlinger admitted she was not an expert in Wunder's grievance; that the person who made the assignment was not an appropriate

unnecessary to address these assertions here, even assuming for argument's sake that they occurred. Mistakes, poor judgment or mere negligence do not breach the duty of fair representation. (See e.g., Dehler at p. 7, citing American Federation of State, County and Municipal Employees, Council 10 (Olson) (1998) PERB Decision No. 682-H; Collins at p. 5.) Nor does such conduct which does not itself foreclose employee rights breach the duty of fair representation. (Fremont District Teachers Association (2003) PERB Decision No. 1572, pp. 7-8; Coalition of University Employees (2003) PERB Decision No. 1517-H, p. 9.) No conduct at the lower levels of the grievance procedure foreclosed Wunder's rights; the grievance ended in February 2004 when the committee decided not to take the grievance to arbitration.

Moreover, claims about the manner in which Wunder's grievance was processed at the lower levels are outside the six-month statute of limitations, they are not part of the complaint, and they do not detract from the conclusion reached above regarding the only issue presented in this proceeding: that is, did CFA breach the duty of fair representation owed Wunder when in February, 2004, it decided not to advance her grievance to arbitration? I conclude that it did not.

PROPOSED ORDER

Based on the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaint and underlying unfair practice in Case No. SA-CO-24-H, Haroldene F. Wunder v. California Faculty Association are 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:

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administrator; and that the Level II meeting was conducted by conference call without Wunder's participation.

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).)

Fred D'Orazio

Fred D'Orazio
Administrative Law Judge