STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

DAVE LUKKARILA, Charging Party, v. CLAREMONT UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-5727-E PERB Decision No. 2357 February 21, 2014

Appearances: Dave Lukkarila, on his own behalf; Fagen, Friedman & Fulfrost by Milton E. Foster, Attorney, for Claremont Unified School District.

Before Martinez, Chair; Huguenin, Winslow and Banks, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Dave Lukkarila (Lukkarila) from a dismissal and deferral to arbitration of his unfair practice charge. The charge alleged that the Claremont Unified School District (District) retaliated against Lukkarila for his involvement in various protected activities and interfered with the rights of employees, in violation of sections 3540, 3543 and 3543.5(a) of the Educational Employment Relations Act (EERA).[1]

On appeal, Lukkarila argues that the Office of the General Counsel misstated certain factual allegations included in the charge and/or failed to grasp their legal significance when determining whether the charge was appropriate for deferral. He urges the Board to reverse the dismissal and issue a complaint. The District argues that Lukkarila's appeal is procedurally

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

and substantively defective; that the charge is appropriate for deferral, and that the dismissal should therefore be affirmed.

After reviewing the entire record in this matter in light of the relevant law,[2] the Board has determined that, the charge is not appropriate for deferral, pursuant to the "futility exception" of EERA section 3541.5, subdivision (a)(2), because the exclusive representative, the Claremont Faculty Association (Association),[3] is unwilling to arbitrate Lukkarila's allegations. We therefore reverse the decision to dismiss and defer to arbitration and remand the matter to the Office of the General Counsel to determine whether the charge states a prima facie case.

We also take this opportunity to revise PERB's deferral procedures. We hold that, in cases where the affirmative defense of deferral is asserted and the charging party cannot invoke binding arbitration independent of the exclusive representative, the Office of the General Counsel, as part of its initial investigation into the appropriateness of deferral, shall determine not only whether the employer, but also whether the exclusive representative, is ready and willing to proceed to arbitration before deferring the matter to arbitration.

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[2] In reviewing the dismissal of a charge, the Board assumes the essential facts alleged in the charge are true. (*San Juan Unified School District* (1977) EERB Decision No. 12 [before January 1, 1978, PERB was known as the Educational Employment Relations Board or EERB]; *Trustees of the California State University (Sonoma)* (2005) PERB Decision No. 1755-H.)

[3] Lukkarila's appeal and his correspondence with the investigating Board agents variously identified the exclusive representative as the "Claremont Faculty Association" and the "California Faculty Association." The Board may take administrative notice of PERB's own records for material that is of probative value in a matter before the Board. (*San Ysidro School District* (1997) PERB Decision No. 1198.) PERB's records indicate that the *Claremont* Faculty Association, and not the *California* Faculty Association, which represents certain academic employees in the California State University system, is the appropriately identified employee organization in this case.

PROCEDURAL HISTORY

On August 7, 2012, Lukkarila filed the present charge, which alleges various acts of discrimination and interference with employee rights, in violation of EERA sections 3540, 3543, and 3543.5, subdivision (a).

On October 19, 2012, the District filed a position statement, denying any wrongdoing and asserting various affirmative defenses. Specifically, the District argued that the charge should be dismissed for failure to specify an appropriate remedy; for PERB's lack of jurisdiction over claims against a public school district or entity that is not the employer of the charging party; for insufficient specificity in the factual statement of the charge; for failure to state a prima facie case; and for inclusion of claims that overlap with pending grievances or that are otherwise subject to dismissal and deferral to arbitration, pursuant to EERA section 3541.5, subdivision (a)(2).

On October 29, 2012, counsel for the District provided PERB with written confirmation of the District's willingness to "waive any contract-based procedural defenses . . . to any claims [in Lukkarila's charge that are] controlled by the Collective Bargaining Agreement" between the District and the Association.

On November 5, 2012, the Office of the General Counsel issued a warning letter advising Lukkarila that all allegations included in the charge were appropriate for deferral to the Collective Bargaining Agreement's (CBA) grievance and arbitration provisions, and that, unless Lukkarila amended or withdrew the charge by November 26, 2012, the charge would be dismissed and deferred. The warning letter stated that, "the issue raised by this charge," i.e., that "the District engaged in reprisals against Lukkarila because he gave notice of and subsequently filed grievances," directly involved an interpretation of certain provisions of the CBA and "whether the District's conduct is prohibited by the CBA." The warning letter also

advised Lukkarila of the District's willingness to waive all procedural, contract-based defenses to arbitration of the claims in the charge. It further advised Lukkarila that the Office of the General Counsel had found "no evidence . . . to indicate that the parties [to the CBA] are not operating within a stable collective bargaining relationship."

After issuing the warning letter, the Office of the General Counsel granted Lukkarila several extensions of time in which to amend or withdraw the charge.

By letter dated January 18, 2013, Lukkarila requested additional time in which to amend the charge and provided the Board agent assigned to this case with additional information, including copies of three grievances filed by Lukkarila on January 8, 2013.

Although additional extensions were granted, Lukkarila did not amend or withdraw the charge. On February 7, 2013, the Office of the General Counsel dismissed and deferred the matter to arbitration pursuant to PERB Regulation 32620, subdivision (b)(5)[4] and EERA section 3541.5, subdivision (a)(2).

After additional extensions of time were granted to both parties, Lukkarila filed and served his appeal on April 26, 2013. Attached to the statement of the appeal were 5 exhibits which included documentation pertaining to Lukkarila's pending grievances against the District. Lukkarila's appeal requests that the Board consider these grievances and his contention that the Association is unwilling to advance Lukkarila's grievances to arbitration.

On June 5, 2013, the District filed and served its response to the appeal in which it opposed Lukkarila's request for the Board to consider new information or additional factual allegations, reiterated that the charge is appropriate for deferral, and urged the Board to affirm the decision to dismiss and defer the charge to arbitration.

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

Lukkarila's Request to Amend the Charge and/or Supplement the Record of this Appeal

Before proceeding to the allegations in Lukkarila's charge, we first consider his request to amend the charge and/or to supplement the record of his appeal with new or additional information. PERB's regulations do not permit a charging party to amend a dismissed charge, unless and until the dismissal is reversed and remanded for further proceedings. (PERB Regs. 32621 and 32647; *Pittsburg Unified School District* (1984) PERB Decision No. 318a.) We therefore deny Lukkarila's request to amend the charge with any evidence or allegations presented for the first time in his appeal.

However, pursuant to PERB Regulation 32635, subdivision (b), the Board may supplement the record of an appeal with new supporting evidence for "good cause." PERB has generally found "good cause" to do so, when the new allegations or supporting evidence presented in an appeal could not have been discovered by the charging party with the exercise of reasonable diligence before the charge was dismissed. (*American Federation of State, County, and Municipal Employees, Local 2620 (McGuire)* (2012) PERB Decision No. 2286-S.) Thus, "good cause" may be found when the events giving rise to the new allegations or supporting evidence did not occur until after the charge was dismissed.

The new or additional information included in Lukkarila's appeal pertains largely to the approximately 13 grievances which he filed against the District between February 2012 and February 2013. Because this information, as well as copies of three grievances filed on January 8, 2013, were already provided to the Office of the General Counsel before it dismissed the charge, no further action by the Board is necessary for these documents to be considered as part of the dismissed charge and as part of the record of Lukkarila's appeal.

However, Lukkarila's appeal also encompasses new information and allegations which support his argument that "neither the . . . Association, nor the District wish[] to process [his]

grievances in a meaningful manner," and which were not presented to the investigating Board agents before the charge was dismissed. Specifically, the appeal asserts that on November 20, 2012, Lukkarila learned from Kim Breen (Breen)[5] that the Association's Representative Council had decided to reconsider whether to advance Lukkarila's March 20, 2012 grievances to arbitration. The appeal states that Breen also informed Lukkarila that the Association would no longer authorize an attorney to prepare a letter to the District about alleged violations of employee rights, as previously requested by Lukkarila. Lukkarila's appeal asserts that in the ensuing weeks, he left several messages for Dave Chamberlain (Chamberlain), the Association's president, about the Representative Council's reconsideration of these grievances but that Chamberlain did not respond until "a few days" before February 12, 2013, when the Representative Council's "revote" was scheduled to take place. As a result, Lukkarila asserts that he was unable to attend the meeting and present his case to the Representative Council.

Lukkarila's appeal further asserts that, in his absence, the Representative Council voted on February 12, 2013 to reverse its previous decision to advance the two March 20, 2012 grievances to arbitration. The Representative Council allegedly also voted not to advance three more of Lukkarila's grievances to arbitration, including his June 12, 2012 grievance alleging that Brett O'Connor (O'Connor) threatened the Association president during an April 30, 2012 disciplinary meeting and thereby interfered with the rights of employees to be represented and to engage in other protected conduct. Lukkarila's appeal also asserts that, on March 12, 2013, the Representative Council voted not to advance to arbitration his three January 8, 2013 grievances, which alleged, among other things, that the District has retaliated against Lukkarila for filing grievances, bringing the present unfair practice charge, and engaging in other protected activity.

[5] The appeal identifies Breen as an "advisor" employed by "Ontario Uniserv" and by the California Teachers Association. The precise relationship between the California Teachers Association, Ontario Uniserv and the Association is not discussed in the charge.

Much of this information, particularly the information concerning the Representative Council's decision not to take some of Lukkarila's grievances to arbitration, pertains to events allegedly occurring after February 14, 2013, when the charge was dismissed. By definition, this information was therefore not previously available to Lukkarila through the exercise of reasonable diligence. (*American Federation of State, County, and Municipal Employees, Local 2620 (McGuire), supra,* PERB Decision No. 2286-S.)[6]

Because Lukkarila asserts that he was unable to attend the February 12, 2013 meeting at which the Representative Council decided to abandon some of his grievances, it is also unclear whether he learned of the Council's decision on the same day or later. Moreover, the Representative Council's February 12, 2013 decision affected a subset of Lukkarila's 13 grievances, whose allegations overlap with those in his Board charge. Thus, even if we were to determine that Lukkarila had failed to exercise reasonable diligence by neglecting to notify the investigating Board agents of the Representative Council's February 12, 2013 decision on or before February 14, 2013, when the charge was dismissed and deferred to arbitration, that determination would not fully dispose of either Lukkarila's request for the Board to consider new information and allegations on appeal.[7]

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[6] Where the "new" information included in Lukkarila's appeal pertains to earlier events, for example, Lukkarila learning in November 2012 of the Representative Council's decision to reconsider arbitrating some of his grievances, Lukkarila cannot be expected to have amended his charge based on a *possible* outcome of the "revote."

[7] As discussed below, we decline to bifurcate the allegations of Lukkarila's charge by deferring only those that meet the statutory requirements for deferral, while the remaining allegations are heard before PERB. Accordingly, even if we were to determine that Lukkarila could have notified the Board agents of the Representative Council's decision to abandon his grievance before his charge was dismissed two days later, it would not dispose of the central issue raised by his appeal – whether the present charge, *in its entirety*, is appropriate for deferral.

Because the new information included in Lukkarila's appeal regarding the Representative Council's reconsideration and ultimate decision not to arbitrate some or all of Lukkarila's grievances was not previously available, and because it is also germane to whether the present charge is appropriate for deferral, we find "good cause" to consider it as part of the record of the appeal, at least to the extent it relates to the statutory "futility exception" to deferral discussed below.

FACTUAL BACKGROUND

Lukkarila is employed by District as a certificated teacher at Claremont High School in a bargaining unit exclusively represented by the Association. At all times material to this charge, the District and the Association were parties to the CBA, which remains in effect until June 30, 2015. Lukkarila is a member of the Association. However, he holds no elected or appointed office with the organization and he does not allege that he otherwise has any authority to speak or act on its behalf.

Article VII of the CBA provides for a multi-step grievance procedure ending in binding arbitration. However, Article VII.7.5 provides that, "No grievant may proceed to [arbitration] without the consent of the Association." Article VII, section 7.6.3 also provides that, "No party to a grievance shall take any reprisals against the other party to the grievance because he/she participated in an orderly manner in the grievance procedure."

Article XVI, sections 16.4.2 and 16.4.3 additionally govern the procedures for observation and evaluation of bargaining unit employees.

Article XIX, section 19.1 includes language providing for safe working conditions, while section 6 includes a procedure for reporting unsafe or hazardous conditions.

Lukkarila alleges that he scheduled a meeting for February 3, 2012 with Assistant Principal Steve Patterson (Patterson) to discuss health and safety concerns and to notify the

District of Lukkarila's intent to file a grievance alleging that the presence of mold in Lukkarila's classroom violated state law and the CBA. Lukkarila further alleges that, after he informed Patterson of his intent to bring Association Representative Chamberlain and Association President Joe Tonan (Tonan) to the February 3, 2012 meeting, Patterson, who was accompanied by O'Connor, excluded Tonan from the meeting and changed the agenda to a discussion of the District's concerns about Lukkarila's performance.

Beginning February 7, 2012, which was the first work day following Lukkarila's notice, he was subject to formal observations over five consecutive days, and received two adverse observations. A summary report of these observations issued on February 14, 2012. Lukkarila disputes the factual accuracy and conclusions of the summary report, and has requested that the summary report be destroyed along with all related reports of "pop-in" observations of his classroom. In the ensuing four-month period, Lukkarila alleges that he was subject to observation 12 times, which he alleges is in excess of what is permitted by the CBA.

On March 20, 2012 Lukkarila filed two grievances against the District. One of these grievances alleged various health and safety violations, while the second alleged that District personnel had interfered with the grievance process, in violation of the "no reprisals" language of Article 7.6.3. On March 22, 2012, O'Connor allegedly "berated" Lukkarila for his efforts to enforce the safety provisions of the CBA.

In addition to the two grievances filed on March 20, 2012, on April 30, 2012, Lukkarila filed two more grievances. On June 5, 2012, the Association's Representative Council voted 19-1 to advance Lukkarila's two March 20, 2012 grievances to arbitration.

On or about May 30 and July 26, 2012, Lukkarila filed two more grievances. The July 26 grievance alleged, among other things, that the District had violated the "no reprisals" language in the CBA by subjecting Lukkarila to excessive scrutiny, treating him disparately, and carrying

out other "discriminatory reprisals" against him, because he had filed grievances and administrative complaints regarding health and safety and other matters.

On August 7, 2012, Lukkarila filed the present charge. The charge alleges that District officials have reprimanded and disciplined Lukkarila and subjected him to unwarranted scrutiny for filing grievances, and that the District interfered with Lukkarila's freedom of speech by requiring him to submit information requests pertaining to his grievances through the offices of the Association rather than directly to the District.[8]

The charge also alleges that, on April 30, 2012, O'Connor "unnecessarily threatened" Tonan while he was representing Lukkarila in a disciplinary meeting.[9] The specifics of the threat are not set forth in the charge but are apparently included in the narrative portion of a June 12, 2012 grievance, a copy of which was included with Lukkarila's appeal. According to Lukkarila's grievance statement, O'Connor informed Lukkarila and Tonan that Lukkarila would

[8] Lukkarila includes this allegation in his July 26, 2012 grievance and in the present unfair practice charge. Without deciding whether, or to what extent the right to self-representation under EERA section 3543, subdivision (a) affords an individual employee a right to request and obtain from a public school employer information that is presumptively necessary and relevant for processing a health or safety grievance or complaint against a public school employer (*Oakdale Union Elementary School District* (1998) PERB Decision No. 1246; *County of Riverside* (2009) PERB Decision No. 2090-M), by Lukkarila's own account, it was not until April 2013, that the Association's Representative Council decided that it would no longer represent any of Lukkarila's 13 pending grievances. Thus, to the extent this issue must be decided on remand, it will presumably be limited to the period after April 2013 when the Association no longer represented Lukkarila's grievances.

[9] Neither the warning letter nor the Office of the General Counsel's dismissal letter specifically mentions or discusses either Lukkarila's allegation in the statement of the charge that the Association president was "unnecessarily threatened" during a disciplinary meeting, or the additional narrative account included in Lukkarila's June 12, 2013 grievance, which was provided to the investigating Board agents.

be disciplined for failing to attend an Individualized Education Program (IEP) meeting.[10] Tonan requested a list of all other teachers who had missed an IEP meeting during the previous two years along with copies of any related disciplinary measures. O'Connor allegedly laughed, slapped his hand on his desk and refused to provide the requested information. He allegedly also characterized Tonan's request as "the oldest . . . trick in the book." After Tonan asked O'Connor if he was "really going to defy the [Association by] refusing [Tonan's] request," O'Connor replied that he "will be sure to tell the Special Education Department."[11] Neither Lukkarila's statement of the charge, nor the grievance statement from which the above allegations are taken, explain the significance of this "threat," though the grievance statement asserts that Tonan "was threatened with having his reputation tarnished with the Special Education Department," and that O'Connor's actions were "unnecessary" and "interfered with [Tonan's] good faith attempts to represent [Lukkarila]" in a disciplinary matter, in violation of the CBA's "no reprisals" language.

Finally, Lukkarila's charge alleges that the law firm of Fagen, Friedman & Fulfrost may retaliate against him or has already done so because of Lukkarila's representation of his wife in PERB proceedings in a separate matter captioned *Jurupa Unified School District* (2012) PERB Decision No. 2283. Fagen, Friedman & Fulfrost represents both the District and the Jurupa Unified School District, the former employer of Lukkarila's wife.

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[10] Because the term "IEP" is not identified or explained in the appeal or in the District's opposition to the appeal, pursuant to Evidence Code section 451, we take administrative notice of the federal Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400(d)(1), which requires public schools to develop an Individualized Education Program or IEP for every student with a disability who is found to meet the federal and state requirements for special education.

[11] Although not spelled out in the charge, it appears from the statement of Lukkarila's grievance that O'Connor's threat was to "blame" Tonan for the additional work required of employees in the Special Education Department to fulfill Tonan's information request.

Lukkarila's appeal asserts that, by September 7, 2012, five of his grievances had reached Level IV, the final step of the CBA's grievance procedure before arbitration. The Association and the District agreed to place these grievances in abeyance, pending settlement discussions. However, by October 15, 2012, settlement talks had failed and the Association took up the issue of whether to advance some or all of Lukkarila's outstanding grievances to arbitration.

Lukkarila's appeal asserts that on November 20, 2012, Breen informed him that the Association's newly-elected Representative Council had decided to reconsider whether to advance Lukkarila's March 20, 2012 health and safety and interference grievances to arbitration. Breen also informed Lukkarila that, although the Association had previously authorized an attorney to prepare a letter for Lukkarila to send to the District about its alleged violations of employee protected activity, as a result of the change in the Association's elected officers, the Association would now no longer authorize an attorney to work on this letter. Lukkarila alleges that he made several attempts to contact Chamberlain, who had replaced Tonan as the Association president, about the Representative Council's reconsideration of Lukkarila's grievances but that Chamberlain did not return Lukkarila's messages until "a few days" before February 12, 2013, when the Representative Council's "revote" was to take place. Lukkarila alleges that he was unable to attend the meeting due to insufficient notice and that, in his absence, the Representative Council voted to reverse its previous decision to advance Lukkarila's first two grievances to arbitration. The Representative Council also voted not to arbitrate the three grievances that Lukkarila had filed on April 30, May 30, and July 26, 2012.

Meanwhile, on January 18, 2013, Lukkarila filed three more grievances. The first of these alleged that the District had improperly denied Lukkarila and his Association representative access to his personnel file, that the District had included derogatory and improper materials in the file without Lukkarila's knowledge, and, that the derogatory materials were

improperly disseminated to PERB in the District's October 19, 2012 response to the present charge. Each of these actions, Lukkarila alleges, was taken in retaliation for Lukkarila's use of the grievance procedure and PERB's administrative process.

The second of Lukkariala's January 8, 2013 grievances alleges that, on October 10, 2012, less than 10 minutes after Lukkarila had publicly voiced his concerns about a new teacher evaluation process at a staff meeting, three District administrators, armed with yellow notepads, entered his classroom and began asking students questions about the curriculum and instruction of Lukkarila's courses. Based on the close temporal proximity of these two events, the fact that three administrators were present, and on Lukkarila's belief that he had previously been subjected to unwarranted scrutiny after notifying the District in February of his intent to file a health and safety grievance, Lukkarila alleges that the administrators' conduct constitutes excessive scrutiny of Lukkarila in retaliation for various protected activities, including voicing his concerns about the teacher evaluation process at a staff meeting less than 10 minutes earlier. The same grievance alleges that Assistant Superintendent Bonnie Bell and other District officials have also subjected Lukkarila to excessive scrutiny, beginning shortly after he filed a complaint about irregularities in the District's testing procedures.

The third of Lukkarila's January 8, 2013 grievances alleges that, on October 18, 2013, Assistant Principal June Hilton, Superintendent Jim Elsasser and School Board Member Steven Llanusa demanded to meet with Lukkarila, ostensibly to discuss concerns arising from a "walk-through" and observation of Lukkarila's classroom that had occurred on September 26, 2012. Lukkarila alleges that any legitimate concerns the District may have had from the September 26 walk-through were stale and pretextual, and that, in fact, the official visit was in response to Lukkarila's public criticism of the newly-adopted teacher evaluation procedure at staff meeting

occurring the previous week. This grievance also alleges that the heightened scrutiny of Lukkarila is in retaliation for his filing grievances and the present unfair practice charge.

As noted above, Lukkarila's appeal asserts that, on March 12, 2013, the Association's Representative Council voted not to advance Lukkarila's three January 8, 2013 grievances to arbitration. On April 12, 2013, Breen informed Lukkarila that the Association would no longer represent him in any of his 13 pending grievances, because of his failure to provide written accounts of the grievances to Breen by April 10, 2013. Lukkarila does not deny that he failed to comply with Breen's request. Instead, he alleges that some of the grievances were still at the "informal" stage of the process and had thus not yet been reduced to writing.

On March 21, 2013, Lukkarila contacted O'Connor to request the opportunity to present a lunch-time lecture, which would include matters related to Lukkarila's health and safety grievances. On March 25, 2013, the District placed Lukkarila on administrative leave, pending investigation of matters raised by a petition that had circulated among staff members.

DISCUSSION

EERA section 3541.5, subdivision 2(a)(2) states, in part, that PERB shall not:

> Issue a complaint against conduct also prohibited by the provisions of [a collective bargaining agreement] between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration.

However, the language of the statute also states that, "when the charging party demonstrates that resort to contract grievance procedure would be futile, exhaustion shall not be necessary."

The statutory "futility exception" is grounded in a recognition that the overriding justification for the policy of deferral, which is to promote the *voluntary* resolution of labor disputes, is absent when an individual employee who seeks to vindicate statutory rights is not

himself or herself a "party" to the private dispute resolution machinery to which the matter has been deferred, and therefore has no control over whether it will be heard on its merits. As explained in *State of California (Department of Agriculture)* (2002) PERB Decision No. 1473-S (*Agriculture*), the language of the statute indicates that deferral is only appropriate, when it is realistically possible for the charging party to obtain a decision on the merits of the dispute, either by settlement or binding arbitration. Thus, deferral is only appropriate when all parties to the collective bargaining agreement are willing to utilize its grievance-arbitration procedures to resolve the dispute on its merits. (*Id.* at pp. 7-8; *State of California (Department of Parks and Recreation)* (1995) PERB Decision No. 1125-S (*Parks and Recreation*), pp. 8-9; *California State University* (1984) PERB Decision No. 392–H.)[12]

Futility may be found when the integrity or effectiveness of the arbitration process itself is at issue, or when the exclusive representative is unwilling to take the grievance to arbitration. (*Parks and Recreation, supra,* PERB Decision No. 1125-S; *California State University, supra*, PERB Decision No. 392-H.) In the latter case, it makes no difference

[12]Because we reverse and remand the dismissal and deferral of Lukkarila's charge based on the statutory futility exception, we reserve for another day the related questions as to the appropriateness and desirability of extending the *Collyer Insulated Wire* (1971) 192 NLRB 837 (*Collyer*) deferral policy to charges brought by individuals who have no independent access to the collectively-bargained grievance-arbitration procedures. The mandatory deferral policy announced in *Collyer* pertained to allegations of unilateral changes and involved facts in which the parties to the collective bargaining agreement were the same as the parties to the unfair practice proceedings. In later decisions, the National Labor Relation Board's (NLRB) policy of mandatory deferral arguably expanded in *National Radio Co.* (1972) 198 NLRB 527, to include other kinds of claims, but then contracted again in *General American Transportation Corp.* (1977) 228 NLRB 808, before being expanded again, several years after EERA was enacted, to include interference and retaliation claims brought by individual employees who were not acting in any official capacity for the exclusive representative. (*Collyer, supra*, at pp. 846-850, esp. 850, Member Fanning dissenting opinion; and 192 NLRB 850-856, esp. 852-853, Member Jenkins dissenting opinion; *National Radio Co., supra,* at pp. 532-536, Members Fanning and Jenkins, dissenting opinion; *General American Transportation Corp.*, Chairman Murphy concurring opinion [overruling *National Radio Co.*]; *United Technologies Corp.* (1984) 268 NLRB 557, 561-564, Member Zimmerman dissenting opinion; see also *Electrical Workers IBEW Local 2188 v. NLRB* (D.C. Cir. 1974) 494 F.2d 1087, 1091.)

whether the union's refusal is a violation of its duty of fair representation or a legitimate exercise of its discretion to administer its agreement and to determine how best to represent employees. (*State of California (Department of Developmental Services)* (1985) PERB Order No. Ad-145-S; *Parks and Recreation*; *State of California (Department of Corrections)* (1986) PERB Decision No. 561-S (*Corrections*).)

We therefore need not and do not consider the issue raised in Lukkarila's appeal of whether his grievances have been, or will be, handled in an arbitrary or perfunctory manner by the Association.[13] It is enough that the Association controls access to arbitration, that it has decided that it will not authorize arbitration of some or all of Lukkarila's grievances, and that the subject of those grievances overlaps with the allegations included in his unfair practice charge. Common to Lukkarila's Board charge and his grievances are his allegations of excessive scrutiny and "further discriminatory reprisals" for his filing a health and safety grievance on March 20, 2012. To the extent his charge was amended or supplemented with additional allegations before it was dismissed, it includes additional allegations of the same nature, as indicated in the three grievances Lukkarila filed on January 8, 2013, and provided to the investigating Board agent on January 18, 2013. Thus, at least some of the allegations of his Board charge cannot advance to arbitration.

Moreover, we decline to parse the contents of Lukkarila's charge to determine whether some allegations may, conceivably, still be appropriate for deferral, because the Association has not yet decided whether to arbitrate them, while the remaining allegations are processed before PERB. At one time, the Board followed a practice of bifurcating charges with multiple legal

[13] The duty of fair representation requires only that the bargaining agent refrain from conduct that is so far outside a "wide range of reasonableness" as to be "wholly irrational" or "arbitrary." (*United Teachers of Los Angeles (Valadez, et al.)* (2001) PERB Decision No. 1453; *Air Line Pilots v. O'Neill* (1991) 499 U.S. 65, 78; *Humphrey v. Moore* (1964) 375 U.S. 335.)

theories whereby only those allegations which met the statutory criteria for deferral would be deferred, while the remainder of the charge would be processed by PERB. (*State of California (California Department of Forestry and Fire Protection)* (1989) PERB Decision No. 734-S; *State of California (California Department of Forestry and Fire Protection)* (1989) PERB Decision No. 734a-S; *State of California (Department of Parks and Recreation)* (1990) PERB Decision No. 810-S; *State of California (Department of Parks and Recreation)* (1990) PERB Decision No. 810a-S.) However, the rationale for bifurcation stemmed from the view, announced in *Lake Elsinore School District* (1987) PERB Decision No. 646 (*Lake Elsinore*), that the statutory deferral language imposed a *nondiscretionary* limit on PERB's jurisdiction to hear allegations of unfair practices which also met the statutory deferral criteria. The Board has since abandoned the holding of *Lake Elsinore* in favor of the view that deferral to arbitration is an affirmative defense which may be waived, if not timely raised in the respondent's answer. (*Agriculture, supra*, PERB Decision No. 1473-S, p. 5; see also *East Side Union High School District* (2004) PERB Decision No. 1713; *City of Burbank* (2008) PERB Decision No. 1988-M.)[14] We therefore decline to bifurcate Lukkarila's charge.

[14] It is doubtful to what extent the underlying rationale for bifurcation survives the reversal of the "jurisdictional" approach of *Lake Elsinore*. Indeed, the practice of bifurcating proceedings, although initially developed in response to *Lake Elsinore*, was itself rejected as inconsistent with several important policy considerations, even before *Lake Elsinore* was overruled. These policy considerations included the parties' right to have their dispute resolved in one neutral forum, a preference for voluntary and private resolution of disputes where the parties have chosen a procedure for doing so, and, the elimination of overlapping and duplicative proceedings. (*State of California (Department of Corrections)* (1995) PERB Decision No. 1100-S, pp. 5-9.) Because these policy considerations remain valid, even after *Lake Elsinore*, no allegation is appropriate for deferral, unless the entire matter is appropriate for deferral. (*John Swett Unified School District* (1981) PERB Decision No. 188; *State of California (Department of Mental Health)* (2003) PERB Decision No. 1567-S, p. 7.)

We also take this opportunity to review PERB's procedures for deferral in light of the facts of this case. Because both the employer and the exclusive representative control access to the arbitration machinery, as explained above, the futility exception to deferral is applicable *either* when the employer's conduct undermines the integrity or effectiveness of that machinery, or when the representative — for whatever reason — decides that it will not arbitrate the subject of the deferred charge. Following the policy of the NLRB, PERB requires, as a prerequisite for deferral of a charge, a determination by the investigating Board agent that the employer is ready and willing to proceed to arbitration and that it waive any contract-based procedural defenses. (*Dry Creek Joint Elementary School District* (1980) PERB Order No. Ad-81; *Collyer, supra*, 192 NLRB 837, 842.)

To date, however, we have not required, at least not as a *prerequisite* for deferral, that the Office of the General Counsel determine whether the exclusive representative is *also* ready and willing to proceed to arbitration, when the charging party is a rank-and-file employee, i.e., is not acting as an official of the exclusive representative, and has no independent access to the contractual grievance machinery. (*Corrections, supra*, PERB Decision No. 561-S.) To prevent unnecessary delay and decrease the likelihood of prejudice to the parties, we hold that in cases in which the charging party is not a party to the collective bargaining agreement and is dependent upon the willingness of the employer and the exclusive representative to have his or her dispute heard before an arbitrator, the Office of the General Counsel shall determine as part of its investigation into the appropriateness of deferral, whether *both* the employer *and the exclusive representative* are ready and willing to have the matter proceed to arbitration.

We reverse the decision and remand to the Office of the General Counsel to determine whether the charge states a prima facie case.

ORDER

The dismissal and deferral of the unfair practice charge in Case No. LA-CE-5727-E is hereby REVERSED and REMANDED to the Office of the General Counsel to determine whether the charge states a prima facie case.

Chair Martinez and Members Huguenin and Winslow joined in this Decision.