STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SANTA MARIA JOINT UNION HIGH SCHOOL DISTRICT, Charging Party, v. SANTA MARIA JOINT UNION HIGH SCHOOL DISTRICT FACULTY ASSOCIATION, Respondent.	Case No. LA-CO-1624-E PERB Decision No. 2445 July 31, 2015

Appearance: Kronick, Moskovitz, Tiedemann & Girard by Christian M. Keiner and Chelsea Olson, Attorneys, for Santa Maria Joint Union High School District.

Before Martinez, Chair; Banks and Gregersen, Members.

DECISION

MARTINEZ, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Santa Maria Joint Union High School District (District) of a dismissal (attached) of its unfair practice charge by the Office of the General Counsel. The charge, as amended, alleges that the Santa Maria Joint Union High School District Faculty Association (Association) violated section 3543.6, subdivision (a), of the Educational Employment Relations Act (EERA)[1] by causing or attempting to cause the District to commit an unfair practice. The Office of the General Counsel dismissed the charge for failure to state a prima facie case. The District timely filed an appeal.[2]

[1] The EERA is codified at Government Code section 3540 et seq. Further code section references are to the Government Code.

[2] The Association did not file an opposition to the appeal.

The Board itself has reviewed this matter in full in consideration of the issues raised on appeal. The warning and dismissal letters accurately describe the allegations of the charge, and are well-reasoned and consistent with applicable law. For reasons discussed herein, we find no merit in the District's appeal. Accordingly, we hereby affirm the dismissal of the charge and adopt the warning and dismissal letters as the decision of the Board itself for the reasons discussed below.

SUMMARY OF FACTUAL ALLEGATIONS[3]

The District and the Association are parties to a collective bargaining agreement (CBA) covering the certificated employee bargaining unit. The Association Chapter President is Mark Goodman (Goodman). Glenn Goldin (Goldin) is a special education teacher. The

[3] On review of a dismissal of an unfair practice charge by the Office of the General Counsel, we assume the truth of the charging party's factual allegations. (*San Juan Unified School District* (1977) EERB Decision No. 12, p. 5; *Golden Plains Unified School District* (2002) PERB Decision No. 1489, p. 6.) We may also consider information provided by the respondent that is submitted in compliance with PERB Regulation 32620, subdivision (c), which requires that any response to a charge be signed under penalty of perjury with the declaration that the response is true and complete to the best of respondent's knowledge and belief. (*Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M.) The Association's position statement complies with this requirement. (Prior to 1978, PERB was known as the Educational Employment Relations Board (EERB); PERB regs. are codified at Cal. Code Regs., tit. 8, sec. 31001, et seq.)

The Association's position statement, and the District's first amended charge, includes a copy of its related unfair practice charge against the District in Case No. LA-CE-5938-E, of which we take official notice. In creating the factual summary for this decision, the Board has relied on information contained in the Association's related charge only where not contradicted or disputed by the District's allegations; and only where necessary to provide a more complete picture of the relevant factual circumstances. In so doing, we are mindful of the rule that where the charging party and the respondent offer conflicting versions of the facts, we must accept the version most favorable to charging party's case. (*California School Employees Association & its Chapter 244 (Gutierrez)* (2004) PERB Decision No. 1606, pp. 3-4.) In relying on information provided by the Association in its position statement for our factual summary, including allegations in the Association's charge against the District, we express no opinion on the sufficiency or merits of the Association's charge.

District hired Goldin in August 2013.[4] His classroom is based at the Santa Maria campus, but he teaches special education students from all of the District's four comprehensive high schools. Goldin is supervised and evaluated by the Santa Maria principal, Joe Domingues (Domingues); is paid through funding allocated for Santa Maria; is part of, and attends meetings of, the Santa Maria special education department; and is identified on District and Santa Maria documents, including his identification badge and business cards, as being employed by the District at the Santa Maria campus.

According to the District, Goldin has been an outspoken critic of the current Association leadership. In support of this assertion, the District alleges that Goldin has discussed "issues with his fellow Association members such as teacher health benefits and negotiation strategies, [and] advocating for an approach which differed from the Association leadership." During the 2013-2014 school year (Goldin's first year of employment with the District), Goldin ran against Goodman for Chapter President for the following school year, and lost.

In or about March 2014, District departments solicited nominations for open department chair seats at all four comprehensive high schools for the 2014-2015 and 2015-2016 school years. Department chairs serve two-year terms, are elected by their respective constituencies at each school,[5] and are paid a nine to ten-and-a-half percent stipend for performing department chair responsibilities. Goldin was nominated to serve as co-chair of Santa Maria's special education department along with Matt Andree (Andree), another Santa Maria special education teacher. An issue arose concerning Goldin's eligibility because the Association viewed him as

[4] Prior to that, Goldin worked on campus at the Santa Maria High School (Santa Maria) as an employee of the Santa Barbara County Office of Education for approximately 18 years.

[5] Although the charge does not define "constituency," we understand from the overall charge allegations it to mean the teachers within a particular department eligible to vote in an election for the chair of that department.

"a District employee rather than a site employee" in that "he supports students from all four (4) comprehensive high schools" in his classroom at Santa Maria.

According to the Association, the Association is responsible for conducting elections for department chair positions pursuant to an agreement between the Association and the District dating back to 2002. The District does not dispute this assertion, but alleges that the Association has no authority to determine who is a District employee and who is a site employee, and disputes the Association's assertion that Goldin is a District employee.

On March 28, 2014, there was an internal union e-mail exchange, a copy of which is attached to the District's first amended charge. Based on the context of the message, we assume that "Sue" is Sue Savins, a member of the Association's Election Committee (see Election Committee letter of April 15, 2014, quoted below) and "Mark" is Mark Goodman, Chapter President. It states in pertinent part:

> Glenn's attempt to file a grievance against the union this afternoon baffles me. Aren't grievance [sic] filed against the district for breaking our contract, not against the assn. by its members?
>
> I didn't want to laugh at him, nor suggest that he meant to file a complaint that he hadn't been properly represented, but the dude is such an aggressive jerk (tossing out that he'd already consulted his lawyer), that it's difficult to know what to do for best.
>
> Thank you, Eric,[6] for delivering the ballot box today. Thank you, Matt, for collecting it for your morning session. You were great hanging around to witness the craziness. Evidently, Glenn was uncomfortable unloading in front of you, huh? When I called Mark to see how this is supposed to work, he [Goldin] kept talking in my other ear, and I finally just let him speak directly to Mark.
>
> OMG, can you imagine such a personality in a powerful leadership position?
>
> Fun, fun, fun.

[6] It is assumed "Eric" refers to Eric Farnsworth. See, *post*, fn. 10.

> By the way, Brad Bowen came by to vote. He's fairly new to my dept. and questioned whether Andree should be allowed to run for DC [department chair] since he's probe 2. I told him that as far as I knew, our practice had been at this site, not to do that. Am I giving incorrect information, Eric? If I need to eat crow, that's fine.
>
> I did not give either Brad or Glenn a copy of our procedures, yet Glenn had one and evidently showed it to Tracy. Do we know where he got it? The guy seems to completely misunderstand the role of a faculty association.

On March 29, 2014, Goodman, who is not a member of the Election Committee, sent the following e-mail message, a copy of which is attached to the District's first amended charge:[7]

> Andree can only run as a DC not as Co-chair.
> Glen is not eligible.
>
> He has the right to appeal to the Executive and to CTA.
> Matt Markstone, do you have his personal email?
>
> Can I have it.
>
> Thanks,
> Mark

At the beginning of April 2014, elections were held for the open department chair seats at all four comprehensive high schools, with the exception of the Santa Maria special education department chair. The Association's Election Committee postponed the election while it reviewed Goldin's eligibility. On April 13, 2014, department chair election results were announced for all but the Santa Maria special education department chair seat.

By letter dated April 15, 2014, the Association's Election Committee notified Goldin of its unanimous determination that he was ineligible to serve as department chair for Santa Maria's special education department. The letter states:

[7] The recipient(s) are unknown.

Dear Glenn Goldin,

The Faculty Association Election Committee met on April 15th to determine whether you are eligible to run for department chair at Santa Maria High School. The committee decided unanimously that you are ineligible. Your job description clearly states that you are a district rather than a site employee. According to the job description, you support students from all three comprehensive high schools, which technically makes you an itinerant teacher even though you work from a single site.

Thank you for your patience while we reached our decision. If you need clarification, please email Mary Blackler [e-mail address omitted] to set up a meeting with the Election Committee.

Sincerely,

Faculty Association Election Committee
Mary Blackler
Sue Savins
Teri Magni
Scott Davis
Matt Markstone
Rebecca Wingerden

Although Goldin was found ineligible to serve as department chair, his eligibility to vote in elections for department chair at Santa Maria was not at issue. The Election Committee continued to postpone the election for special education department chair at Santa Maria to allow Goldin the opportunity to appeal the Election Committee's determination. During that time, despite Goldin's repeated requests, the Association refused to provide Goldin with the bylaws or procedures that govern such eligibility determinations.[8]

[8] Attached to the District's first amended charge is a copy of a single e-mail message from Goldin to Mary Blackler, a member of the Election Committee (see Election Committee letter of April 15, 2014, quoted above), which states: "Please provide me with a copy of the Bylaws the FA Election committee referenced to make its determination that I am ineligible to run for department chair at Santa Maria High School."

By letter dated April 23, 2014, the District notified the Election Committee that it disagreed with the Election Committee's determination of Goldin's eligibility, and disputed the Election Committee's authority to determine whether an employee is a District or site employee. The District informed the Election Committee that it would neither recognize nor pay a stipend to anyone selected as Santa Maria's special education department chair in an election in which Goldin's name did not appear on the ballot. The District threatened to file an unfair practice charge against the Association if it refused to place Goldin's name on the ballot.

On or about early May 2014, Goldin appealed the Election Committee's eligibility determination to President Goodman pursuant to the Association's Grievance Processing (Internal) Standing Rules. Goodman deferred the decision to the next level, the Executive Board. The Executive Board voted 4-0 to uphold the determination of the Election Committee.

During this period of time, Santa Maria was undergoing a significant change to its student schedule for the following school year, changing from block scheduling to a seven period schedule. Santa Maria's special education department felt it needed to have a department chair to implement the schedule changes. Therefore, by e-mail message from Domingues on May 20, 2014, Santa Maria's special education department was directed to "partake in a department-wide vote" to determine who would serve as Santa Maria special education department chair. He also directed that Goldin and Andree's names be placed on the ballot as co-chair candidates along with the name of Kim Andrews. According to the District, all three had been nominated for department chair. Domingues directed that the vote take place on Friday, May 23, 2014. On information and belief, the District alleges that Goldin and Andree won the election by an overwhelming majority. This election was overseen by then special education department chair Gary Knuckles. The Association did not sanction this election.

On May 22, 2014, the Association's building/site representatives[9] voted 10-0 to uphold the eligibility decision of the Election Committee at the last step of the internal union grievance process. By e-mail message from Election Committee member Matt Markstone on May 22, 2014, Santa Maria's special education department was invited to vote for department chair that same day during the lunch break or after school. By e-mail message from Eric Farnsworth[10] to Santa Maria department chairs on Friday, May 23, 2014, Santa Maria's department chairs were informed of the election results: "Kim Andrews was the only eligible nominee and won the election." The District counters that a large majority of the special education department again elected Goldin and Andree as "write in" candidates, but the Association refused to count those votes.

By letters to Goldin and Andree dated May 30, 2014, the District recognized Goldin and Andree as the validly elected co-chairs of Santa Maria's special education department for the 2014-2015 school year. On June 2, 2014, the Association filed a Level I grievance against the District alleging that the District violated article 16.2 of the CBA governing Maintenance of Benefits, a copy of which the District attached to the charge. The grievance states:

> On May 22 and 23, Principal Joe Domingues forced the Special Education Department at Santa Maria High School to run an improper election in parallel to the properly conducted Faculty Association election for Department Chair. This directive, in addition to illegally interfering with the Faculty Association's role as conductor of elections for these positions, also violates long-standing practice and established District policy that has stood in place for decades. Principal Domingues' directive additionally violates the standing agreement between the District and Faculty Association regarding qualifications for election to Department Chair.

[9] This body is referred to as the Representative Council in the Grievance Processing (Internal) Standing Rules, a copy of which is attached to the Association's position statement.

[10] Neither Farnsworth's title nor role in the election is identified in the District's charge or the Association's position statement.

The grievance goes on to state that "Principal Joe Domingues refused to withdraw his directive to run the improper election or to recognize the properly–elected candidate." The District has taken the position that the Association's grievance is not grievable and therefore is not subject to the mediation and arbitration processes.

On July 11, 2014, the same day the District filed the present charge, the Association filed an unfair practice charge in Case No. LA-CE-5938-E. In that case, the Association alleges that the District interfered with the election. The requested remedy is an order requiring the District to recognize the results from the election sanctioned by the Association and to retract the results from the non-sanctioned election that was held at the direction of Domingues.

The District asserts that the Association filed grievances,[11] and the related unfair practice charge, in retaliation against Goldin for engaging in protected activity, which the District identifies as running for president of the Association and running for department chair. Specifically, the District asserts that the Association is "attempting to force District to impose adverse consequences upon Mr. Goldin through the loss of department co-chair status and loss of a paid stipend." As the District states:

> [T]he Association, who lacks authority to directly remove Mr. Goldin from his position and to stop District from paying Mr. Goldin the appropriate stipend, is attempting to cause the District to do its discriminatory and retaliatory bidding for it.

The District alleges that, for purposes of establishing retaliation, "animus" is shown in the above-quoted e-mail message: "I don't want to laugh at him, nor suggest he meant to file a complaint that he hadn't been properly represented, but the dude is such an aggressive jerk." In addition, in a declaration attached to the first amended charge, Goldin asserts that "[i]n

[11] According to the District, the Association filed a second "informal" grievance on December 2, 2014.

response to my exercise of protected activities I was told by an [sic] Faculty Association Election Committee member that I needed to stop because I was going to '[f word] it up.'"

THE DISMISSAL

The Office of the General Counsel issued a warning letter on November 13, 2014. The Office of the General Counsel identified the statutory issue as whether the District set forth a prima facie case under EERA section 3543.6, subdivision (a), which makes it unlawful for an employee organization to cause or attempt to cause an employer to commit an unfair practice. The Office of the General Counsel concluded that the information provided in the charge did not demonstrate that the District engaged in an unfair practice or that the Association affirmatively acted to cause or attempt to cause any unfair practice on the part of the District.

In response to the first amended charge, the Office of the General Counsel issued a second warning letter on January 15, 2015.[12] Responding to the District's contention that there is no statutory requirement that the District commit an unfair practice in order to state a prima facie case, the Office of the General Counsel stated:

> The District misunderstands the aim of the analysis provided in the Warning Letter. A Charging Party is not required to undertake an unlawful act to state a prima facie case, rather, the Charging Party must provide facts that demonstrate that the act in question, if it were undertaken, would be an unfair practice. (*Tustin Unified School District* [(1987)] PERB Decision No. 626.)

[12] We recognize the value of the Office of the General Counsel's efforts to inform the District of the deficiencies of the first amended charge in the second warning letter. PERB Regulation 32620, subdivision (d), requires the Board agent to advise the charging party in writing of any deficiencies in the charge in a warning letter. Ordinarily, an amendment to a charge would not compel issuance of a second warning letter. While the Board agent has the duty to assist the charging party to state the required information in *proper form* and answer *procedural questions* (PERB Reg. 32620, subds. (b)(1) and (b)(2), emphasis added), it has no duty beyond the initial warning letter to assist the charging party in perfecting its charge. The decision whether to issue more than one warning letter in any particular case is at the sole discretion of the Office of the General Counsel.

As the Office of the General Counsel explained:

> Without provision of facts demonstrating that the District's withdrawal of its own parallel election and/or acquiescence to the Association Election Committee's determination is undertaken because of Goldin's exercise of rights, the charge fails to state a prima facie case.

(Underlining in the original.)

After receipt of the second warning letter, counsel for the District informed the assigned Board agent that the District did not intend to amend or withdraw the charge. On February 13, 2015, the Office of the General Counsel dismissed the charge based on the facts and reasons set forth in the two warning letters.

DISCUSSION

The determinative issue is whether the District has stated a prima facie violation of EERA section 3543.6, subdivision (a), which states that it shall be unlawful for an employee organization to "[c]ause or attempt to cause a public school employer to violate Section 3543.5." EERA section 3543.5 enumerates five employer unfair practices. The unfair practice at issue in this case is described in subdivision (a), which makes it unlawful for a public school employer to "[i]mpose 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." (EERA sec. 3543.5, subd. (a), emphasis added.)[13]

A violation of EERA section 3543.6, subdivision (a), may only be established by a clear showing of how and in what manner the employee organization affirmatively acted to

[13] EERA section 3543, subdivision (a), sets forth the rights of public school employees and states that "[p]ublic school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations."

cause or attempt to cause the unfair practice. (*Tustin Unified School District* (1987) PERB Decision No. 626 (*Tustin*).) The facts must establish a causal connection between the employer's unlawful conduct and the employee organization's behavior. (*State of California (Department of Personnel Administration)* (1987) PERB Decision No. 609-S (*Dept. of Personnel Administration*).) The employer must show that it was "the unwitting accomplice" of the employee organization and that "[its] own unlawful behavior was not ... the product of a conscious disregard for the impact (upon employee rights)." (*Id.* at pp. 7-8, underlining in the original.) Where the employer is relying on an "attempt" theory, the employer must allege facts demonstrating that the employee organization "consciously attempted (but failed) to make the [employer] its unwitting accomplice." (*Id.* at p. 7, fn. 7, underlining in the original.)

Although the employer is not required to go so far as to undertake an unlawful act to state a prima facie case, it must provide facts that demonstrate that the act in question, if it had been undertaken, would have been an unfair practice. (*Tustin, supra,* PERB Decision No. 626.) EERA section 3543.6, subdivision (a), refers to all variety of employer unfair practices as enumerated in EERA section 3543.5. As applicable to the allegations of this charge, to demonstrate a discrimination/retaliation violation of EERA section 3543.5, subdivision (a), the District must demonstrate that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).)

The District's theory of this case is that the Association has *attempted* to cause the District to retaliate against Goldin by filing grievances and a PERB unfair practice charge that aim to remove Goldin from his current position as Santa Maria special education department

chair and strip him of his stipend.[14] There are two levels to the analysis, the first looks at the District's conduct that was induced by the Association's unlawful animus; the second, at the Association's inducing behavior. At the first level of analysis, the District must demonstrate that if it were to remove Goldin from his department chair seat and strip Goldin of his stipend, such conduct would constitute unlawful retaliation under *Novato*. (*Tustin, supra,* PERB Decision No. 626.) At the second level of analysis, the District must demonstrate that the Association, by filing grievances and a PERB charge, affirmatively caused or consciously attempted to cause the District to commit the unlawful retaliatory act. (*Service Employees International Union, Local 221 (Meredith)* (2008) PERB Decision No. 1982 (*SEIU (Meredith)*.) In so doing, the District must show that the Association "consciously attempted (but failed) to make the [District] its unwitting accomplice." (*Dept. of Personnel Administration, supra,* PERB Decision No. 609-S, p. 7, fn. 7.)

[14] In its appeal, the District states that the Association has continued filing grievances since the filing of the first amended charge, and has written letters and e-mails, to continue to pressure the District into carrying out the Association's retaliatory objective. These are new allegations that were not presented to the Office of the General Counsel in the charge processing and investigation stage of this proceeding. A charging party may not present on appeal new charge allegations or supporting evidence unless good cause is shown. (PERB Reg. 32635, subd. (b).) Whether the grievances, letters and e-mails referred to in District's appeal occurred before or after the dismissal of the charge, which occurred on February 13, 2015, two months after the filing of the first amended charge, is not known. The absence of dates notwithstanding, the District refers to these new allegations in its appeal without reference to the above-cited regulation or argument as to why they should be considered on appeal without a showing of good cause. Moreover, an allegation that the Association transmitted grievances, letters and e-mails in an effort to pressure the District to commit an unfair practice lacks specificity and would not meet PERB's pleading standard even if the Board were to find good cause to consider it. (*United Teachers-Los Angeles* (*Ragsdale*) (1992) PERB Decision No. 944 [PERB's pleading standard, as a general matter, requires alleging "who, what, when, where and how"]; see also *National Union of Healthcare Workers* (2012) PERB Decision No. 2249a-M, p. 6, fn. 5 [formulaic application of "*Ragsdale*" standard rejected in favor of an analysis focusing on the prima facie elements of the alleged unfair practice and the sufficiency of the charging party's allegations in relation to each of those elements].)

I. Did the District establish the prima facie elements of a retaliatory act induced by the Association's unlawful animus?

With regard to the first level of analysis, contrary to the District's assertions, the Office of the General Counsel did not misapply *Novato*. Three elements of the *Novato* test are not at issue: protected activity, knowledge and adverse action. The deficiency fatal to the District's charge involves a fourth element, i.e., nexus or unlawful motivation on the part of the Association. In support of the nexus element, the District proffers a statement in an e-mail message from a member of the Election Committee, referring to Goldin as an "aggressive jerk." That statement may show animus or hostility toward Goldin, but not *unlawful* animus directed towards Goldin ***because of*** his protected activities of criticizing the Association's positions on certain workplace issues, advocating for his position on those issues with bargaining unit members and running for office. (See, e.g., *Jurupa Unified School District (Gillotte)* (2015) PERB Decision No. 2420 (*Jurupa (Gillotte)*), pp. 24-25, fn. 25 ["I'm taking a hit out on [charging party]" (proposed dec. at p. 6) does not demonstrate nexus; mere dislike of charging party without evidence it is *because of* the exercise of protected activity is not unlawful under EERA].)

Goldin states in his declaration that "[i]n response to my exercise of protected activities I was told by an [sic] Faculty Association Election Committee member that I needed to stop because I was going to '[f word] it up.'" In judging the factual sufficiency of charge allegations, PERB looks to see whether the allegations describe the "who, what, when, where and how" of an unfair practice. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S (*Dept. of Food and Agriculture*), citing *United Teachers-Los Angeles (Ragsdale), supra,* PERB Decision No. 944; see also *National Union of Healthcare Workers, supra,* PERB Decision No. 2249a-M, p. 6, fn. 5.) Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District*

(1991) PERB Decision No. 873.) Goldin's statement lacks sufficient factual detail and context, and is insufficient to establish the required nexus between Goldin's protected activities and the would-be adverse action.

Unlawful motive can be established by circumstantial evidence and inferred from the record as a whole. (*Novato, supra,* PERB Decision No. 210, p. 6; *Carlsbad Unified School District* (1979) PERB Decision No. 89; *Republic Aviation Corp. v. NLRB* (1945) 324 U.S. 793; *Radio Officers' Union of Commercial Telegraphers Union v. NLRB* (1954) 347 U.S. 17, 40-43.)[15] The District, however, has failed to satisfy its burden.[16] The factual allegations as a whole do not support an inference that the Association, through the District, sought to retaliate against Goldin because of his exercise of protected rights under EERA.

The District contends that the Office of the General Counsel misapplied *Novato* by requiring "the District to *complete* adverse action before a prima facie case is met." (District's appeal, p. 13, italics in the original.) The District goes on to argue that "[t]o meet the forth [sic] *Novato* prong here, it must only be pled sufficient facts that 'the Association "*attempted*

[15] When construing California public sector labor relations statutes, California courts and PERB rely on National Labor Relations Board (NLRB) decisions and judicial decisions construing similar language in the National Labor Relations Act (NLRA). *(San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850; *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608; the NLRA is codified at 29 U.S.C. section 151 et seq.)

[16] Types of circumstantial evidence probative of unlawful motive, referred to as "nexus" factors, include: the timing of the adverse action (*North Sacramento School District* (1982) PERB Decision No. 264 (*North Sacramento*)); disparate treatment of the employee (*State of California* (*Department of Transportation*) (1984) PERB Decision No. 459-S); departure from established procedures and standards when dealing with the employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104); inconsistent or contradictory justification for the actions (*State of California (Department of Parks and Recreation*) (1983) PERB Decision No. 328-S); cursory investigation (*City of Torrance* (2008) PERB Decision No. 1971-M); offering of exaggerated, vague or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786; anti-union animus (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M); or any other facts that might demonstrate unlawful motive (*North Sacramento*).

to cause" the employer to take action because of the employee's exercise of protected of protected rights.'" (*Ibid.*, italics in the original.)

The Office of the General Counsel did not misapply *Novato*, let alone in the way the District suggests. In the second warning letter, the Office of the General Counsel explained, in clear terms, that the District "is not required to undertake an unlawful act to state a prima facie case, rather, the [District] must provide facts that demonstrate that the act in question, if it were undertaken, would be an unfair practice." Contrary to the District's assertion, the Office of the General Counsel did not "write[] the phrase '*attempted to cause*' out of section 3543.6(a)." (District exceptions, p. 13, italics in the original.)

II. Did the District establish the prima facie elements of an "attempt" by the Association to cause the District to commit an unfair practice?

A. Does the filing of grievances and an unfair practice charge by the Association constitute an "attempt"?

The District conflates the two level of analyses required in a charge alleging a violation of EERA section 3543.6, subdivision (a). We will assume, for argument's sake only, that the District has set forth a prima facie retaliation case at the first level of analysis by demonstrating that if the Association were successful at getting Goldin removed from his department chair seat and stripped of his stipend it would be "because of" Goldin's exercise of protected activities (the nexus element of the *Novato* test). That would only get the District mid-way there. The District must also demonstrate how and in what manner the Association affirmatively and consciously attempted to make the District its unwitting accomplice in carrying out the retaliatory act. (*Tustin, supra,* PERB Decision No. 626; *Dept. of Personnel Administration, supra,* PERB Decision No. 609-S, p. 7, fn. 7.)

The District alleges that the Association filed grievances and a PERB charge to induce the District to remove Goldin from his department chair seat and strip him of his stipend

because the Association has no authority to effect those changes on its own. In other words, according to the District, the Association is attempting to use the District as its tool to do the Association's bidding or dirty work. The District analogizes its theory of the charge to the "cat's paw"[17] theory of liability.[18]

The filing of grievances, however, does not qualify as the type of affirmative action necessary to meet the District's burden. (*SEIU (Meredith), supra,* PERB Decision No. 1982.) As the Board held in *SEIU (Meredith)*:

> [E]ven if Meredith's rejection on probation was retaliatory, the charge fails to establish that SEIU acted affirmatively to cause the District to retaliate against him. The charge alleged that SEIU filed grievances against Meredith with the aim of having him removed as head custodian. Even assuming that SEIU had such a motive, the charge fails to establish that by filing these grievances SEIU caused

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[17] As the United States Supreme Court explained:

> The term "cat's paw" derives from a fable conceived by Aesop, put into verse by La Fontaine in 1679, and injected into United States employment discrimination law by Posner in 1990. See *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (CA7). In the fable, a monkey [Bertrand] induces a cat [Raton] by flattery to extract roasting chestnuts from the fire. After the cat has done so, burning its paws in the process, the monkey makes off with the chestnuts and leaves the cat with nothing. A coda to the fable (relevant only marginally, if at all, to employment law) observes that the cat is similar to princes who, flattered by the king, perform services on the king's behalf and receive no reward.

(*Staub v. Proctor Hosp.* (2011) 562 U.S. 411, 416.)

[18] In the employment law context, cat's paw refers to an innocent or unwitting person or entity being used as a conduit to accomplish another's purpose. (See *Shager v. Upjohn Co.* (7th Cir. 1990) 913 F.2d 398, 405.) PERB employs a cat's paw theory of liability, referred to as subordinate bias liability. The unlawful motive of a subordinate supervisorial employee may be imputed to the decision-maker responsible for authorizing the adverse action against the charging party where: the lower-level official's recommendation, evaluation or report was motivated by the employee's protected conduct; the lower-level official intended for his or her conduct to result in an adverse action; and the lower-level manager's conduct was a motivating factor or proximate causes of the decision to take adverse action against the employee. (*Berkeley Unified School District (Crowell)* (2015) PERB Decision No. 2411.)

> or attempted to cause the District to retaliate against Meredith because of his protected activity. Thus, even if the grievances played a part in the District's decision to reject Meredith on probation, the charge does not establish that those grievances induced, or attempted to induce, the District to violate EERA.

(*Id.* at p. 11.)[19]

The District contends that the grievances filed by the Association are not subject to the parties' grievance procedures including mediation and arbitration. But at the same time, the District argues that the Association is attempting to cause it to commit an unfair practice by the filing of those grievances. These two positions are irreconcilable. One must have the *ability* "to cause" in order to be in a position "to cause." Based on the District's own charge allegations, the Association has no ability "to cause" the District to commit an unfair practice given that the Association's grievances are ungrievable.[20] More importantly, by submitting the dispute over Goldin's eligibility to serve as Santa Maria's special education department chair to the grievance procedure, the Association has taken the issue, including the grievability of

[19] In *SEIU* (*Meredith*), *supra,* PERB Decision No. 1982, the unfair practice charge under EERA section 3543.6, subdivision (a), was brought by a public school employee, not a public school employer. An earlier Board decision, *SEIU Local 1000, CSEA* (*Burnett*) (2007) PERB Decision No. 1914-S, calls into question the standing of an individual employee to bring a charge under a similar provision in Ralph C. Dills Act (Dills Act) section 3519.5, subdivision (a), which makes is unlawful for an employee organization to cause or attempt to cause the state to violate section 3519, enumerating types of unfair practices by the state. The charge was dismissed in part because "individual employees lack standing to allege that the employee organization violated the rights of an employer." (*SEIU Local 1000, CSEA* (*Burnett*), warning letter at p. 5.) The portion of *SEIU (Meredith)* relied on herein does not turn on standing, and therefore is appropriately cited as precedential authority on the issue of whether the District has met its prima facie burden. Because the present charge was brought by a public school employer, not a public school employee, standing is not at issue and we need not resolve the conflict in PERB precedent on whether individual employees have standing to bring an unfair practice under EERA section 3543.6, subdivision (a), or any of the equivalent provisions under the other public sector labor relations statutory schemes administered by PERB. (The Dills Act is codified at sec. 3512, et seq.)

[20] "The question of whether a complaint is subject to the grievance procedure may itself be processed through the grievance procedure and arbitration." (Elkouri & Elkouri, *How Arbitration Works* (7th ed.) ch. 5.4, 5-12.)

the dispute, out of its own hands and demonstrated that it is willing to place it in the hands of a neutral arbiter (assuming the parties reach that level of the grievance procedure). That behavior does not demonstrate that the Association is affirmatively and consciously attempting to make the District its tool or unwitting accomplice in its alleged desire to seek unlawful retribution against Goldin. As a matter of public policy, the Board is unwilling to find that the act of submitting a dispute to the parties' negotiated grievance procedure invokes a cat's paw (subordinate bias) analysis, let alone constitutes grounds on which to bring an unfair practice charge under EERA section 3543.6, subdivision (a). (See *Jurupa (Gillotte), supra,* PERB Decision No. 2420, proposed dec. at p. 40 [using a negotiated dispute resolution process or complaint procedure under the collective bargaining agreement is protected].) This same analysis applies to the act of filing an unfair practice charge with PERB.

B. Was the District the Association's mere tool or unwitting accomplice?

A more fundamental problem with the District's argument is that it fails to recognize its own responsibility for creating the problem it now faces. Referring back to the cat's paw fable, Raton the cat had no role in the story prior to falling for Bertrand the monkey's trickery. Unlike Raton the cat, the District is no mere tool or unwitting actor. The District's charge, as amended, does not dispute that the Association is the "conductor" of department chair elections through its Election Committee. The District's charge, as amended, does not dispute that the Association postponed the special education department chair election at Santa Maria to allow Goldin to appeal the Election Committee's eligibility decision through to the highest level of the Association's internal grievance procedures. The District's charge, as amended, does not dispute that the Election Committee conducted department chair elections for open seats at all the District's comprehensive high schools.

Despite all of the above, the District *chose* to take matters into its own hands, thereby setting in motion the present controversy. The District could have refrained from inserting itself into the matter. The District could have deferred to the Association on election matters, as it presumably did with regard to all other department chair elections since 2002. The District chose to do otherwise. It commanded the election for Santa Maria's special education department chair seat, ordered that Goldin's name be placed on the ballot and recognized Goldin as the victor in an election that was not sanctioned by the Association. While we recognize that the District alleges that the Association does not have the authority to determine who is a District employee and who is a site employee and disputes that Goldin is a District employee, it is not PERB's role in this case to take sides on the department chair eligibility issue or determine the parties' respective roles in department chair elections. Those matters are more likely to be decided in the Association's related charge against the District for allegedly interfering with the election. The only issue raised in this case is whether the District has satisfied its burden to demonstrate that the Association attempted to cause it to retaliate against Goldin under EERA section 3543.6, subdivision (a), and for all the reasons described herein, we conclude that the District has not met its burden.

Although the District finds support for its charge in cases decided under the NLRA involving application of an analogous NLRA provision, we find these cases to be inapposite.[21] In *United Brotherhood of Carpenters & Joiners, Local Union No. 1016 (Bertram Constr. Co.)* (1984) 272 NLRB 539, employers operating under a master agreement were required to seek

[21] The language of EERA section 3543.6, subdivision (a), derives from NLRA section 158, subdivision (b)(2), which makes it an unfair labor practice for a labor organization to "cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) [of this section]." Section (a)(3) prohibits discrimination based on the exercise of employee rights that has the tendency to encourage or discourage union membership. As noted *ante* at fn. 15, when interpreting California's labor relations statutes, PERB may take guidance, as appropriate, from administrative and judicial authorities construing analogous provisions of federal labor law.

qualified employees for their construction projects from the local union. A known union dissident expressed interest in working on a particular project. When the employer undertaking the project inquired about this employee for the project, the union's business representative responded that "He's bad news, and don't f--- with him. ... He's trying to stir up trouble." Based on this conversation, the employee was not hired. In *Kroger Co.* (1993) 312 NLRB 7, the union was exasperated at the obduracy of an employee in pursuing her grievance and threatened her with the loss of regular relief work, which paid at a substantially higher wage rate compared to her normal rate as a clerk/cashier. The union was successful in pressuring the employer to remove the employee from regular relief work. The NLRB found that the union took this action because it harbored ill will toward the employee for vigorously pursuing her grievance. In *NLRB v. St. Joe Paper Co.* (2nd Cir. 1963) 319 F.2d 819, the NLRB found that the union caused two successive employers to discharge an employee who had previously been expelled from the union. The union pressured the first employer to discharge the employee because he "was not a union man," and told the second employer that he was a "trouble maker," "a bad actor," and "a problem" who "had to be watched" and who "was always running to the Labor Board." The NLRB found that these communications induced the employers to take retaliatory action against the employee at the union's behest or suggestion. Similar to the above-cited cases, *Groves-Granite* (1977) 229 NLRB 56 involved the discharge of two employees, induced by the union in response to protected activities.[22]

[22] The District also cites to *NLRB v. Teamsters "General" Local Union No. 200* (7th Cir. 2013) 723 F.3d 778, which involved the issue whether a labor organization, which operated an exclusive hiring hall, violated its duty of fair representation and engaged in discrimination by failing to refer a union dissident for work. This case did not involve the issue whether the union caused or attempted to cause the employer to discriminate against the employee based on the employee's exercise of protected rights. It is not appropriate, therefore, to take guidance from this case. Moreover, even if considered appropriate guidance, it is just as inapposite as the other private sector cases cited by the District, for the reasons provided in the Board's discussion of those authorities.

These cases are distinguishable on two primary grounds. First, there was direct or circumstantial evidence of unlawful retaliatory motive in all these cases. In contrast, as previously discussed, there is no evidentiary support contained in the District's charge that the Association was motivated by anything other than its concern about Goldin's eligibility to serve as department chair, or that the Association's eligibility concern was pre-textual, as the District alleges. That a member of the Election Committee referred to Goldin as an aggressive jerk does not demonstrate unlawful retaliatory design. Second, unlike the employers in the private sector cases, the District is not an unwitting accomplice or mere tool. As stated above, the District was the principal actor that set in motion the circumstances that created the present controversy.

Another NLRB decision relied on by the District is *General Motors Corp.* (1984) 272 NLRB 705. In that case, the union caused the employer to change an employees' start time in retaliation for statements made by the employee that were critical of a new absentee program supported by the union. The NLRB found that the union acted on an unlawful motive and the employer acquiesced and cooperated in the union's retaliatory plan. This case illustrates the conceptual strain under which the District's theory of its charge operates. For the District to prevail in establishing a prima facie "attempt" case under EERA section 3543.6, subdivision (a), it would have to show that the Association is seeking to keep Goldin from occupying a department chair seat in retaliation for engaging in protected activities and the District has *acquiesced and cooperated* in the Association's attempt to do that. That is not this case. It is the District that is pressing the Association to acquiesce and cooperate in the District's attempt to maintain the results of an unsanctioned department chair election.

The common thread running through the private sector authorities is that the employers played no role in the creation, or stoking, of the controversy between the union and the

employee. The employers were only guilty of succumbing to the unions' pressure tactics and, in so doing, carrying out the union's unlawful retaliatory design. In contrast, the District inserted itself into the controversy by taking its own independent action. The District is no mere tool or unwitting accomplice. Having staked out a position opposed by the Association, the District cannot now complain that the Association has filed grievances and a PERB charge in pursuit of a resolution of this dispute by a neutral arbiter. Accordingly, the Board concludes that the District has not stated a prima facie case under EERA section 3543.6, subdivision (a).

ORDER

The unfair practice charge in Case No. LA-CO-1624-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Banks and Gregersen joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
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Telephone: (818) 551-2809
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February 13, 2015

Chelsea R. Olson, Attorney
Kronick Moskovitz Tiedemann & Girard
733 Marsh Street, Suite 210
San Luis Obispo, CA 93401

Re: *Santa Maria Joint Union High School District v. Santa Maria Joint Union High School District Faculty Association*
Unfair Practice Charge No. LA-CO-1624-E
DISMISSAL LETTER

Dear Ms. Olson:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on July 11, 2014. The Santa Maria Joint Union High School District (District or Charging Party) alleges that the Santa Maria Joint Union High School District Faculty Association (Association or Respondent) violated section 3543.6(a) of the Educational Employment Relations Act (EERA or Act)[1] by causing or attempting to cause the District to commit an unfair practice.

Charging Party was informed in the attached Warning Letter dated November 13, 2014, that the above-referenced charge did not state a prima facie case. Charging Party was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, Charging Party should amend the charge. Charging Party was further advised that, unless Charging Party amended the charge to state a prima facie case or withdrew it on or before November 24, 2014, the charge would be dismissed. The Board agent granted the District's two requests for an extension of time to amend the charge and the District filed a timely first amended charge on December 10, 2014.

Charging Party was informed in the attached Second Warning Letter dated January 15, 2015, that the above-referenced charge did not state a prima facie case. Charging Party was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, Charging Party should amend the charge. Charging Party was further advised that, unless Charging Party amended the charge to state a prima facie case or withdrew it on or before January 26, 2015, the charge would be dismissed.

[1] EERA is codified at Government Code section 3540 et seq. PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of PERB's Regulations may be found at www.perb.ca.gov.

On or about February 11, 2015, the undersigned Board agent discussed the case with legal counsel for Charging Party, Ms. Olson, and Ms. Olson stated she had received both warning letters and that the District did not intend to amend or withdraw the charge.

Therefore, the charge is hereby dismissed based on the facts and reasons set forth in the November 13, 2014 and January 15, 2015 Warning Letters.

Right to Appeal

Pursuant to PERB Regulations, Charging Party may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code Regs., tit. 8, § 32635, subd. (a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code Regs., tit. 8, § 32635, subd. (b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document

may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, § 32135, subd. (c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs., tit. 8, § 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

WENDI L. ROSS
Deputy General Counsel

By _____
Mary Weiss
Senior Regional Attorney

Attachment

cc: Brenda Sutton-Wills, Staff Counsel, California Teachers Association

PUBLIC EMPLOYMENT RELATIONS BOARD

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January 15, 2015

Chelsea R. Olson, Attorney
Kronick Moskovitz Tiedemann & Girard
733 Marsh Street, Suite 210
San Luis Obispo, CA 93401

Re: *Santa Maria Joint Union High School District v. Santa Maria Joint Union High School District Faculty Association*
Unfair Practice Charge No. LA-CO-1624-E
SECOND WARNING LETTER

Dear Ms. Olson:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on July 11, 2014. The Santa Maria Joint Union High School District (District or Charging Party) alleges that the Santa Maria Joint Union High School District Faculty Association (Association or Respondent) violated section 3543.6(a) of the Educational Employment Relations Act (EERA or Act)[1] by causing or attempting to cause the District to commit an unfair practice.

Charging Party was informed in the attached Warning Letter dated November 13, 2014, that the above-referenced charge did not state a prima facie case. Charging Party was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, Charging Party should amend the charge. Charging Party was further advised that, unless Charging Party amended the charge to state a prima facie case or withdrew it on or before November 24, 2014, the charge would be dismissed. The Board agent granted the District's two requests for an extension of time to amend the charge and the District filed a timely first amended charge on December 10, 2014.

The Warning Letter explained that a violation of Government Code section 3543.6, subdivision (a) may only be established by a clear showing of how and in what manner the employee organization affirmatively acted to cause or attempt to cause a violation of section 3543.5. (*Tustin Unified School District* (1987) PERB Decision No. 626.) To summarize, section 3543.5 makes it unlawful for a public school employer to impose reprisals, discriminate, interfere or deny employee rights under EERA, fail to bargain in good faith, refuse to participate in impasse procedures in good faith, or to dominate or interfere in the administration of any employee organization.

[1] EERA is codified at Government Code section 3540 et seq. PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the EERA and PERB Regulations may be found at www.perb.ca.gov.

In its First Amended Charge, the District contends the Association is attempting to remove teacher Glenn Goldin (Goldin) as department chair for discriminatory reasons but lacks authority to directly remove Goldin from the chair position, and therefore is trying to force the District to impose the discriminatory act upon Goldin. The District states there is no statutory requirement that the District must wait until it is compelled to commit an unfair practice in order to make a prima facie case.

The District misunderstands the aim of the analysis provided in the Warning Letter. A Charging Party is not required to undertake an unlawful act to state a prima facie case, rather, the Charging Party must provide facts that demonstrate that the act in question, if it were undertaken, would be an unfair practice. (*Tustin Unified School District*, *supra*, PERB Decision No. 626.) The amended charge provides no facts demonstrating that the District would be committing an unfair practice if it agreed to the Association Election Committee's April 15, 2014 determination that Goldin is ineligible to be a department chair at Santa Maria High School. The District simply concludes in its amended charge that the Association has taken concrete action to force the District to inflict adverse action against Goldin, for example, loss of chair compensation and status. The District's amended charge, however, fails to demonstrate a violation of section 3543.5(a) which requires a showing that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210.) Without provision of facts demonstrating that the District's withdrawal of its own parallel election and/or acquiescence to the Association Election Committee's determination is undertaken because of Goldin's exercise of rights, the charge fails to state a prima facie case.

For these reasons the charges, as presently written, do not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled Second Amended Charge, contain all the facts and allegations Charging Party wishes to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before

January 26, 2015, PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

WENDI L. ROSS
Acting General Counsel

By _____
Mary Weiss
Senior Regional Attorney

Attachment

PUBLIC EMPLOYMENT RELATIONS BOARD

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November 13, 2014

Chelsea R. Olson, Attorney
Kronick Moskovitz Tiedemann & Girard
733 Marsh Street, Suite 210
San Luis Obispo, CA 93401

Re: *Santa Maria Joint Union High School District v. Santa Maria Joint Union High School District Faculty Association*
Unfair Practice Charge No. LA-CO-1624-E
WARNING LETTER

Dear Ms. Olson:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on July 11, 2014. The Santa Maria Joint Union High School District (District or Charging Party) alleges that the Santa Maria Joint Union High School District Faculty Association (Association or Respondent) violated section 3543.6(a) of the Educational Employment Relations Act (EERA or Act)[1] by causing or attempting to cause the District to commit an unfair practice.

FACTS AS ALLEGED

The District and the Association are parties to a collective bargaining agreement (CBA) covering the certificated employee bargaining unit.

Mark Goodman (Goodman) is the Association Chapter President.

Glenn Goldin (Goldin) is employed by the District at Santa Maria High School (SMHS) in its special education department. His classroom is based at SMHS, he is supervised and evaluated by the SMHS principal, he is paid through funding allocated for SMHS, he is part of the SMHS special education department, attends department meetings and is identified on both District and school documents as being a member of the SMHS special education department.

All District special education programs are open to all students in the District. Like many other special education teachers, Goldin teaches special education students from all of the District's four comprehensive high schools.

[1] EERA is codified at Government Code section 3540 et seq. PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the EERA and PERB Regulations may be found at www.perb.ca.gov.

Goldin has been an outspoken critic of current Association leadership. During the 2013-2014 school year, Goldin ran against Goodman for Association Chapter President. Goldin lost the election and Goodman remains Association Chapter President.

On or about April 2014, District departments solicited nominations and held elections for department chairs at all four comprehensive school sites throughout District. Pursuant to CBA, Article 3.5.2, department chairs are to be elected by their respective constituencies at each school site and must be paid a 9-10.5% stipend by the District for performing department chair duties.

Goldin was nominated to serve as co-chair of the SMHS special education department with another SMHS special education teacher, Matt Andrade (Andrade). In a preliminary election on or about May 2014, Goldin and Andrade were unanimously selected by their constituency (the special education teachers at SMHS).

On or about April 15, 2014, the Association Election Committee determined that Goldin was ineligible to be a department chair at SMHS on the basis that he is a District, rather than a site employee, because he supports students from all four comprehensive high schools.

In the special education department at Righetti High School, where Goodman serves as department chair, the special education teacher serving in the equivalent position as Goldin is allowed to vote for department chair.

The Association does not dispute Goldin's ability to vote for the department chair in the special education department at SMHS but "illogically and in retaliation, disputes his qualification to be the department chair."

On or about April 23, 2014, the District notified Association that Goldin was a SMHS employee and the Association did not have authority to determine which District employees are "District employees" and which employees are "site employees." There is no distinction included in the CBA and it is the past practice to allow all department members at a school site to run for department chair in his/her department if he/she so desires. The District further stated that if the Association continued to refuse to place Goldin on the ballot, it retained the right to file an unfair practice against the Association because it was causing the District to violate the Educational Employment Relations Act section 3543.5 by causing it to discriminate or otherwise interfere with, restrain, or coerce Goldin because of his exercise of protected rights.

Another election was held for the SMHS special education department chair. The Association refused to place Goldin and Andrade on the ballot. Association members who are also members of the SMHS special education department nevertheless "wrote in" votes for Goldin and Andrade and again selected them as co-chairs of the department. However, the Association refused to "count" those votes and identified another employee as department chair of SMHS. That employee, also an Association member, believes that Goldin and Andrade were appropriately elected as department chairs.

On or about May 30, 2014, the District determined that it must recognize the validly elected employees, Goldin and Andrade, as co-chairs of the SMHS special education department. It notified Goldin and Andrade of that decision and carbon copied appropriate Association representatives of that decision.

On or about June 2, 2014, the Association filed a grievance against the District maintaining the District has "illegally" interfered with the Association's role as "conductor of elections" and that it retains authority to determine qualifications for department chair.

The Association has engaged in this course of action to retaliate against Goldin for engaging in "protected activity." Specifically, Goldin has attempted to participate in Association activities including running for Association president and running for department chair. These are employee rights protected by EERA and the Association has retaliated against Goldin for seeking election to Association office and to deter other members of the Association bargaining unit from seeking office. The Association is also attempting to force the District to impose adverse consequences upon Goldin through the loss of department co-chair status and loss of a paid stipend.

The Association is also attempting to use the grievance article to force the District to impose these adverse consequences on Goldin.

The District asserts that "[b]y the acts set forth above, among other acts, the Association has violated Government Code section 3543.6(a) by causing or attempting to cause the District to '[i]mpose 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' in violation of Government Code section 3543.5(a)."

DISCUSSION

Under EERA, it is unlawful for an employee organization to cause or attempt to cause an employer to commit an unfair practice. (Gov. Code, § 3543.6, subd. (a).) A violation of this provision may only be established by a clear showing of how and in what manner the employee organization affirmatively acted to cause or attempt to cause the unfair practice. (*Tustin Unified School District* (1987) PERB Decision No. 626.) In addition, the facts must establish a causal connection between the employer's unlawful conduct and the employee organization's behavior. (*State of California (Department of Personnel Administration)* (1987) PERB Decision No. 609-S.)

The District alleges that the Association caused or attempted to cause the District to violate the Educational Employment Relations Act section 3543.5 by causing it to discriminate or otherwise interfere with, restrain, or coerce Goldin because of his exercise of protected rights. However, the information provided in the charge does not demonstrate that the District engaged in an unfair practice or otherwise interfered with or retaliated against Goldin. It is therefore not possible to establish, from the facts presented, that the Association affirmatively

acted to cause or attempt to cause any unfair practice on the part of the District. It is also unclear that the Association acted affirmatively "to encourage or assist" the District in interfering, discriminating or retaliating against Goldin. (*California Nurses Association (O'Malley)* (2004) PERB Decision No. 1651-H.) Also, to the extent the District may be asserting rights on behalf of Goldin, it is unclear whether the District has standing to assert such a claim.

To the extent that the unfair practice charge alleges the Association's conduct breached the parties collective bargaining agreement, it is well-established that PERB does not have jurisdiction to resolve pure contract disputes. (Gov. Code, § 3541.5, subd. (b); *Compton Community College District* (1991) PERB Decision No. 915.)

For these reasons the charge, as presently written, does not state a prima facie case.[2] If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before November 24, 2014,[3] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Mary Weiss
Senior Regional Attorney

MW

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[2] In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make "a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Ibid.*)

[3] A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile or electronic mail. (PERB Regulation 32135.)