STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

KATHY McGINNIS WADSWORTH, Charging Party, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondent.	)	Case No. LA-CE-2375 PERB Decision No. 599 December 23, 1986
KATHY McGINNIS WADSWORTH, Charging Party, v. UNITED TEACHERS OF LOS ANGELES, Respondent.	)	Case No. LA-CO-362

Appearance: Kathy McGinnis Wadsworth, on her own behalf.

Before Hesse, Chairperson; Morgenstern, Burt, Porter and Craib, Members.

DECISION

This case is before the Public Employment Relations Board (Board) on appeal by Charging Party of the Board agent's dismissals, attached hereto, of her charges alleging that the Los Angeles Unified School District and the United Teachers of Los Angeles, respectively, violated sections 3543.5(a), (c) and (e) and sections 3543.6(b), (c) and (d) of the Educational Employment Relations Act (Gov. Code sec. 3540 et seq.) by discriminating against her and by failing to file grievances on her behalf.

We have reviewed the dismissals and, finding them free from prejudicial error, adopt them as the Decisions of the Board itself.

ORDER

The unfair practice charges in Case Nos. LA-CE-2375 and LA-CO-362 are DISMISSED WITHOUT LEAVE TO AMEND.

By the BOARD.

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, California 94108
(415) 557-1350

July 30, 1986

Kathy McGinnis Wadsworth

Richard Fisher
O'Melveny & Myers
400 South Hope Street
Los Angeles, CA 90071

Re: REFUSAL TO ISSUE COMPLAINT AND DISMISSAL OF UNFAIR PRACTICE CHARGE
Kathy McGinnis Wadsworth v. Los Angeles Unified School District
Charge No. LA-CE-2375

Dear Parties:

Pursuant to Public Employment Relations Board (PERB) Regulation section 32730, a complaint will not be issued in the above-referenced case and the pending charge is hereby dismissed because it fails to allege facts sufficient to state a prima facie violation of the Educational Employment Relations Act (EERA).[1] The reasoning which underlies this decision follows.

On April 21, 1986 Kathy McGinnis Wadsworth filed an unfair practice charge against the Los Angeles Unified School District (District) alleging violation of EERA sections 3543.5(a), (c) and (e). Charging party has alleged in general terms that the District discriminated against her commencing on or about November 1981 when she became a representative of the National Organization for Women (NOW). She attributes a number of incidents occurring in the years between November 1981 and January 1986, when she was terminated from employment with the District, to the role she played as representative for teachers on a pay equity committee formed by NOW.

On June 27, 1986 charging party and the regional attorney spoke by telephone for a period of 2-1/2 hours concerning the details of her job history with the District. Subsequent conversations occurred on July 3, 8, 25 and 28, 1986. On July 21, 1986 the regional attorney wrote to Ms. Wadsworth warning her that because the charge was deficient as written, it would be dismissed on July 30, 1986 unless previously withdrawn or amended. The warning letter is attached and incorporated by reference.

On July 28, 1986 the regional attorney spoke again with Ms. Wadsworth by

[1]References to the EERA are to Government Code sections 3540 et seq. PERB Regulations are codified at California Administrative Code, Title 8.

telephone. She restated her various theories of violation: she engaged in protected activity in fall 1981 when she was a member of the pay equity committee of NOW, and the adverse conduct of the employer in the ensuing five years took place because of such participation; allegations describing her period without work, from September 1 to October 20, 1985, and her later complaint to EEOC present elements of a discrimination charge; and, the school administrator's conduct toward her on December 15, 1985, when she was accused of having alcohol on her breath and screaming at students at the Brentwood Magnet School, took place because she was a member of NOW in 1981 and/or because she complained to EEOC on fall 1985. Ms. Wadsworth indicated that she has no intention of withdrawing or amending the charge, and that presently she contemplates filing an appeal in this matter.

Charging party complains of adverse actions which took place subsequent to disclosing her membership in NOW's pay equity committee and filing an EEOC complaint against the District: first, management personnel at Brentwood Magnet School, on December 15, 1985, disciplined her for allegedly having alcohol on her breath and screaming at students; and, second, the District dismissed her from employment as a substitute on January 28, 1986, based on three unsatisfactory evaluations she received at school to which she was assigned as a substitute.

These allegations are insufficient to state a prima facie violation of EERA. section 3543.5(a). Charging party has not alleged facts which could establish a connection or "nexus" between her protected activity and the District's subsequent adverse action. The temporal proximity between the protected conduct and the adverse action is insufficient to raise an inference of unlawful motivation on the part of District personnel. Moreland Elementary School District (1982) PERB Decision No. 227; Charter Oak Unified School District (1984) PERB Decision No. 404.

For the reasons stated above, as well as in the warning letter of July 21, 1985 described above, the allegations are dismissed. No complaint will issue.

Pursuant to Public Employment Relations Board regulation section 32535 (California Administrative Code, title 8, part III), you may appeal the refusal to issue a complaint (dismissal) to the Board itself.

Right to Appeal

You may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this Notice (section 32635(a)). To be timely filed, the original and five (5) copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) on August 19, 1986, or sent by telegraph or certified or Express United States mail postmarked not later than August 19, 1986 (section 32135). The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

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 (5) copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal (section 32635(b)).

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself (see section 32140 for the required contents and a sample form). The document will be considered properly "served" when personally delivered or deposited in the first-class mail postage paid and properly addressed.

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 (section 32132).

Final Date

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

Very truly yours,

JEFFREY SLOAN
General Counsel

By _____
PETER HABERFELD
Regional Attorney

cc: General Counsel

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD
San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, California 94108
(415) 557-1350

July 21, 1986

Kathy McGinnis Wadsworth

Re: Kathy McGinnis Wadsworth v. Los Angeles Unified School District
Charge No. LA-CE-2375

Dear Ms. Wadsworth:

On April 21, 1986 Kathy McGinnis Wadsworth filed an unfair practice charge against the Los Angeles Unified School District (District) alleging violation of EERA sections 3543.5(a), (c) and (e). Charging party has alleged in general terras that the District discriminated against her commencing on or about November 1981 when she became a representative of the National Organization for Women (NOW). She attributes a number of incidents occurring in the years between November 1981 and January 1986, when she was terminated from employment with the District, to the role she played as representative for teachers on a pay equity committee formed by NOW.

Facts

Investigation of this charge revealed details about several incidents she believes would not have occurred but for her announced participation on the pay equity committee. In November 1981 charging party was employed with the District at the 52nd Street School. She informed her principal, Dr. Charlene Kelley, that she was a member of the pay equity committee. The District superintendent also learned of her role with NOW. The principal responded that she did not like the committee. Charging party concluded that subsequent evaluations by the principal therefore would be unfavorable. She resigned employment as a full-time teacher in January 1982, and commenced to work as a substitute for the District. when' she applied in fall 1982 to work full-time for the District, she learned that Dr. Kelley had, in fact, given her a negative evaluation.

In fall 1982, when she applied to become a full-time teacher with the District, she also concluded that the District had eliminated favorable evaluations from her employment record and retained the negative ones. While describing this "adverse conduct," charging party does not present information which could establish a connection between her activity on the pay equity committee in November 1981 and the alleged suppression of favorable evaluations in fall 1982. Charging party concedes that she only attended three of the pay equity committee's monthly meetings in 3.951. There is no allegation to suggest that management representatives responsible for the alleged manipulation of her evaluations knew of her activity on the NOW

committee.

In mid-fall 1982 charging party was denied a day's pay because the secretary of the substitute office made a mistake. The secretary's notation suggested wrongly that charging party was employed for a particular day. That notation resulted in her being passed over when the assignments were allocated. The union assisted her in clearing the matter up, and she was paid for the lost day in 1983.

Between fall 1983 and spring 1984 charging party received three unsatisfactory evaluations for arriving late at the school to which she was assigned as a substitute. She received negative evaluations from the Loma Vista School and the Solano School. The threatened evaluation at South Central was never filed. Charging party has not alleged or provided information which could establish a connection between the adverse conduct and the knowledge by management officials that charging party served on the pay equity committee of NOW. She concedes that on all three occasions she was, in fact, tardy. However, she attributes her lateness to the District because, contrary to her request, the District continued to send her to outlying regions distant from her home, thereby complicating her travel to work.

In summer 1984 charging party alleges that she was denied work as a substitute. Charging party alleges that the cause for such a denial was unknown to her until fall 1985. At that time she was out of work for a month, complained to the affirmative action committee at the District and learned that her application had erroneously been placed at "the bottom of the list." She attributes the denial of work as a substitute during sunnier 1984 to the misplacement of her file. The committee was able to straighten out fee matter and she subsequently received work as a substitute. Although charging party believed that she was erroneously denied opportunity to work and was thereby deprived of one month's salary, she made no effort to grieve or in any way be made "whole."[1] The committee did not explain how the problem was resolved or provide information which would enable her to speculate about the connection, if any, between her file being placed at the bottom of tie "substitute stack" and her role in NOW. No facts have been alleged or information provided which could establish that the adverse conduct described herein was connected to charging party's exercise of protected rights.

In summer 1985 charging party was assigned to the Brentwood Magnet School on a 2-day assignment. On the second day she was asked to leave the school because management officials claimed that she had alcohol on her breath, and accused her of screaming at the students. She was given an "unsatisfactory" note which later provided grounds, along with two other unsatisfactory evaluations described above, for termination from employment as a substitute with the

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[1]The collective bargaining agreement, particularly Article I (Recognition) section 1.1 excludes from the unit all day-to-day substitutes who have not been paid for at least one hundred days' work with the District during the preceding year. Charging party had no right under the contract to grieve the alleged District misconduct.

District. Charging party does not allege facts or provide information which could establish that the accusation that she was screaming at students and had alcohol on her breath was a pretext for discriminating against her because she was a member of the pay equity committee of NOW, or exercised any other protected rights.

On January 28, 1986 charging party was dismissed from employment. The grounds listed in the termination consisted of arriving late at her assignments. Charging party has not provided information or alleged facts which could establish that the termination occurred because she exercised protected rights.

Applicable Legal Principles

In San Dieguito Union High School District (1982) PERB Decision No. 194, PERB held that, to state a prima facie violation, charging party must allege and ultimately establish that the alleged unfair practice either occurred or was discovered within the six-month period immediately preceding the filing of the charge with PERB. EERA section 3541.5.

PEE© has held that a prima facie statement of unlawful discrimination and retaliation requires allegations that: (1) the employer took adverse action against a certain employee; (2) the enployee engaged in activity protected by EERA; and, (3) the employer would not have taken the adverse action against the particular employee "but for" his/her having engaged in the protected activity. Novato Unified School District (1982) PERB Decision No. 210; Regents of the University of California (1983) PERB Decision No. 308-E; Regents of the University of California (1983) PERB Decision No. 319-H.

The nexus between the employer conduct and the protected activity is established by alleging unlawful motivation on the part of the employer. In Placerville Union School District (1984) PERB Decision No. 377, PERB stated that where direct evidence of unlawful motivation is lacking, it has generally looked to such factors as timing (North Sacramento School District (3S32) PERS Decision No. 254; Coast Community College District (1982) PERB Decision No. 251), disparate treatment (San Joaquin Delta Community College District (1982) PERB Decision No. 261; San Leandro Unified School District (1983) PERB Decision No. 288), departure from past procedures (Novato Unified School District (1982) PERB Decision No. 210), and inconsistent justifications (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S) which, under certain circumstances, may support an inference of unlawful motivation. Also see University cf California (1933) PETS Decision - No. 308-H.

In determining whether a party has violated section 3543.5(c) of EERA, the PERB utilizes either the "per se" or the "totality of conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process, The "totality of conduct" test is applied to determine whether "surface bargaining'[1] has occurred. The test looks to the entire course of negotiations to determine whether the charged party has failed to negotiate with the "requisite subjective intention of reaching agreement." Pajaro Valley Unified School District (1978) PERB Decision Mo, 51.

Charging party has also alleged a violation of EERA section 3543.5(d). That subdivision makes it unlawful for an employer to dominate or control the administration of an enployee organization, for it would render the enployee representative unable to make wholehearted efforts on behalf of the employees it represents. Santa Monica Unified School District (1978) PERB Decision No. 52; Antelope Valley Community College District (1979) PERB Decision No. 97. See Clovis Unified School District (1984) PERB Decision No. 389. "Interference," although a lesser degree of intrusion than "domination," is considered equally unlawful. This terms includes intruding into the internal functioning of the organization, setting up a rival organization, or engaging in a campaign to induce employees to support a particular union. See Antelope Valley Community College District, supra; Jack Smith Beverage Co., Inc. (1951) 94 NLRB 14012 [28 LRRM 1199]. Lending financial support or encouraging membership in a particular union has also been found by PERB to constitute unlawful "assistance" in violation of section 3543.5(d). Azusa Unified School District (1977) EERB Decision No. 38; Department of Corrections (1980) PERB Decision No. 127-S; Sacramento City Unified School District (1982) PERB Decision No. 214.

Conclusion

The charge, as presently written, fails to state a prima facie violation of EERA section 3543.5. First, with respect to all conduct alleged in the charge and described during the investigation as having occurred prior to November 21, 1985, *the* allegations are time-barred. Second, the charge fails to allege any connection between the adverse conduct and the activity charging party described with regard to her role as a member of the pay equity committee of NOW. There is no information suggesting that anyone of the District management staff besides Dr. Kelley and the school superintendent knew of charging party's role on that committee. There are no facts to support charging party's speculation that their knowledge of her role on that committee was the genesis of her future problems in the District. Thus, charging party has not set forth facts to support a prima facie violation of EERA section 3543.5(a). Third, there are no facts to suggest that the District failed to bargain in good faith or participate in good faith in the statutory impasse procedures, and therefore no prima facie violation of sections 3543.5(c) or (e) have been stated.

If you feel that there are facts which would correct the deficiencies explained above, please amend the charge accordingly: (1) The amended charge should be prepared on a standard PERB unfair practice charge form clearly labeled First Amended Charge, (2) contain all the facts and allegations you wish to make, (3) indicate the case number where indicated on the form (even though you are not to write in the box when originally filing a charge), (4) and be signed under penalty of perjury by the charging party (forms enclosed). The amended charge must be served on the respondent, and proof of service must be attached to the original as well as to all copies of the amended charge (forms enclosed).

If I do not receive an amended charge or withdrawal from you on or before July 30, 1986, I shall dismiss your charge. If you have any questions on how to proceed, please call me at (415) 557-1350.

Sincerely yours.

Peter Haberfeld
Regional Attorney

Enclosures

STATE OF CALIFORNIA

GEORGE DEUKMEJIAN Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, California 94108
(415) 557-1350

July 30, 1986

Kathy McGinnis Wadsworth
644 Landfair Ave., #207
Los Angeles, CA 90024

Wayne Johnson, President
United Teachers-Los Angeles
2511 West Third
Los Angeles, CA 90057

Re: REFUSAL TO ISSUE COMPLAINT AND DISMISSAL OF UNFAIR PRACTICE CHARGE
Kathy McGinnis Wadsworth v. United Teachers of Los Angeles
Charge No. LA-CO-362

Dear Parties:

Pursuant to Public Employment Relations Board (PERB) Regulation section 32730, a complaint will not be issued in the above-referenced case and the pending charge is hereby dismissed because it fails to allege facts sufficient to state a prima facie violation of the Educational Employment Relations Act (EERA).[1] The reasoning which underlies this decision follows.

On April 21, 1986 Kathy McGinnis Wadsworth filed an unfair practice charge against the United Teachers of Los Angeles (UTLA) alleging violation of EERA sections 3543.6(b), (c) and (d). Specifically, charging party alleges that ULTA denied her the right of fair representation when, on several occasions during the previous few years, it failed to file grievances on her behalf against the Los Angeles Unified School District (District).

On June 27, 1986 charging party and the regional attorney spoke by telephone for a period of 2-1/2 hours concerning the details of her job history with the District. Subsequent conversations occurred on July 3, 8, 25 and 28, 1986. On July 21, 1986 the regional attorney wrote a warning letter to Ms. Wadsworth indicating that her charge, as stated, was deficient and that it would be dismissed unless withdrawn or amended by July 30, 1986. On July 25, 1986 the regional attorney spoke by telephone with Ms. Wadsworth concerning this charge. She stated at that time that she would neither withdraw or amend the charge, and that she agreed, "there is no case against the Union."

For the reasons stated in the warning letter of July 21, 1986, attached and

[1]References to the EERA, are to Government Code sections 3540 et seq. PERB Regulations are codified at California Administrative Code, Title 8.

incorporated by reference, the allegations of this charge are dismissed. No **complaint will** issue thereon.

Pursuant to Public Employment Relations Board regulation section 32635 **(California Administrative** Code, title 8, part III), you may appeal the **refusal to** issue **a** complaint (dismissal) to the Board itself.

Right to Appeal

You may obtain a review of this dismissal of the charge by filing an appeal **to the Board itself within** twenty (20) calendar days after service of this Notice **(section 32635(a)). 1b** be timely filed, the original and five (5) copies of **such** appeal must be actually received by the Board itself before the close of **business** (5:00 **p.m.)** on August 19, 1986, or sent by telegraph or certified or **Express** United States mail postmarked not later than August 19, 1986 (section 32135). The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

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 (5) copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal (section 32635(b)).

Service

All documents authorized to be filed herein must also be "served" upon all **parties to** the proceeding, and a "proof of service" must accompany each copy **of a document served** upon a party or filed with the Board itself (see **section 32140 for** the required contents and a sample form). The document will be considered properly "served" when personally delivered or deposited in the first-class mail postage paid and properly addressed.

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 (section 32132).

Final Date

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

Very truly yours,

JEFFREY SLOAN
General Counsel

By _____
PETER HABERFELD
Regional Attorney

cc: General Counsel

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD
San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, California 94108
(415) 557-1350

July 21, 1986

Kathy McGinnis Wadsworth
644 Landfair Ave., #207
Los Angeles, CA 90024

Re: Kathy McGinnis Wadsworth v. United Teachers-Los Angeles
Charge No. LA-CO-362

Dear Ms. Wadsworth:

On April 21, 1986 Kathy McGinnis Wadsworth filed an unfair practice charge against the United Teachers of Los Angeles (UTLA) alleging violation of EERA sections 3543.6(b), (c) and (d). Specifically, charging party alleges that ULTA denied her the right of fair representation when, on several occasions during the previous few years, it failed to file grievances on her behalf against the Los Angeles Unified School District (District). A more elaborate description follows.

Charging party alleges that her problems with the District commenced in November 1981 when she became a representative of teachers on a pay equity committee formed by the National Organization for Women (NOW). She alleges that after she joined the committee, the District lost or misplaced favorable teaching evaluations she had obtained in other districts, and that she received negative evaluations and was consequently denied a contract since 1982, denied summer work since 1984, and dismissed as a substitute teacher in 1986.

Charging party alleges that since August 1982 she has been unable to enlist ULTA's support in locating her lost records and filing grievances against the employer. She alleges in general terms that ULTA on numerous occasions has failed to provide her with "accurate or adequate advise (sic) or representation."

On June 27, 1986 charging party and the regional attorney spoke by telephone for a period of 2-1/2 hours concerning the details of her job history with the District. Subsequent conversations occurred on July 3 and 8, 1935. Charging party has presented the following account of her relationship with the District and the UTLA.

Charging party taught in other districts within the State of California prior to becoming employed with the Los Angeles Unified School District, In spring 1979 she applied for a job with the District, intending to acquire a position by September 1979. In late summer 1979 she was told that the District had lost her papers. She was under the impression that she would have to go to Sacramento to straighten out the confusion, but she knew her family would not allow it and therefore she neither told them nor vent to Sacramento. By mid-November 1979 she obtained employment with the District. She worked at the Bud Long Elementary School between January 1930 and June 1980, and then worked at the Mara Monte School between fall 1930 and fall 1981.

In fall 1981 charging party began to work at the 52nd Street School. Charging party told her principal, Dr. Charlene Kelley, that she was working on the pay equity committee of NOW which was interested in the pay differentials between men and women teachers within the District. Dr. Kelley stated she did not like the committee. Charging party concluded that the principal would henceforth evaluate her negatively because of her connection to the NOW committee and her interests in the Equal Rights Amendment (ERA). In anticipation of the negative evaluations, charging party approached UTLA and asked what could be done. The union advised her to attempt to resolve whatever difficulties existed with the principal.

On January 29, 1982 charging party resigned her full-time teaching position with the District and commenced thereafter to work with the District as a substitute teacher. She explains that the reasons for her resignation were that: she had been threatened by Dr. Kelley with negative evaluations, Dr. Kelley thereafter refused to talk with her, she was having a difficult time getting access to materials necessary for teaching the class to which she was assigned, and her paperwork at the District office was not in order.

In fall 1982 charging party was surprised that, contrary to the union's advice, she was unable to obtain a contract for full-time teaching with the District. Contrary to what the union implied, her resignation had not avoided an evaluation by principal Kelley. She believes that her failure to secure full-time employment with the District owed to the District's loss or intentional manipulation of her paperwork: the file contained a bad evaluation, and did not contain the favorable evaluations charging party claims to have acquired during prior employment. For example, she had been evaluated favorably by Mrs. Herd, the vice-principal at the Bud Long School during the 1979-80 school year. She learned, however, that the favorable Herd evaluation had been replaced by a negative one prepared by the principal of the Bud Long School. Charging party alleges that the negative effect of this evaluation was exacerbated by the presence of three copies in her District file.

Charging party attempted to file a grievance with the union. However, the union responded that the loss of papers was not a grievable matter. She was also told that she was ineligible to file a grievance under the contract. Although she did not agree with the union's assessment that the matter was not grievable and that she could not be grievant, she decided that fighting the issue was too much trouble and that it would be better to ignore it in the hope that "it would all go away."

Between fall 1982 and June 1983 charging party continued to work at District schools as a substitute teacher. During that period another incident arose. She was assigned to substitute at a particular school, and the secretary failed to release her. The effect was that her name did not appear on the substitute eligibility list for the following day, and as a consequence she lost a day's pay. In that instance the union cleared up the matter on her behalf.

Between fall 1983 and spring 1984 three incidents arose. First, in spring 1983, while working at the 64th Street School, charging party was threatened with an unsatisfactory evaluation because she arrived late at the school. Next, in July 1983 she received a bad evaluation for arriving late at the Loma Vista School. Then, in December 1983, while working at the Solano Street School, charging party was late and received a bad evaluation. Charging party claims that it was the District's fault that she arrived late at these three schools. She had asked that her assignments be closer to home so that freeway traffic could be avoided.

UTLA, sent a representative to be present during the meeting at which the principal of the Solano Street School discussed her negative evaluation. Charging party requested that the union grieve the incident, particularly the fact that the principal had called her at home, and the way in which he treated her during the meeting. UTLA responded that it was unable to grieve on her behalf because the contract between the District and UTLA did not cover persons teaching in her category, namely, substitutes who had not worked 100 days the preceding year.

Charging party contends that she was of a different viewpoint and believed instead that the contract did give her the right to use the grievance procedure, and contained a clause which was violated by the principal's conduct. However, she explains that her family talked her out of making an issue of this, and in order to avoid the problems she continued working without challenging the District or UTLA's conduct.

Charging party "alleges that she was denied work as a substitute during the summer of 1984. She did not discover until fall 1985 that the denial of work owed probably to the fact that her substitute papers had been "placed at the bottom of the list." Her discovery of this fact occurred when she was not assigned work during an entire month. She complained to the affirmative action committee within the District, and they straightened the matter out, returning her once again to priority substitute status.

Beginning in fall 1985 her employment as a substitute with the District ran "smoothly." However, in December 1985 an incident occurred at the Brentwood Magnet School. She was given a 2-day assignment at that school, but was told on the second day that she was dismissed because the vice principal detected alcohol on her breath, and that she was "screaming" in the classroom. She called the union to ask for advice and was told that, if she would forego one day's pay, the matter would not be reflected on her record. She was advised to attach a piece of paper to the "pay slip" and state that she would not receive pay for services not rendered.

Contrary to her expectations after speaking with the union, she was given an unsatisfactory notice which was placed in her personnel file. Charging party contends that the union had assured her this would not happen, and that she now regrets not going to Kaiser for a breath test that would have enabled her to disprove the vice principal's assertion.

Charging party complains that the union failed to represent her fairly when it did not obtain money on her behalf to compensate her for the lost month's work caused by the District placing her papers at the bottom of the substitute list. Additionally, the union gave her bad advice in connection with the incident at the Brentwood Magnet School. Charging party states that no information is apparent to her which could suggest that what she deems inadequate advice owes to union officials being "out to get her." She characterizes the advice as incompetent, and at most negligent.

Charging party describes a one-hour consultation with UTLA's representative on January 27, 1986. She was told at that time that the union was unable to represent her because the contract did not allow substitutes in her category to be represented in the District. It was explained that UTLA could counsel substitutes regarding their problems, but that the organization had no power under the contract to file a grievance.

On January 20, 1986 she was terminated as a substitute with the District, based on the negative evaluations she received for allegedly being tardy and having alcohol on her breath.[1] When she went to the union on January 29, 1986, she was told by the representative that the organization had no power to assist her in challenging the termination. Charging party concedes that she at no time during this period had worked 100 days during the preceding academic year and that, as a consequence, according to UTLA, she was hot eligible under the contract to file grievances.[2]

Charging party has alleged that the exclusive representative denied her the right to fair representation guaranteed by section 3544.9, and thereby violated section 3543.6(b). The fair representation-duty imposed on the exclusive representative extends to contract negotiations (Redlands Teachers Association (Faeth). (1978) PERB Decision No. 72; SEIU, Local 99 (Kimmett) (1979) PERB Decision No. 106; Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124; El Centro Elementary Teachers Association (Willis) (1982) PERB Decision No. 232), contract administration (Castro Valley Teachers Association (McElwain) (1980) PERB Decision No. 149; SEIU, Local 99 (Pottorff) (1982) PERB Decision No. 203), and to grievance handling (Fremont Teachers Association (King) (1980) PERB Decision No. 125; United Teachers of Los Angeles (Collins) (1983) PERB Decision No. 258). PERB has ruled that a prima facie statement of such a violation requires allegations that: (1) the acts complained of were undertaken by the organization in its capacity as the exclusive representative of all unit

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[1]The unsatisfactory conduct was stated to have occurred while she substituted at Loma Vista, Solano and Brentwood Magnet Schools.

[2]Article I (Recognition) section 1.1 states that all day-to-day substitutes who were paid for fewer than one-hundred days during the preceding school year are excluded from the unit. The contractual grievance procedure does not apply.

employees; and, (2) the representational conduct was arbitrary, discriminatory, or in bad faith.

This charge focuses on the Union's conduct in processing or failing to process a grievance. PERB has enunciated the standard to apply to the Union's conduct in this context. In United Teachers of Los Angeles (Collins) (1982) PEES Decision No. 258, the Board stated:

> Absent bad faith, discrimination, or arbitrary conduct, mere negligence or poor judgment in handling a grievance does not constitute a breach of the Union's duty. (Slip Op. at p. 5.)

PERB continued by stating:

> A union may exercise its discretion to determine how far to pursue a grievance in the employee's behalf as long as it does not arbitrarily ignore a meritorious grievance or process a grievance in a perfunctory fashion. A union is also not required to process an employee's grievance if the chances for success are minimal. (Ibid.)

A prima facie case alleging arbitrary conduct violative of the duty of fair representation,

> must, at a minimum, include an assertion of sufficient facts from which it becomes apparent how or in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment. Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Decision No. 332, citing Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124.

In San Francisco Classroom Teachers Association (Bramell) (1984) PERB Decision No. 430, the Board quoted Wright v. Interstate and Ocean Transportation (4th Cir. 1980) 623 F.2d 888 [104 LRRM 2408] to the following effect:

> To sustain a member's action against his union . . it is not necessary that the union's breach be intentional. A union representative could be so indifferent to the rights of members or so grossly deficient in his conduct purporting to protect the rights of members that the conduct could be equated with arbitrary action. (Slip Op. p. 5.)

The allegations of the charge do not set forth a prima facie violation of EERA section 3543.6(b). The charge does not. contain allegations which suggest that charging party had a right to grieve under the contract. She concedes that

she did not receive pay for 100 days' work during the preceding academic year. The contract states that a day-to-day substitute in her circumstances is not covered by the contract. (See fn. 2, supra.) No duty of fair representation was owed to her.[3]

If you feel that there are facts which would correct the deficiencies explained above, please amend the charge accordingly: (1) The amended charge should be prepared on a standard PERB unfair practice charge form clearly labeled First Amended Charge, (2) contain all the facts and allegations you wish to make, (3) indicate the case number where indicated on the form (even though you are not to write in the box when originally filing a charge), (4) and be signed under penalty of perjury by the charging party (forms enclosed). She amended charge must be served on the respondent, and proof of service must be attached to the original as well as to all copies of the amended charge (forms enclosed).

If I do not receive an amended charge or withdrawal from you on or before July 30, 1986, I shall dismiss your charge. If you have any questions on how to proceed, please call me at (415) 557-1350.

Sincerely yours.

Peter Haberfeld'
Regional Attorney

Enclosures

[3]Besides the fatal defect discussed above that charging party was not a member of the unit, and therefore the exclusive representative had no obligation to represent her, allegations describing incidents occurring prior to November 21, 1985 must be dismissed as untimely. San Dieguito Union High School District (1982) PERB Decision No. 194. Charging party must allege and ultimately establish that the alleged unfair practice "either occurred or was discovered within the six-month period immediately preceding the filing of the charge with PERB.