STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JUDITH MAE GORCEY, Charging Party, v. OXNARD EDUCATORS ASSOCIATION, Respondent.	)	Case No. LA-CO-369 PERB Decision No. 681 June 20, 1988
JAN MARIE TRIPP, Charging Party, v. OXNARD EDUCATORS ASSOCIATION, Respondent.	)	Case No. LA-CO-370

Appearances; Rosenmund & Rosenmund by Michael A. Morrow for Judith Mae Gorcey and Jan Marie Tripp ; Schwartz, Steinsapir, Dohrmann, and Sommers by Michael R. Feinberg for Oxnard Educators Association.

Before Hesse, Chairperson; Craib and Shank, Members.

DECISION

SHANK, Member: These cases are before the Public Employment Relations Board (PERB or Board) on exceptions filed by Judith Mae Gorcey and Jan Marie Tripp (Charging Parties), to the proposed decision of a PERB administrative law judge (ALJ).

The ALJ dismissed Charging Parties' complaints wherein they alleged that the Oxnard Educators Association (OEA, Union or Association) violated section 3543.6(b) of the Educational

Employment Relations Act (EERA) by breaching its duty of fair representation.[1] Specifically, the allegations are that, during the course of negotiations, OEA failed to inform its members of the status of negotiations, thereby denying Charging Parties the opportunity to communicate their views to the bargaining team; and, at a later ratification meeting, OEA misrepresented the provisions in the contract tentatively agreed to by the bargaining team, thereby denying Charging Parties the opportunity to express their views or cast an informed vote. The ALJ dismissed Charging Parties' complaint. In support of his dismissal, the ALJ first concluded that the type of activity being complained of concerns purely internal union conduct over which the Board has no jurisdiction. The ALJ alternatively concluded that, even if the Board has jurisdiction, Charging Parties have failed to establish that

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[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.6(b) provides as follows:

> It shall be unlawful for an employee organization to:
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> . . . . . .
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> (b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

OEA's conduct was arbitrary, discriminatory or in bad faith. To the extent that it is consistent with the discussion below, we affirm the decision to dismiss the charge.

FACTUAL SUMMARY

Prior to the 1984-85 school year the Oxnard School District used a 12-step salary schedule for its certificated employees. To better recruit qualified teachers, OEA agreed to a collective bargaining agreement that provided for a 10-step salary schedule that consolidated the lowest three steps into a single step. Thus, incumbents with one to three years' experience were placed on step one, receiving identical salaries. Incumbents with four years' experience were placed on step two, with five years' experience on step three, and so forth.

During the 1984-85 school year, unlike incumbents, newly hired teachers were placed on the 10-step schedule according to the method previously used when the old, 12-step schedule was in place (i.e., four years' experience equalled step four rather than step two for an incumbent with four years' experience). This resulted in teachers with identical years of experience being placed on two separate steps, dependent on whether they were incumbent or newly hired in 1984-85. Incumbent teachers complained about the disparity to OEA. They demanded that OEA negotiate a return to the 12-step schedule. OEA negotiated a return to the 12-step salary schedule for the 1985-86 school year.

Prior to negotiations that ultimately led up to the 1985-86 agreement, the OEA Representative Council in January 1985, solicited input from OEA's membership by way of school mailboxes of all teachers who were "on track" and by mail to the homes of teachers who were "off track."[2] Responses were tallied and prioritized by the bargaining team. As a result of the foregoing, a proposal aimed at resolving the salary schedule was placed in OEA's opening proposals.

OEA's initial proposals were presented to the District in Spring 1985. Those same proposals were distributed to members of OEA's representative council, each of whom was responsible for posting and explaining to the members OEA's position regarding the proposals.

OEA and the District did not begin discussing economic issues until late August or early September 1985, as the parties traditionally waited until after the state budget was adopted in July. According to the District's negotiator, OEA expressed two priorities: (1) salary increases within the salary schedule, and (2) return to a 12-step schedule.

As early as September 1985, OEA, through its Representative Council and various publications (i.e., OEA Update, Negotiations Hot Line and OEA Special Report), advised its members that, while it was continuing its discussions with the

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[2]Under the District's year-round calendar, "on track" teachers are those not on vacation, "off track" teachers are those on vacation.

District to reinstate the 12-step schedule, the District was reluctant to do so. A detailed description of all salary issues as they then existed in the negotiations was presented, setting forth OEA's position, the District's position, and the rationale for the respective positions.

During the September sessions, the District's position was that it was not interested in returning to a 12-step schedule because it was no longer experiencing recruitment problems. Beginning with the October 8, 1985 bargaining session, the District began to try to negotiate a compromise to resolve the salary inequities by offering lump sum payments to affected incumbents. Further negotiations in the month of October did not result in a tentative agreement.

Effective November 1985, OEA installed its new president. In response to the concerns raised by unit members, the president addressed a memo to all bargaining unit members, dated November 4, stating that he was committed to the "settlement of a contract with the 12-step salary schedule and a good raise." As a result of the District's perception of teacher unrest over the salary schedule, on November 8, 1985, after rejecting OEA's proposal of a 12-step schedule with the first three steps being identical to each other, the District offered a counterproposal. The District's proposal provided that those employees on steps one through five (hired before the 1984-85 school year) be given a two-step increase, with an annual one-step increase for all employees on the salary

schedule for school year 1985-86. The District proposed no further increases for employees on steps six through nine. OEA rejected the District's proposal. This was the first time during the negotiations that the parties discussed a salary proposal that varied from an across-the-board increase.

The District negotiator, David Miller, then "suggested"—due to the absence of school board authority to make an offer—the salary schedule and salary increase that was ultimately agreed upon, to wit: equate years of experience with salary step placement for those on steps six through nine, effective July 1, 1986, crediting the increase against the 1986-87 school year budget. Those on steps one through five and on step ten would get two additional steps during the 1985-86 school year to return them to wages based on their experience levels while those on steps six through nine would get two additional steps in the next school year to return them to wages based on their levels of experience.[3]

Charging Party Judith Mae Gorcey was personally affected by the salary schedules as follows: in 1983-84 she was on step nine with nine years' experience, in 1984-85 she was on step eight with ten years' experience, and in 1985-86 she was on step nine with eleven years' experience. Gorcey alleges she lost $2,685.00 in compensation because she received a one-step rather than a three-step increase.

3charging Parties, and all others at steps six through nine, suffered a salary loss due to the delay of their salary step increase by one year.

Charging Party Jan Marie Tripp was personally affected by the salary schedules as follows: in 1983-84 she was on step six with six years' experience, in 1984-85 she was on step five with seven years' experience, and in 1985-86 she was on step six with eight years' experience. In 1985-86, other teachers with less experience were currently on steps six and seven receiving equal or greater pay than Charging Party. Tripp alleges she lost $2,132.00 in compensation because she received a one-step rather than a three-step increase.

Pursuant to Miller's inquiry, OEA indicated that it would agree to Miller's suggested offer were it to be authorized and officially tendered, subject to the bargaining unit's ratification. The parties agreed not to reveal the details of the "conceptual agreement" until such time as the school board had an opportunity to hear about the terms of the proposal from Miller.

On November 14, Miller was informed that the board had approved the conceptual agreement. On November 15, Miller told OEA of the board's approval, OEA accepted, and a tentative agreement was reached.

Since an OEA by-law required that voting procedures not be conducted during track changes, OEA moved quickly to hold a ratification meeting and conduct an election so teachers could receive their increases in December 1985 rather than several months later, after the next track change.

On November 18, OEA prepared a publication called "Hot-Line" to inform unit members of the existence of a tentative agreement and that a ratification meeting would be held November 20. The November 18 Hot Line told members that the meaning of the tentative agreement to each member would be spelled out on November 20, and that the agreement was more complex than just an "across-the-board" salary increase. On the morning of November 19, OEA received a draft of the contract language, from which it prepared a detailed explanation of the terms for purposes of discussion at the ratification hearing. Prior to the ratification meeting, OEA did not inform unit members of the details of the salary concept first raised on November 8.

The ratification meeting was held on November 20. Explanatory handouts were given to teachers as they entered. Between 150 and 170 teachers attended, among them Gorcey and Tripp. It was the largest ratification turnout in 15 years.

The OEA bargaining team first explained the terms of the agreement and then opened the meeting to questions from the attendees. Both in the initial explanation and in response to questions, OEA negotiators explained that employees on steps six to nine had to wait until July 1986 for additional steps due to the District's lack of funds. With regard to steps six to nine, there were no questions nor any discussion of

retroactivity. Neither Gorcey nor Tripp asked any questions. Both Gorcey and Tripp left the meeting before it adjourned.

None of the attendees expressed any confusion as to the nature of, or reasons for, the delayed two-step increase. No one protested that he was not given enough time to consider the contract terms. No one moved to postpone the vote so as to permit further consideration of the agreement. No one proposed that the tentative agreement be voted down.

The ratification election was conducted over four days, November 21, 22, 25 and 26, 1985. Teachers who did not attend the ratification meeting on November 20 found the OEA handout explaining the agreement in their school mailboxes. OEA representatives were available to those with questions. At some school sites faculty meetings were held by OEA to discuss the tentative agreement.

The final vote of the membership was 268 to ratify the contract, 96 to reject.

The allegations in the charges, as amended July 11, 1986 are twofold: first, during the course of negotiations, OEA failed to inform its members of the status of negotiations thereby denying Charging Parties the opportunity to communicate their views to the bargain team; second, at a later ratification meeting OEA misrepresented the provisions in the contract, thereby denying Charging Parties the opportunity to express their views or cast an informed vote. The charge

alleges that this conduct breached the duty of fair representation.[4]

ALJ'S PROPOSED DECISION

The ALJ, relying on Compton Education Association (Sanders) (1985) PERB Decision No. 509 and Service Employees International Union, Local 99 (Kimmett) (1979) PERB Decision No. 106, concluded that the type of activity being complained of concerns purely internal union conduct over which the Board has no jurisdiction. The ALJ, reasoned that:

> Under the holding in Compton, supra, union procedures for communicating or not communicating with the bargaining unit during the negotiations process is a matter within the category of internal union activities and therefore is beyond reach in this unfair practice decision.

The ALJ further analyzed the case in the alternative by assuming, arguendo, that the Board did have jurisdiction over the type of "internal union activities" complained of here. Even under this analysis, the ALJ concluded, OEA did not breach its duty of fair representation on this record. In reaching this conclusion, the ALJ separately addressed the issue pertaining to OEA's obligation to communicate with and receive input from bargaining unit members during the negotiations

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4section 3544.9 sets forth a union's duty of fair representation:

> The employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit.

process and the issue of whether OEA misrepresented the effective date of the two-step increase for teachers on steps six through nine.

With regard to the first issue, the ALJ noted that under PERB precedent the duty of fair representation implies some consideration of the views of various groups of employees and some access for communication of those views, but there is no requirement that formal procedures be established. El Centro Elementary Teachers Association (1982) PERB Decision No. 232, pp. 15-16.

Focusing on the events occurring on November 8, 1985 and thereafter, the ALJ concluded that the modified salary schedule was first raised in negotiations on November 8 and had not been discussed prior to that date. It was an entirely new concept that was not presented to the membership until the ratification meeting on November 20. While Charging Parties claimed that OEA's silence between November 8 and 20 constituted a breach of the duty of fair representation and, to be sure, a broad notice requirement may have some advantages, the failure to adhere to such a requirement under the circumstances presented here did not breach the duty of fair representation. The District negotiator's desire to have his client hear of any proposal from him first hand was found to be not unreasonable, and OEA's acquiescence to Miller's request was similarly found not to be out of line. The OEA negotiator's desire to clarify the proposal before releasing details to the membership was also

viewed by the ALJ as reasonable; there was a legitimate interest in avoiding exciting members about a tentative offer.

Since OEA's agreement to remain silent was in the nature of a ground rule, and it applied to the unit as a whole, the ALJ concluded it was not discriminatory. Similarly, there was no evidence of bad faith, since the bargaining team actually felt they had negotiated the best possible provision.[5] 5

Moreover, the ALJ found that Charging Parties failed to establish that OEA's conduct was in any way arbitrary. The District's negotiator moved immediately to seek school board approval of the November 8 discussions. Not until Friday, November 15, did the District negotiator inform OEA's negotiator that the board agreed to the concept. This was the first date that OEA learned the parties in fact had a tentative agreement. On Monday, November 18, OEA acted to schedule a ratification meeting on November 20, the first possible date under the bylaws, given its two-day notice requirement. Time was of the essence since a "track change" was near. If the meeting and subsequent voting on November 21, 22, 25 and 26, 1985 had not occurred when they did, the vote would have had to have been postponed past the track change. The result would have been that employees would have had to wait several months—beyond the holiday season—to get their salary increases.

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[5]We note that two OEA negotiators and the wives of two others were in the step 6-9 range.

In addition, the ALJ noted that "there is no requirement in the EERA that a union must individually advise individual employees of the status of each particular proposal affecting them." California School Employees Association and its Local Chapter No. 616 (1985) PERB Decision No. 508. He also noted that since it was clear from OEA's bylaws that there was no requirement that the tentative agreement be presented to the membership prior to ratification, such decisions inherent in the "bargaining process" are left in the hands of the union. To read a formal and potentially overly rigid notice requirement into this document would impermissibly interfere with an internal union prerogative. Compton Education Association (1985) PERB Decision No. 509. Furthermore, courts and labor boards have consistently refused to interfere with the conduct of an exclusive representative during the bargaining process. Redlands Teachers Association (1978) PERB Decision No. 72, citing Ford Motor Co. v. Huffman (1953) 345 US 330.

With regard to the issue that OEA breached the duty of fair representation by misrepresenting the salary schedule to unit members, the ALJ concluded that the informational notice, distributed to all teachers via the school mailboxes or U.S. mail, clearly put them on notice that the agreement was complex and not "just an 'across-the-board' salary increase." Furthermore, the agreement itself unambiguously indicated that only steps one through five and ten would receive retroactive payments.

After a lengthy explanation of the salary schedule by OEA representatives, at least two employees asked questions and were given answers that made clear that those on steps six through nine would receive no retroactive payment. Employees who remained to ask questions after the presentation expressed no confusion about the delayed increase. The evidence shows that the subject was discussed at length, and many questions were asked and answered.

While Charging Parties argued that OEA should have specifically described steps six through nine as "non-retroactive", since historically all salary steps received the same increase at the same time, in the ALJ's view such a requirement would be an onerous one. Given the opportunity for ratification, it was enough that the agreement was satisfactorily explained to members. See Western Conference of Teamsters (1980) 251 NLRB 331.

CHARGING PARTIES' EXCEPTIONS

Charging Parties except to the ALJ's proposed decision on five bases. First Charging Parties argue that, contrary to the ALJ's viewpoint, they have not "broadly criticized OEA's actions." This is not a case of disgruntled union members dissatisfied with their contract. Rather, OEA failed to inform its members of the contract provision relating to salary schedule steps implemented by the District, thereby failing to provide members with access for communication of their views and failing to consider their views.

The second exception is to the ALJ's reliance on Compton Education Association (1985) PERB Decision No. 509 for the proposition that union procedures for communicating with the unit during negotiations is a matter of internal union activity over which the Board has no jurisdiction.

Charging Parties argue that Compton is inapposite because it differs on its facts, to wit: in Compton the Charging Party had adequate notice but objected to the method by which she was allowed to communicate her views. Thus, Charging Parties argue, that while the ALJ relied on Compton to dismiss Charging Parties' complaints, in doing so, he ignored the principle first established in El Centro Elementary Teachers Association (1982) PERB Decision No. 232. Compton relied on El Centro, in which it was established that the duty of fair representation requires some consideration of members' views and access for the communication of these views. Additionally, Charging Parties argue that the ALJ's use of Compton ignores Service Employees International Union, Local 99 (1979) PERB Decision No. 106, also cited in Compton. In SEIU, Local 99, the Board established that the duty of fair representation extends only to union activities that have a substantial impact on the relationship of the unit members to their employers. There can be no dispute that the negotiation of salary schedules meets the test of SEIU, Local 99, supra, and that notice of proposals is required.

Further, the Charging Parties argue that here the only issue is the timing of the union's notice, and neither Compton, El Centro nor SEIU, Local 99 address the minimal amount of

notice required of a union to its members of its contract proposals before the close of negotiations.

While the ALJ's decision is replete with instances of OEA's providing notice of proposals, it is also true that every instance identified (save that ratification meeting) predated November 8. Since the November 8 proposal was radically different (i.e., less than across the board), the Charging Parties' assert, OEA was obligated to communicate it in a timely fashion.

The third exception taken is to the ALJ's conclusion that OEA's agreement with the District to remain silent pending the school board's vote was a rational decision based on negotiating ground rules affecting all equally and done in good faith.

Charging Parties argue that while it might be easier to keep negotiations quiet, and in the backroom under wraps, that is not a proper justification for depriving unit members of some basic notice of salary proposals which are discriminatory and unique.

The fourth exception taken is to the ALJ's interpretation of California School Employees Association and its Local Chapter No. 616 (1985) PERB Decision No. 508. Charging Parties argue that the ALJ erred in relying on this decision for the proposition that there is no requirement for OEA to advise individual employees of the status of each particular proposal affecting them. What CSEA, Local 616 really holds, Charging Parties argue, is that an individual unit member does not have

a right to an individualized method of notice. Here, while not seeking individualized notice, Charging Parties argue there was simply no notice.

The fifth and final exception taken by Charging Parties is to the ALJ's interpretation of the bylaws which state, in pertinent part at item VI, section 10:

> The membership shall be surveyed before determining the contents of the proposed contract demands and the elements of the contract proposal shall be approved by members of the council. (Emphasis added by Charging Parties)

Further, in item IX, section 7:

> responsibility and authority for directing the bargaining process on behalf of the Association is vested in the Executive Board subject to policies established by the council. (Emphasis added by Charging Parties)

The ALJ's reading of these provisions had led him to conclude that there is no notice requirement imposed by the OEA by-laws. Charging Parties argue that:

> The clear language of these By-laws require that a contract proposal be submitted to the Representative Council for approval. Since these sections refer to proposals, this would mean that contract language should be submitted to the Representation Council before the close of negotiations. This was not done in this case. There was no Representative Council meetings or Executive Board meetings between November 8 and the ratification meeting on November 20. (R.T. Vol. #3, p. 69). Charging Parties exceptions, p. 12.

ASSOCIATION'S RESPONSE

The Association argues that Charging Parties misstate Borowiec v. Local No. 1570 of International Brotherhood of Boilermakers, etc. What it really holds, the Association argues, is that "the union is required to consider the requests of these members and give them 'notice and opportunity for hearing upon its proposed action.'" Borowiec 626 F.Supp, at 303 (Emphasis supplied by Association.) The Association argues further that, as the ALJ found, this is precisely what the Association did in the instant case.

Unit members were given notice and an opportunity for hearing upon the proposed action, that is, upon the proposed final agreement. Further, Charging Parties can point to no case law that entitles them to notice and an opportunity for hearing upon any specific contractual proposal. This is as true of tentative agreements as it is of proposals made back and forth across the bargaining table during the course of negotiations. Rocklin Teachers Professional Association (1980) PERB Decision No. 124.

The Association also maintains that its decision not to release the terms of the November 8 "concept" until the November 20, 1985 ratification meeting was rationally based.

The Association's final argument is that, while it is undisputed that Association bylaws require that the membership must be surveyed as to its wishes concerning the Association's initial contract proposals which must be approved by the Representative Council, the bylaws do not require that all subsequent proposals that develop during the course of negotiations be submitted to the Representative

Council for approval. Furthermore, there is no requirement that a tentative agreement be submitted to the Representative Council before going to the membership.

ISSUE

The issue on appeal requires this Board to answer the following question: does the Union's failure to provide notice of, and information on, a heretofore unknown bargaining proposal before the close of negotiations constitute a breach of the duty of fair representation?

DISCUSSION

The ALJ concludes that Union procedures for communicating with the bargaining unit during the negotiations process is a matter of internal Union activities and therefore outside PERB's jurisdiction. The ALJ relies on Compton Education Association (1985) PERB Decision No. 509 which cites Service Employees International Union, Local 99 (1979) PERB Decision No. 106 and El Centro Elementary Teachers Association (1982) PERB Decision No. 232 to support his conclusion. The ALJ ruled that Charging Parties' attempt to distinguish Compton on factual grounds was not persuasive since the Board viewed the type of activity discussed in Compton as internal union conduct.

We disagree with the ALJ's conclusion that the conduct being complained of here is nothing more than internal union activity over which PERB has no jurisdiction.

As we read Compton, El Centro Elementary Teachers Association and SEIU, Local 99, the jurisdictional test is not solely whether the conduct being complained of involves union procedures for

communicating with the bargaining unit. Rather, the test is whether the conduct being complained of has "a substantial impact on employees' relationship with their employer."

While here the ALJ is correct insofar as the Union procedures being complained about (i.e., the failure to provide notice of the proposal before the close of negotiations) do not, standing alone, have a substantial impact on employees' relationship with their employer, we think Charging Parties are arguing more than procedure. Charging Parties are arguing that OEA's complete failure to communicate the proposal in a timely fashion breaches the duty of fair representation because the subject of the proposal (i.e., wages) does have a substantial impact on the employees' relationship with their employer. For the above reasons, we overrule the ALJ's dismissal of this complaint insofar as it is based on jurisdictional grounds. However, as discussed below, we agree with the ALJ that Charging Parties have failed to establish a breach of the Association's duty of fair representation.

We think the crux of the Charging Parties' statement of exceptions is as follows. Charging Parties acknowledge that OEA cannot please all of the people all of the time and that OEA has no obligation to do so. However, OEA is required to give notice of contract proposals before the close of negotiations to give substance to the right of its members to have some access for communication of their views. To provide notice after the close of negotiations, as was done here, is not to provide meaningful notice. Borowiec v. Local No. 1570 of International Brotherhood of Boilermakers, etc. (1986) 626 F.Supp. 296. Extended further. Charging Parties argue for

the general proposition that the Union must represent its members with impartiality, consider the requests of its members and provide them with notice and an opportunity for hearing. Charging Parties urge that, for this right to have any meaning in the negotiation setting, the Union must be required to provide notice and an opportunity to be heard before the close of negotiations. In this vein, Charging Parties argue, contrary to the ALJ's conclusion which rests on Compton, the Board has never established a standard setting forth the minimum amount of notice required of a union to its members of its contract proposals. We agree.

To be sure, individual constituent's opinions will, conceivably, carry greater weight and influence if heard before the close of negotiations. It cannot be said however, that the Association must consult its members every time there is a proposal and/or counterproposal made that differs from previously communicated proposals during the course of negotiations. To place such a restriction on the Association would create unnecessary interference with the fluidity of the give and take that constitute negotiations. Furthermore, constituent ratification serves as a check to errant provisions with which the majority does not agree. The essential ingredient to this process is the provision of notice and an opportunity for members to be heard before the collective bargaining agreement becomes final and binding. Here, there was a ratification process. The record establishes that Charging Parties received notice, attended the ratification meeting, and knew what the salary schedule provided for. Charging Parties exercised their rights as members and voted against ratification because of the salary

provision. There, quite simply, were not enough members who shared Charging Parties' concern.

We emphasize that this decision should not be construed to require that notice of bargaining proposals be made in any particular manner or form. The procedures (whether formal or informal) used for communicating proposals or receiving input from unit members are internal union matters that do not, in and of themselves, implicate the duty of fair representation. Nonetheless, as the Board stated in El Centro, supra, the duty of fair representation implies some consideration of the views of unit members. Thus, our inquiry is limited to consideration of whether the exclusive representative has fulfilled its obligation to fairly represent unit members. That inquiry may include an examination of the effect of a particular application of the procedures adopted by the union:

It is not feasible to establish a more specific standard for the communication of proposals than that set forth in El Centro, supra. The variables of bargaining are simply too divergent and unpredictable. Instead, in each case we must evaluate the exclusive representative's conduct in light of its obligation to fairly represent its members.

We think that, under the facts presented here, Charging Parties have failed to establish that the Association acted arbitrarily discriminatorily, or in bad faith.

ORDER

Based on the foregoing, the charge is hereby DISMISSED.

Chairperson Hesse and Member Craib joined in this Decision.