STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ELMER (JOHN) SANDER, Charging Party, v. LOS RIOS COLLEGE FEDERATION OF TEACHERS, Respondent.	Case No. S-CO-321 PERB Decision No. 1111 July 21, 1995
ALFRED J. GUETLING, Charging Party, v. LOS RIOS COLLEGE FEDERATION OF TEACHERS, Respondent.	Case No. S-CO-322
ELENE E. HOLMES, Charging Party, v. LOS RIOS COLLEGE FEDERATION OF TEACHERS, Respondent.	Case No. S-CO-323
BILL K. MONROE, Charging Party, v. LOS RIOS COLLEGE FEDERATION OF TEACHERS, Respondent.	Case No. S-CO-324

MINA-MAY BROWN ROBBINS,

Charging Party,

v.

LOS RIOS COLLEGE FEDERATION OF TEACHERS,

Respondent.

Case No. S-CO-325

JOHN R. DARLING,

Charging Party,

v.

LOS RIOS COLLEGE FEDERATION OF TEACHERS,

Respondent.

Case No. S-CO-326

DOUGLAS F. GARDNER,

Charging Party,

v.

LOS RIOS COLLEGE FEDERATION OF TEACHERS,

Respondent.

Case No. S-CO-327

WILLIAM P. DIONISIO,

Charging Party,

v.

LOS RIOS COLLEGE FEDERATION OF TEACHERS,

Respondent.

Case No. S-CO-328

GLOYD ZELLER,

Charging Party,

v.

LOS RIOS COLLEGE FEDERATION OF TEACHERS,

Respondent.

Case No. S-CO-329

FRANK BAKER,

Charging Party,

v.

LOS RIOS COLLEGE FEDERATION OF TEACHERS,

Respondent.

Case No. S-CO-330

ROBERT E. PROAPS, JR.,

Charging Party,

v.

LOS RIOS COLLEGE FEDERATION OF TEACHERS,

Respondent.

Case No. S-CO-331

DONALD BRYANT KENT,

Charging Party,

v.

LOS RIOS COLLEGE FEDERATION OF TEACHERS,

Respondent.

Case No. S-CO-332

NOEL LANCE BERNATH,

Charging Party,

v.

LOS RIOS COLLEGE FEDERATION OF TEACHERS,

Respondent.

Case No. S-CO-334

RYAN POLSTRA,

Charging Party,

v.

LOS RIOS COLLEGE FEDERATION OF TEACHERS,

Respondent.

Case No. S-CO-335

Appearances: Elmer (John) Sander, Alfred J. Guetling, Elene E. Holmes, Bill K. Monroe, Mina-May Brown Robbins, John R. Darling, William P. Dionisio, Frank Baker, Noel Lance Bernath, Ryan Polstra, on their own behalf; Bill Monroe, on behalf of Douglas Gardner; Annette M. Deglow, on behalf of Gloyd Zeller; Cynthia D. Kent, on behalf of Donald Bryant Kent; Law Offices of Robert J. Bezemek by Adam H. Birnhak, Attorney, for Los Rios College Federation of Teachers.

Before Carlyle, Garcia and Johnson, Members.

DECISION

GARCIA, Member: This consolidated case is before the Public Employment Relations Board (PERB or Board) on appeal by Elmer (John) Sander, Alfred J. Guetling, Elene E. Holmes, Bill K. Monroe, Mina-May Brown Robbins, Douglas F. Gardner, Gloyd Zeller, Frank Baker, Donald Bryant Kent, William P. Dionisio, Noel Lance

Bernath, and Ryan Polstra (Charging Parties)[1] to a PERB administrative law judge's (ALJ) proposed decision (attached). The ALJ dismissed the unfair practice charges and complaint, which alleged violations of section 3543.6(b) of the Educational Employment Relations Act (EERA).[2] After reviewing the entire record in this case, including the proposed decision, transcript, exhibits, the exceptions and the response filed by the Los Rios College Federation of Teachers (Federation), the Board hereby adopts the ALJ's proposed decision consistent with the following discussion.

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[1]On May 17, 1995, Charging Party Robert E. Proaps, Jr. (Case No. S-CO-331) notified the Board that he had not filed exceptions to the proposed decision. The appeals assistant confirmed this by letter on May 22, 1995.

On May 26, 1995, Charging Party John R. Darling requested that the exceptions in Case No. S-CO-326 be withdrawn. The Board hereby grants the request for withdrawal in Case No. S-CO-326.

Therefore, the Board's Order in this Decision does not apply to Case No. S-CO-331 or Case No. S-CO-326. However, the ALJ's proposed decision is binding on the parties in Case No. S-CO-331 and Case No. S-CO-326.

[2]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 states, in pertinent part:

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

CHARGING PARTIES' EXCEPTIONS

The Charging Parties' statement of exceptions reads, in pertinent part:

> We hereby appeal the decision . . . on the grounds that the evidence presented does in fact support that the Federation by its acts and conduct outlined and presented within the record . . . did in fact act contrary to their obligation described in Government Code section 3544.9 and thereby violated Government Code section 3543.6(b) of the [EERA] with respect to our employment rights.
>
> We respectfully submit that the Regional Attorney erred in his findings. . . . the record supports that the Federation failed to meet its duty of fair representation with regard to their representation of 58 grievances filed by the [charging parties], thereby violating subdivision (b) of section 3543.6.

FEDERATION'S RESPONSE TO EXCEPTIONS

The Federation briefly responded to the statement of exceptions, noting that:

> The Board does not consider exceptions which do not comply with PERB Regulation 32300. Janowicz v. State of California (Department of Youth Authority) (1995) PERB Order No. 1080-S [Janowicz]. The charging parties' statement of exceptions does not comply with PERB Reg. 32300 because it does not: (1) state the specific issues of procedure, fact, law or rationale to which each exception is taken; (2) identify the page or part of the decision to which each exception is taken; (3) designate by page citation or exhibit number, the portions of the record, if any, relied upon for each exception; and (4) state the grounds for each exception.

DISCUSSION

The Federation's citation to Janowicz is appropriate. In essence, the "Statement of Exceptions" is nothing more than a repetition of the allegations in the original unfair practice charges, coupled with a refutation of the ALJ's conclusions. The exceptions do not identify the grounds on which exception is taken, much less provide the specific types of information required in PERB Regulation 32300.[3] We do not consider exceptions that fail to comply with the standard.

ORDER

The Board hereby AFFIRMS the proposed decision in Case Nos. S-CO-321, S-CO-322, S-CO-323, S-CO-324, S-CO-325, S-CO-327, S-CO-328, S-CO-329, S-CO-330, S-CO-332, S-CO-334 and S-CO-335.

Members Carlyle and Johnson joined in this Decision.

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

ELMER (JOHN) SANDER, Charging Party, v. LOS RIOS COLLEGE FEDERATION OF TEACHERS, Respondent.	Unfair Practice Case No. S-CO-321 PROPOSED DECISION (4/6/95)
ALFRED J. GUETLING, Charging Party, v. LOS RIOS COLLEGE FEDERATION OF TEACHERS, Respondent.	Case No. S-CO-322
ELENE E. HOLMES, Charging Party, v. LOS RIOS COLLEGE FEDERATION OF TEACHERS, Respondent.	Case No. S-CO-323
BILL K. MONROE, Charging Party, v. LOS RIOS COLLEGE FEDERATION OF TEACHERS, Respondent.	Case No. S-CO-324

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ROBERT E. PROAPS, JR., Charging Party, v. LOS RIOS COLLEGE FEDERATION OF TEACHERS, Respondent.	Case No. S-CO-331
DONALD BRYANT KENT, Charging Party, v. LOS RIOS COLLEGE FEDERATION OF TEACHERS, Respondent.	Case No. S-CO-332

NOEL LANCE BERNATH, Charging Party, v. LOS RIOS COLLEGE FEDERATION OF TEACHERS, Respondent.	Case No. S-CO-334
RYAN POLSTRA, Charging Party, v. LOS RIOS COLLEGE FEDERATION OF TEACHERS, Respondent.	Case No. S-CO-335

Appearances: Cynthia Kent, Attorney, for Donald Bryant Kent, Michael K. Brady, Attorney, for Elene E. Holmes, Annette Deglow for Gloyd Zeller, and Elmer (John) Sander, Alfred J. Guetling, Bill K. Monroe, Mina-May Brown Robbins, John R. Darling, Douglas Gardner, William Dionisio, Frank Baker, Robert E. Proaps, Jr., Noel Lance Bernath and Ryan Polstra, on their own behalf; Law Offices of Robert J. Bezemek by Adam H. Birnhak, Attorney, for Los Rios College Federation of Teachers.

Before Allen R. Link, Administrative Law Judge.

INTRODUCTION

The complaint in this case alleges that at various times in early 1993, Annette M. Deglow (Deglow) and the charging parties, all of whom are part-time instructors and were employed by the Los Rios Community College District (District) prior to 1967 (pre-67 instructors), filed collective bargaining agreement (CBA) grievances. The grievances concerned (1) seniority, (2) longevity pay, (3) sick leave credits, and (4) retirement credits. Not all of the charging parties filed grievances on all

of these subjects. The complaint further alleges that the Los Rios College Federation of Teachers (Federation) took the following negative action(s) with regard to these grievances: (1) made negative comments about Deglow to the District's personnel director; (2) informed Deglow that it would only be interested in her grievances if she and the other pre-67 instructors became Federation members; (3) refused to pursue the subject grievances to a Board of Review hearing; and (4) rejected requests for reconsideration of this refusal.

The Federation responds that it fairly represented the pre-67 instructors and that their grievances were either collaterally estopped or were outside the ambit of matters within the Federation's control.

PROCEDURAL HISTORY

Unfair practice charges were filed on August 8, 1994, by Elmer (John) Sander, Alfred J. Guetling, Elene E. Holmes, Bill K. Monroe, Mina-May Brown Robbins, John R. Darling, and Douglas F. Gardner (PERB Case Nos. S-CO-321 through S-CO-327), on August 11, 1994, by Gloyd Zeller, Frank Baker, Robert E. Proaps, Jr., Donald Bryant Kent, and William P. Dionisio (S-CO-328 through S-CO-332), on August 17, 1994, by Noel Lance Bernath (S-CO-334), and on August 19, 1994, by Ryan Polstra (S-CO-335), with the Public Employment Relations Board (PERB or Board) against the Federation

alleging violations of various sections of the Educational Employment Relations Act (EERA or Act).[1]

On August 18, 1994, after an investigation of the charges, PERB's Office of the General Counsel issued a complaint alleging violations of subdivision (b) of section 3543.6.[2] On September 9, 1994, an informal conference was held in an attempt to reach voluntary settlement. No settlement was reached.

On September 1, 1994, the respondent filed its answer to the complaint.

A formal hearing was held by the undersigned on December 8 and 9, 1994. The hearing was abbreviated due to the incorporation by reference of the transcript and exhibits of a previous hearing on the same subject filed by Deglow.[3] The formal hearing in that case, Los Rios College Federation of Teachers (PERB Case No. S-CO-314), was heard in August of 1994.

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[1]EERA is codified at Government Code section 3540 et seq. All section references, unless otherwise noted, are to the Government Code.

[2]Subdivision (b) of section 3543.6, in pertinent part, states:

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

[3]No transcripts were prepared nor briefs submitted in this case due to the incorporation of the record of the previous case.

Two of the allegations in this case concern direct Federation contact with, or comments about, Deglow.

Each side waived post-hearing briefs, but submission of additional documentation delayed the submission date until December 19, 1994.

FINDINGS OF FACT

Jurisdiction

It is found that the charging parties are public school employees, and the respondent is an employee organization and exclusive representative, within the meaning of section 3540.1.

Background

On July 1, 1965, as a result of a general population election, the Los Rios Junior College District assumed the operation of the American River College and Sacramento City College. American River College was, at that time, an independent operating junior college district. However, Sacramento Junior/City College had been a part of the Sacramento City Unified School District since 1916. Through this merger process, the pre-67 instructors became employees of the new district, which was renamed Los Rios Community College District in 1970.

During this merger process the pre-67 instructors believed they were not given the full quantum of rights they were entitled to by law. Most of the grievances that are the subject of this case involve allegations that the Federation breached its duty of

fair representation with regard their attempts to attain these rights from the District.

The Federation and the District were parties to a CBA, effective July 1, 1990 to June 30, 1993. On August 25, 1993, the parties signed a successor CBA, effective July 1, 1993 to June 30, 1996.

Seniority Grievance

In 1980-81, Deglow filed a grievance, similar to the one filed by her and the charging parties in 1993, over her seniority date on the certificated register (a register of all District instructors in chronological employment hire date order). The Federation took the identical position on this grievance that it took with regard to the previous one, that the seniority date issue did not have an "adverse affect," on Deglow or any of the charging parties and therefore did not fall within the CBA definition of grievance.[4] On June 30, 1981, Deglow reacted to the Federation's opposition by filing an unfair practice charge over its refusal to take her grievance to the Board of Review, the last step in the CBA grievance procedure.

A PERB Administrative Law Judge (ALJ) held that Deglow was "seeking the expenditure of Federation funds to challenge an issue that might never arise." He went on to state that the

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[4]The CBA defines a grievance as a complaint by:

> a. a unit member that she/he has been adversely affected by a misrepresentation, misapplication or violation of the provisions of this Agreement, . . . [Emphasis added.]

Federation had legitimate reasons for not pursuing the grievance and that it informed Deglow of those reasons. (See Los Rios College Federation of Teachers, Local 2279, CFT/AFT, AFL-CIO (1982) PERB Decision No. HO-U-147, pp. 39-40.) Although the charging parties were not in privity with Deglow in the 1981 charge, issues that are identical to those presented in this case were litigated once before and found to be insufficient to justify a favorable decision.

Deglow's 1993 grievance states that her "current seniority date on the Certificated Employment Register does not reflect my relative date of employment consistent with past policies and procedures utilized for others in my 'position'."

Longevity Pay

On December 5, 1990, Deglow and other pre-67 instructors, collectively filed an unfair practice charge alleging the Federation violated EERA by agreeing to a CBA longevity provision. This CBA provision granted a "4% longevity increase after 20 years in Los Rios." Shortly thereafter, the Federation and the District modified this provision to read:

> After 20 years of full-time, tenure-track service with Los Rios, a longevity increment will be awarded which is 4% of the appropriate range and step.

The Board dismissed the charge in Los Rios College Federation of Teachers, CFT/AFT (Baker et al.) (1991) PERB Decision No. 877 (Baker et al.) for two reasons. First, it stated that the pre-67 instructors waited until more than six months after the subject Federation action to file their charge.

EERA prohibits PERB from issuing a complaint under such circumstances.[5] The second reason was that an exclusive representative is not obligated to bargain a particular item benefitting certain unit member(s). The charge was dismissed because conduct under the "arbitrary, discriminatory or in bad faith" standard requires a showing that the exclusive representative's conduct was without a rational basis or was devoid of honest judgment. Such a showing was not made in that case.

On January 11, 1993, Deglow filed a new grievance alleging, once again, that the District was violating the CBA by not granting her, and by implication the other pre-67 instructors, the 4 percent longevity increase.

Retirement Credit Grievance

Deglow's January 11, 1993, retirement credit grievance, which complains of the same District action as that of the other charging parties, states that her "STRS[6] records indicate that I have not been provided service credit consistent with my

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[5]Section 3541.5 states, in pertinent part:

> (a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following:
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> (1) Issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge; . . .

[6]STRS is an acronym for the State Teachers Retirement System.

probationary/regular status in the early years of my employment" (emphasis added). The allegations contained in the grievances filed by the other pre-67 instructors parallel this chronological period.

The Federation was first elected exclusive representative of the District's instructor bargaining unit in 1977, long after the pre-67 instructors were allegedly harmed by the District.

Sick Leave Credit Grievance

Deglow's January 11, 1993, sick leave credit grievance, which complains of the same District action as that of the other charging parties, states that "[m]y sick leave records indicate that I have not been provided sick leave credit consistent with my probationary status in the early years of my employment" (emphasis added). Deglow was on probationary status from September 1967 through the end of the 1973-74 school year. As stated above, the Federation became the exclusive representative in 1977.

Federation's Alleged Actions

Negative Perrone Comments about Deglow to Personnel Manager

This charge concerns a conversation between a Federation employee, the District's personnel manager and another District instructor in which certain derogatory statements were made about Deglow. She filed an identical unfair practice charge based on this same conversation against the District. PERB eventually dismissed the charge, incorporating a board agent's warning and dismissal letters. (See Los Rios Community College District

(1994) PERB Decision No. 1048.) Those letters described the conversation as follows:

> On July 20, 1993, Michael Lowman, a part time instructor for the Employer, Mary Jones, the Employer's Director of Personnel, and Robert Perrone, the Federation's Executive Director met for a grievance hearing concerning a separate matter involving Lowman.[7] According to Lowman, the following exchange took place between Jones and Perrone at that meeting:
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> Jones: "And also I had to deal with Deglow today too, so I'm not in a very good mood."
>
> Perrone: "Oh right, Deglow, I can understand why you wouldn't be in a very good mood."
>
> Jones: "Yeh, she's filing a grievance because she says nobody likes her and you know what? It's true, nobody does."
>
> Jones and Perrone: Laughter.
>
> Perrone: "Oh I've dealt with Deglow. I know what you're faced with."
>
> Jones and Perrone: Laughter.

<u>Federation Conditioning Action on Membership</u>

Deglow stated, in her first amended charge, that during a telephone conversation in late November 1993, Perrone told her that "the Union membership was not interested in her issue and pre-67 issues in general; however if Deglow and the other Pre-67 instructors were to join the Union the issues could be considered." Perrone denies making this statement, or anything like it.

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[7]Lowman is not a pre-67 instructor nor a grievant in any of the subject grievances.

As no one else was a party to this conversation and both Perrone and Deglow testified in a credible manner, a resolution of the conflict requires an examination of other factors.

First, in a letter dated December 11, 1993, several of the pre-67 instructors wrote to Federation President Linda Cullings-Hartin (Cullings-Hartin) complaining about the Federation's inactivity on behalf of their longevity grievances and requesting a meeting with her. No mention was made of Perrone's alleged statement conditioning Federation consideration on membership.

Second, on January 10, 1994, Deglow filed her initial charge. No mention was made of the Perrone statement. Certainly, this statement could have provided evidence to support an inference of animus towards the pre-67 instructors and would, if proven, be a factor in any failure to meet a duty of fair representation charge. However, it was not until February 16, when she filed her first amended charge, that she first made the allegation about Perrone's statement. Granted, the initial charge was not as detailed as the amended one, but there was sufficient detail in it to set forth other factual allegations that she deemed persuasive. Deglow's initial allegations included both the negative statement made by Perrone to the District's personnel director, and a slight that she perceived in a Perrone letter to one of the other pre-67 instructors. The "conditioning action on membership" allegation would have outweighed either of these incidents in any "inference of animus" scale.

Third, at the time Perrone allegedly made the subject statement, several of the pre-67 instructors were members of the Federation. Perrone was aware of that fact at that time.

Lastly, Perrone is an experienced, journeyman labor relations professional. Deglow has made no secret of her membership in, and preference for, CTA becoming the unit's exclusive representative. She has been a leader in CTA's various attempts to decertify the Federation as the unit's bargaining representative. It would have been both stupid and foolhardy for him to overtly make such an improper statement to Deglow. Perrone is neither stupid nor foolhardy. He would have been very aware that (1) this type of statement would not cause Deglow, after years of battling the Federation, to join it, and (2) Deglow would use the statement against him in subsequent proceedings.

However, as stated above, Deglow's testimony was both forthright and credible. The evidence supports a finding that although Perrone did not make the alleged statement, she misinterpreted something he said to arrive at a conclusion that the "conditioning action on membership" statement was made.

Federation's Refusal to Take Grievances to Board of Review

On February 23, 1994, the Federation declined to take any of the pre-67 instructor grievances to the District's Board of Review, the last step in the grievance procedure. Deglow believes that this decision was based on animus towards her and the other pre-67 instructors. The Federation insists that its

decision was not based on animus but rather on two other factors. The Federation's attorney stated, first, that the grievances would probably not be successful at the grievance level, and second, even if there was a favorable decision from the Board of Review, it was likely the District's governing board would overturn such decision. The CBA has no provision for binding arbitration. The Federation has never taken a grievance to the Board of Review in the past six years.

ISSUES

Did the Federation fail to meet its duty of fair representation with regard to the pre-67 instructor grievances, thereby violating subdivision (b) of section 3543.6?

CONCLUSIONS OF LAW

Standard for Duty of Fair Representation

In order to prove a violation of the duty of fair representation,[8] the charging parties must show that the employee organization's conduct was arbitrary, discriminatory or in bad faith. (Rocklin Teachers Professional Association (1980) PERB Decision No. 124 (Rocklin), citing precedent set by the National Labor Relations Board and affirmed by the U. S. Supreme Court in Vaca v. Sipes (1967) 386 U.S. 171 [64 LRRM 2369].)

[8]The duty of fair representation is set forth in section 3544.9. It states:

> 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.

The Board in Rocklin, affirmed this concept as set forth in Griffin v. United Auto Workers (4th Cir. 1972) 469 F.2d 181 [81 LRRM 2485], as follows:

> A union must conform its behavior to each of these standards. First, it must treat all factions and segments of its membership without hostility or discrimination. Next, the broad discretion of the union in asserting the rights of its members must be exercised in complete good faith and honesty. Finally, the union must avoid arbitrary conduct. Each of these requirements represents a distinct and separate obligation, the breach of which may constitute the basis of civil action.
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> . . . .
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> The repeated references in Vaca to "arbitrary" union conduct reflected a calculated broadening of the fair representation standard. [Citations] Without any hostile motive of discrimination and in complete good faith, a union may nevertheless pursue a course of action or inaction that is so unreasonable and arbitrary as to constitute a violation of the duty of fair representation.

Charging Party's Allegations

The complaint cites four factual examples of the Federation allegedly failing to meet its duty of fair representation. The first two will be discussed to determine if either of them constitute an independent or per se violation of the Act and/or support an inference of unlawful motivation on the part of the Federation towards Deglow or the pre-67 instructors. With regard to the third, the Federation's failure to take the above-described grievances to the Board of Review, the merits of the grievances themselves will be evaluated to determine whether the

Federation's action was arbitrary, discriminatory or in bad faith. If the Federation's actions regarding the grievances are deemed proper, it would be justified in rejecting the charging parties' requests for reconsideration, the fourth charge alleged in the complaint.

Negative Perrone Comments about Deglow to Personnel Manager

This conversation was discussed at length in the Board's decision in Deglow's charge against the District. (Los Rios Community College District, supra, PERB Decision No. 1048.) In that decision, the Board stated, in pertinent part:

> The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment. (Emphasis added; footnote omitted.)
>
> The instant allegation does not meet the standard established under Novato, and Palo Verde Unified School District, supra, and Newark.[9] The charge does not allege facts to establish how (using an objective test) the action of the Employer in making disparaging remarks about Deglow in the presence of another employee caused harm or had "impact on the employee's employment." However understandable Deglow's subjective reaction to this incident, the facts alleged here do not bring the conduct within the ambit of a violation of EERA and the allegation must be dismissed.
>
> Statements made by an employer are to be viewed in their overall context (i.e., in light of surrounding circumstances) to determine if they have a coercive meaning.

[9]Novato Unified School District (1982) PERB Decision No. 210; Palo Verde Unified School District (1988) PERB Decision No. 689; and Newark Unified School District (1991) PERB Decision No. 864.

> (Los Angeles Unified School District (1988) PERB Decision No. 659; emphasis added; footnotes and citations omitted.)
>
> The allegations here are free of any statements or conduct which has, on its face, "coercive meaning."

Although the Board's decision concerned employer action, it was examining the same dialogue to which Deglow and the pre-67 instructors are objecting in this case.

An examination of the subject statements, viewed in there overall context, dictates a conclusion that they neither caused harm to, nor had an adverse impact on the employee's (Deglow's or any of the pre-67 instructors') employment. Nor did they have a "coercive meaning" within the context of Los Angeles Unified School District (1988) PERB Decision No. 659.

Granted, disparaging remarks about an employee to an employer by the exclusive representative does lend support to an inference of unlawful motivation, but the statements themselves do not constitute an independent violation of the Act.

Federation Conditioning Action on Membership

It was found, supra, that Perrone did not make the statements Deglow attributed to him. As there was insufficient evidence to determine the actual statement that Deglow misinterpreted, there can be no conclusion drawn that (1) there was an independent violation of the Act, or (2) that this incident supported an inference of improper motivation on the part of the Federation against either Deglow or any of the other pre-67 instructors.

Charging Party's Grievances

A union is not required to process a grievance if the chances for success are minimal. (United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258.)

Seniority Grievance

In 1982, an ALJ held that Deglow's position on the certificated employment register was a hypothetical issue and that the Federation had legitimate reasons not to take it to the Board of Review. (Los Rios College Federation of Teachers, Local 2279, CFT/AFT, AFL-CIO, supra, PERB Decision No. HO-U-147, pp. 39-40.) Although this decision is not precedential, it was binding on the parties. The decision clearly shows that this same issue was previously litigated and the position the pre-67 instructors are taking in this case was not supported by the ALJ.

Deglow insists that this grievance is different than the 1982 matter as she is presently complaining about her position on the certificated employment register, whereas before she was complaining about not being placed on the register at all. This argument sets forth a distinction without a difference. The certificated employment register, and the pre-67 instructors' positions on it, will only affect their employment status in the unlikely event a reduction in force were to jeopardize their continued employment status. Absent such a threat, which is rather remote considering the years of seniority they have with the District, the issue is only hypothetical.

The evidence supports a conclusion that the Federation's decision not to take this grievance to the Board of Review was neither without a rational basis nor devoid of honest judgement.

Longevity Pay Grievance

The Federation is not obligated to bargain a particular item benefiting certain unit members. (Baker et al.)

Collateral estoppel traditionally has barred relitigation of an issue if "(1) the issue necessarily decided at the previous [proceeding] is identical to the one which is sought to be relitigated; (2) the previous [proceeding] resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior [proceeding]. [Citation.]" (People v. Simms, 32 Cal.3d 468, 484 [186 Cal.Rptr. 77].)

In this case, the three part collateral estoppel test has been met: (1) the identical issue, the 20-year bonus, was decided in a prior PERB proceeding; (2) the previous proceeding resulted in a final judgment on the merits; and (3) the pre-67 instructors were parties to the prior proceeding. Thus, the doctrine of collateral estoppel prohibits them from complaining about the Federation breaching its duty of fair representation when it failed to take the 20-year bonus grievances before the Board of Review.

The pre-67 instructors are also barred by the provisions of section 3541.5(a)(1) (fn. 5, p. 7) which prohibit the issuance of a complaint based on acts occurring more than six months prior to

the filing of the charge. The pre-67 instructors are complaining about Federation action that took place in the late 1980s. PERB determined in Baker et al. that the previous charge on this subject was time-barred. There has been no credible evidence to show that anything has occurred since that time to negate that decision.

In addition, the evidence supports a conclusion that the Federation's decision not to take this grievance to the Board of Review was neither without a rational basis nor devoid of honest judgment.

Retirement Records and Sick Leave Credit Grievances

Deglow's and the other pre-67 instructors' retirement and sick leave credit grievances complain of District action at the time of its creation, long before the first CBA was executed. Therefore, the Federation owes no duty of fair representation to the pre-67 instructors with respect to these matters. (San Francisco Classroom Teachers Association, CTA/NEA (1983) PERB Decision No. 544.)

Any claim the pre-67 instructors may have to sick leave and/or retirement credits for pre-collective bargaining service arises from District policy and/or Education Code provisions. "The duty of fair representation does not extend to a forum that has no connection with collective bargaining, . . ." (Los Rios College Federation of Teachers, Local 2279, CFT/AFT, AFL-CIO (1993) PERB Decision No. 992.) "There is no duty of fair representation owed to a unit member unless the exclusive

representative possesses the exclusive means by which such employee can obtain a particular remedy. . . ." (California State Employees' Association (Darzins) (1985) PERB Decision No. 546-S.)

In addition, the grievances do not adequately allege a violation(s) of CBA provisions. Deglow's retirement credit grievance cites Article 3 and 17 as CBA provisions that were alleged to have been violated. Article 3 does not mention STRS contributions except in the retiree health benefit and pre-retirement workload areas. Article 17 is a one paragraph statement that the parties agree not to discriminate against any faculty member on the basis of race, color, creed, national origin, religion, sex, age, sexual preference, political beliefs, political activities, political affiliation, or marital status.

The allegation of a violation of these very general CBA provisions, given the specific nature of the complaints about inadequate retirement credits, is insufficient to meet the CBA definition of a grievance (fn. 4, p. 5) and are, therefore, not grievable.

The evidence supports a conclusion that the Federation's decision not to take these grievances to the Board of Review were neither without a rational basis nor devoid of honest judgment.

Summary

It is determined that the Federation did not breach its duty of fair representation regarding allegations about (1) negative comments by Perrone about Deglow, (2) informing Deglow that it

would only be interested in her grievances if she and the other pre-67 instructors became Federation members, (3) refusing to pursue the subject grievances to a Board of Review hearing, or (4) rejecting requests for reconsideration of this refusal.

PROPOSED ORDER

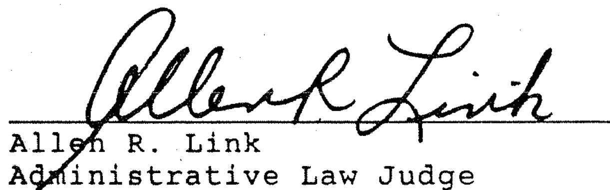
Based on the foregoing findings of fact, conclusions of law and the entire record in this case, it is found that the Los Rios College Federation of Teachers did not violate subdivision (b) of section 3543.6 of the Educational Employment Relations Act. It is ORDERED that all aspects of the charge and complaint in this case are hereby DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a request for an extension of time to file exceptions or a statement of exceptions with the Board itself.

This Proposed Decision was issued without the production of a written transcript of the formal hearing. If a transcript of the hearing is needed for filing exceptions, a request for an extension of time to file exceptions must be filed with the Board itself (Cal. Code of Regs., tit. 8, sec. 32132). The request for an extension of time must be accompanied by a completed transcript order form (attached hereto). (The same shall apply to any response to exceptions.)

In accordance with PERB regulations, the statement of exceptions must be filed with the Board itself within 20 days of service of this Decision or upon service of the transcript at the

headquarters office in Sacramento. The statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code of Regs., tit. 8, sec. 32300.) A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing ". . . or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . ." (Cal. Code of Regs., tit. 8, sec. 32135; Cal. Code of Civ. Proc., sec. 1013 shall apply.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (Cal. Code of Regs., tit. 8, secs. 32300, 32305 and 32140.)



Allen R. Link
Administrative Law Judge