STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

WANDA ROSS-EZOZO, Charging Party, v. AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, DISTRICT COUNCIL 57, Respondent.	)	Case No. LA-CO-64-H PERB Decision No. 1370-H January 3, 2000

Appearance: Wanda Ross-Ezozo, on her own behalf.

Before Caffrey, Chairman; Dyer and Amador, Members.

DECISION

DYER, Member: This case comes before the Public Employment Relations Board (Board) on appeal from a Board agent's dismissal (attached) of Wanda Ross-Ezozo's (Ross-Ezozo) unfair practice charge. Ross-Ezozo's charge alleges that the American Federation of State, County and Municipal Employees, District Council 57 breached its duty of fair representation in violation of the Higher Education Employer-Employee Relations Act (HEERA).[1]

[1]HEERA is codified at Government Code section 3560 et seq. Although Ross-Ezozo did not specify under what section(s) the charge was filed, the Board has decided this matter under HEERA sections 3571.1 and 3578.

Section 3571.1 provides, 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

The Board has reviewed the entire record in this case, including the unfair practice charge, the warning and dismissal letters and Ross-Ezozo's appeal. The Board finds the warning and dismissal letters to be free from prejudicial error and adopts them as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. LA-C0-64-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Caffrey and Member Amador joined in this Decision.

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guaranteed by this chapter.

(e) Fail to represent fairly and impartially all the employees in the unit for which it is the exclusive representative.

Section 3578 provides:

The employee organization recognized or certified as the exclusive representative shall represent all employees in the unit, fairly and impartially. A breach of this duty shall be deemed to have occurred if the employee organization's conduct in representation is arbitrary, discriminatory, or in bad faith.

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Blvd., Suite 1435
Los Angeles, CA 90010-2334
(213) 736-3127

August 20, 1999

Wanda Ross-Ezozo
3 6914 Jenna Lane
Palmdale, CA 93550

Re: Wanda Ross-Ezozo v. American Federation of State. County and Municipal Employees, District Council 57
Unfair Practice Charge No. LA-CO-64-H, First Amended Charge
DISMISSAL AND REFUSAL TO ISSUE A COMPLAINT

Dear Ms. Ezozo:

In this charge filed on April 13, 1999 by Wanda Faye Ezozo (also known as Wanda Ross-Ezozo) against the American Federation of State, County and Municipal Employees, Council 57 (AFSCME), it is alleged that AFSCME violated the duty of fair representation (DFR) in its processing of a grievance after Ms. Ezozo was laid off from the position of Hospital Lab Technician III in the Department of Ophthalmology, Jules Stein Eye Institute at UCLA, effective October 24, 1997. This conduct is alleged to violate Government Code section 3560 et. seq. of the HEERA.

I indicated to you, in my attached letter dated August 12, 1999, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to August 19, 1999, the charge would be dismissed.

On August 17, 1999, I received your First Amended Charge. It appears to provide additional facts responding to a key portion of my letter dated August 12, 1999. My letter stated, in part,

> The facts demonstrate that AFSCME processed the Ezozo grievance (regarding seniority and casual employees) all the way to binding arbitration, which was decided in the University's favor on February 27, 1999. The facts do not demonstrate that AFSCME's conduct was arbitrary, discriminatory or in bad faith. Mr. Keith Uriarte of AFSCME executed the grievance form on October 14, 199 7. The grievance was taken over in or about November 1997 by Mr. Battle at Step 2. It is unclear whether the above race discrimination allegations were brought to AFSCME's attention by Ms. Ezozo at Steps I or II to allow for a possible amendment to the grievance. Mr. Battle appealed to

> Step III on February 19, 1998. According to the collective bargaining agreement, a grievance may be filed by an individual employee or AFSCME. See Article 6, section A.I and 4. This would permit an employee to raise in the grievance all the allegations he or she wishes to. Also, it appears that the race discrimination allegations may have not have been brought to AFSCME by Ms. Ezozo until May 21, 1998, at the time the AFSCME Grievance Fact Sheet was executed by Ms. Ezozo. Even if AFSCME had knowledge of the alleged race discrimination allegations at Steps I and II, a rational decision to not pursue, or possible negligence in not pursuing this defense to the layoff does not violate the DFR. Also, the fact one of the grievants was Caucasian may have dissuaded AFSCME from bringing this discrimination claim. A union is not under an obligation to process a claim which it feels it cannot win. Finally, it is unclear that this discrimination claim was arbitrable since at least one of the issues was not arbitrable. See Article 4, section E.3 above.
>
> The facts regarding the offer of a 50% position are unclear because initially, Ms. Ezozo declined such a position. Even if AFSCME was negligent in not assisting Ms. Ezozo to obtain such a position, such conduct does not violate the DFR. This is because no bad faith has been demonstrated.

The First Amended Charge discusses three areas, the alleged failure of AFSCME to arbitrate the claim of discrimination, AFSCME's alleged failure to assist Ms. Ezozo in obtaining a 50% position, and AFSCME's alleged failure to arbitrate the fact that Ms. Ezozo's and Ms. Yadegaran's layoffs were unjustified since they were replaced by casual employees.

The Amended Charge indicates, in part, that Ms. Ezozo met with Mr. Battle after she received a copy of the October 14, 1997 grievance. Ms. Ezozo believed the reasons for the layoff were based on discrimination, and wished to raise the issue of discrimination. Mr. Battle is alleged to have replied,

> The union contract has no provisions for [her] discrimination complaint, therefore, [Ms. Ezozo] cannot file a grievance for discrimination. If [she] wanted to file a complaint of discrimination, [she] would have to do that on [her] own....

Ms. Ezozo's attorney, George Robertie, advised Mr. Battle that Article 4 of the contract, Nondiscrimination in Employment, provided a vehicle for raising the discrimination issue. It is asserted that Mr. Battle told Mr. Robertie, "[her] discrimination complaint fits in with everything else and it would be brought out in the step II grievance meeting." The reason Ms. Ezozo did

not physically file a discrimination complaint in the beginning was that Mr. Battle advised her and Mr. Robertie that " [it] was acknowledged and it would in fact be arbitrated along with the mentioned grievances."

As noted in my letter dated August 12, 1999, Ms. Ezozo has alleged that the exclusive representative denied her the right to fair representation guaranteed by EERA section 3544.9 and thereby violated section 3543.6(b). The duty of fair representation imposed on the exclusive representative extends to grievance handling. (Fremont Teachers Association (King) (1980) PERB Decision No. 125; United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258.) In order to state a prima facie violation of this section of EERA, Ms. Ezozo must show that AFSCME's conduct was arbitrary, discriminatory or in bad faith. In United Teachers of Los Angeles (Collins). the Public Employment Relations 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. [Citations.]
>
> 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.

In order to state a prima facie case of arbitrary conduct violating the duty of fair representation, a Charging Party:

> " . . . 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. (Emphasis added.)" [Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Decision No. 332, p. 9, citing Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124.]

I do not find the above conduct by AFSCME to be arbitrary, discriminatory or in bad faith. Article 4, Nondiscrimination in employment, section A.I prohibits discrimination on the basis of race. Article 4, section E.3, discussed in my letter dated August 12, 1999, provides that grievances alleging a violation of

Article 4 and a non-arbitrable provision of the contract are not eligible for appeal to Article 7, Arbitration Procedure of the agreement. The basis for the grievance was in part Article 13, section C.3, Selection for Layoff, which discusses indefinite layoff procedures and order. Here the University's decision under section C.3 to retain employees less senior than the grievants, was not subject to the Article 7, Arbitration Procedure of the agreement given the specific manner in which this section is written. Accordingly, a grievance containing the above Articles could not have been arbitrated. Also, as Ms. Yadegaran, the co-grievant was Caucasian, it does not appear that AFSCME's decision not to arbitrate the issue of alleged discrimination was arbitrary, discriminatory or in bad faith.

The second area raised in the Amended Charge involves AFSCME's alleged failure to assist Ms. Ezozo in obtaining a 50% position. It is asserted that during the Step II grievance meeting, management asked if she would accept a 50% position. Ms. Ezozo initially declined as she felt that the reasons for offering the 50% position and not the 100% position were discriminatory. As Mr. Battle indicated that Ms. Ezozo should accept the 50% position, she accepted it "with the understanding that Mr. Battle would still arbitrate the offer of the 50% position was based on discrimination." Subsequently, management did not acknowledge Ms. Ezozo's acceptance of the 50% position, and although she requested an opportunity to file a grievance, Mr. Battle did not "[give her] the opportunity [to] grieve this issue..." "From that point on [her] phone calls were not returned and he avoided." (sic)

It appears as if the University, during the grievance procedure, offered Ms. Ezozo a 50% position to settle the grievance. Ms. Ezozo wanted the 50% position, and to continue to process her grievance, contending that this offer was based on discrimination. This was apparently unacceptable. Based on these facts, there is nothing to indicate that AFSCME's decision not to file a grievance concerning the 50% position was arbitrary, discriminatory or in bad faith. In addition, Ms. Ezozo's statement that she wished to accept the 50% position and continue to process a grievance was not an acceptance of the settlement offer. Thus, there was no 50% position to obtain.

The third area raised in the Amended Charge concerns AFSCME's alleged failure to arbitrate the fact that Ms. Ezozo's and Ms. Yadegaran's layoffs were unjustified since they were replaced by casual employees. It is asserted that Mr. Battle misled Ms. Ezozo and Ms. Yadegaran to think he would arbitrate the fact that the layoffs were not justified since they were replaced by casual employees; and that "there was no need to physically file the complaint." Unknown to the grievants, Mr. Battle made a decision not to arbitrate this potential grievance and stated the reason,

"Mr. Uriarte [Ezozo's initial AFSCME Representative] wrote down the wrong Article (Article 34B1.)."

Article 34, Positions, Section B, Casual Positions, subsection 1 provides,

> Casual positions are positions established at any percentage of time, fixed or variable, for less than one(1) year, or are positions established at a fixed or variable percentage of time at less than fifty percent (50%) of full-time regardless of the duration of the position.

The unfair practice charge asserts that from Ms. Ezozo's understanding, this complaint should have been grieved under Article 8, Discipline and Dismissal. It also states that "Mr. Battle was aware that Mr. Uriarte had file (sic) the grievance inappropriately well within the time frame to correct or file another grievance." When Ms. Ezozo first met Mr. Battle he stated, "I don't know why Keith used this Article (34B1)."

There is no indication how Ms. Ezozo came to the understanding that Article 8 was involved, nor explained how her layoff violated this article. Two issues were in fact raised and taken to arbitration, violation of layoff procedures and having allegedly been replaced by new casual employees. But the arbitrator found no violation of the alleged articles of the contract, Article 13, section C.3 and Article 34, section B.I. Thus, there is no evidence to show that AFSCME's above conduct was arbitrary, discriminatory or in bad faith.

Therefore, I am dismissing the charge based on the facts and reasons contained above, and in my August 12, 1999 letter.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, 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 dismissal. (Cal. Code Regs., tit. 8, sec. 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, sec. 32135(a); see also Cal. Code Regs., tit. 8, sec. 32130.)

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

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code Regs., tit. 8, sec. 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 Cal. Code Regs., tit. 8, sec. 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. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, sec. 32135(c).)

Extension of Time

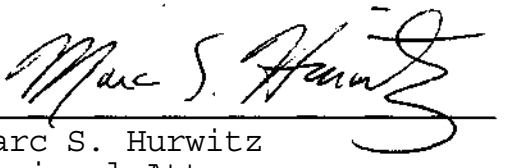
A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document.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

Final Date

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

Sincerely,

ROBERT THOMPSON
Deputy General Counsel

By 
Marc S. Hurwitz
Regional Attorney

Attachment

cc: Robert Battle of AFSCME.

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Blvd., Suite 1435
Los Angeles, CA 90010-2334
(213) 736-3127

August 12, 1999

Wanda Ross-Ezozo
3 6914 Jenna Lane
Palmdale, CA 93550

Re: Wanda Ross-Ezozo v. American Federation of State. County and Municipal Employees, District Council 57
Unfair Practice Charge No. LA-C0-64-H
WARNING LETTER

Dear Ms. Ezozo:

In this charge filed on April 13, 1999 by Wanda Faye Ezozo (also known as Wanda Ross-Ezozo) against the American Federation of State, County and Municipal Employees, Council 57 (AFSCME), it is alleged that AFSCME violated the duty of fair representation (DFR) in its processing of a grievance. This conduct is alleged to violate Government Code section 3560 et. seq. of the HEERA.

My investigation and the charge have revealed the following information. Ms. Ezozo was an employee at UCLA since April 1985; and a full time career/regular employee in the classification of Hospital Lab Technician III since 1991. By letter dated September 22, 1997, two employees, Ezozo and Yadegaran,[1] were notified that they would be laid off from the position of Hospital Lab Technician III in the Department of Ophthalmology, at the UCLA Jules Stein Eye Institute, effective October 24, 1997, due to a reorganization and repositioning of activities. Individual grievances were filed by AFSCME in October 1997,[2] processed through the grievance procedure and on April 8, 1998 appealed to binding arbitration by AFSCME. On May 19, 1998, AFSCME informed Ms. Ezozo in writing that if she wished her grievance to be considered for arbitration, she had to fill out

[1]Although Ms. Ross-Ezozo and Ms. Yadegaran were both grievants after being laid off from the position of Hospital Lab Technician III in the Department of Ophthalmology, Jules Stein Eye Institute at UCLA, effective October 24, 1997, it is Ms. Ezozo who filed this unfair practice charge against AFSCME. Ms. Ezozo is black and Ms. Yadegaran is Caucasian.

[2]The Ezozo grievance was filed on October 14, 1997 by AFSCME Representative Uriarte. It was appealed to Step 2 on November 6, 1997 where AFSCME Representative Battle took over. After a denial on February 12, 1998, the grievance was appealed to Step 3 on February 19, 199 8. After a denial on March 25, 1998, the grievance was appealed to arbitration on April 8, 1998.

an Intent to Proceed form and a Grievance Fact Sheet. She was also advised that she and/or her representative must appear before AFSCME's Grievance Committee who will decide whether to recommend that the grievance be heard before an arbitrator.

The grievances challenged the Department's decision to keep several employees with less seniority than the grievants and alleged that the grievants' positions were improperly being replaced by casual positions. It was alleged that the layoffs violated Article 13, section C.3 and Article 34, section B.I. Specifically, it was alleged that,

> 1) Grievant laid off not in inverse order of seniority. Less senior employees do not possess special skills, etc., to a greater degree that grievant.
> 2) Grievant's position is replaced by a new casual position.

Article 13, Layoff and Reduction in time, section A, Determination, provides that "The University shall determine when temporary or indefinite layoffs or reductions in time are necessary." Article 13, section C, Selection for Layoff provides:

> 1. If, in the judgment of the University, budgetary or operational considerations make it necessary to curtail operations, reorganize, reduce the hours of the workforce and/or reduce the workforce, staffing levels will be reduced in accordance with this Article. The selection of employees for layoff shall be at the sole discretion of the University.
>
> 2. The University shall review and, at its sole non-grievable discretion, determine when some, any or all casual employees will be laid off prior to laying off career employees.
>
> 3. With regard to indefinite layoff only, the order of indefinite layoff of employees in the same class within a department shall be in inverse order of seniority, except that the University may retain, at its discretion, employees irrespective of seniority who possess special skills, knowledge, or abilities which are not possessed to the same degree by other employees in the same class and which are necessary to perform the ongoing function of the department. To the extent permitted by law, the University may also consider workforce diversity when making layoff decisions and implementing layoff actions. <u>All such exceptions and the decision to make such exceptions shall not be subject to Article 7 - Arbitration Procedure of this Agreement</u>. (emphasis added.)

Article 34, Positions, Section B, Casual Positions, subsection 1 provides,

> Casual positions are positions established at any percentage of time, fixed or variable, for less than one(1) year, or are positions established at a fixed or variable percentage of time at less than fifty percent (50%) of full-time regardless of the duration of the position.

The arbitration hearing was held on November 12, 1998 by Arbitrator Edna E.J. Francis. Each side had representation and closed their cases with written, post-hearing argument. The Arbitrator noted in her decision on February 27, 1999, in part, that Mr. Foerstel testified in part that in September 1997, the new Division Chief for the Glaucoma Division caused a restructuring of the manner patient care would be given and the elimination of some positions, including the grievants[7] positions. The affected classifications and seniority information were identified. Mr. Foerstel got together with the supervisors of junior employees, discussed specific duties of their positions, and determined whether any of the senior employees whose positions had been eliminated were capable of performing the duties of the junior employees' positions. One of those positions, a 50% career position, was offered to Ms. Ezozo and Ms. Yadegaran and they both declined the position.

The Arbitrator also found, in part, as follows,

> While the record reflects that the Department apparently failed to satisfy the procedural requirements to submit to the Assistant Vice Chancellor, Campus Human Resources, any request for exceptions to retain an employee out of seniority and based its decisions about the grievants' skills, knowledge and abilities on somewhat limited information (not even including an interview of the grievants), the record does not reflect a violation of the Agreement.
>
> Ironically, the primary provision of the Agreement upon which AFSCME relies to support its grievance, Article 13C3, insulates the University from the challenge mounted here by AFSCME. Article 13C3 both established that the order or indefinite layoff of employees in the same class with a department shall be in inverse order of seniority **and** (in the next breath) that the University may at its discretion make an exception to that principle and at its discretion retain employees **irrespective of seniority** who possess special skills, knowledge, or abilities which are not possessed to the same degree by other employees in the same class and

> which are necessary to perform the ongoing function of the department. Most significantly, it then takes the further step of providing that such exceptions and the decisions to make such exceptions shall not be subject to the arbitration procedure of the Agreement. Thus, in the face of the language of Article 13C3, the grievances seeking to invalidate the Department's decision to retain employees less senior than the two grievants cannot be considered at arbitration.
>
> Finally, there is no evidence of any violation of Article 34B1 of the Agreement pertaining to casual positions, (emphasis in original.)

The Award states,

> The University's decision to lay off Ross and Yadegaran as Hospital lab Technician Ill's in the Department of Ophthalmology effective October 24, 1997, is arbitrable. The University's decision to retain employees with less seniority than Ross and Yadegaran is not arbitrable. The layoffs of Ross and Yadegaran did not violate Article 13.C.3 or Article 34B.1 of the Agreement.

The unfair practice charge asserts that AFSCME arbitrarily ignored a meritorious grievance and processed a grievance in a perfunctory fashion. In October 1997, the Department claimed that the layoff was necessary since the Ezozo job position was no longer needed. Three days subsequent to Ms. Ezozo's layoff, the Department reopened the same position and hired a Hospital Lab Technician under "casual" employee statutes to accomplish the job the Department claimed no longer existed. According to Ms. Ezozo's Grievance Fact Sheet which she prepared for AFSCME on May 21, 1998, the Department had no budgetary problems. The reorganization was merely to relocate her equipment closer to the doctors' suite, from "A" floor to the second floor. Mr. Foerstel advised Ms. Ezozo he was turning her position into a casual position, and would permit her to keep her job if she agreed to become casual and accept a reduction in pay. She refused and was laid off effective October 24, 1997. Mr. Foerstel hired a technician for her position two weeks later.

During the arbitration, Ms. Ezozo asked Mr. Robert Battle of AFSCME to offer evidence showing a violation of an article of the contract but he refused to do so.[3] Thus, the arbitrator did not find a violation. Mr. Battle arbitrated facts indicating that

[3]It is unclear which article of the contract is being referred to here. I note that Article 4 covers Nondiscrimination In Employment.

the Department did not follow their own policy by laying off employees without using seniority and without the necessary authorization from the Campus Human Resource Vice-Chancellor. Mr. Battle refused Ms. Ezozo's request to present evidence of discrimination. Mr. Battle agreed to Ms. Ezozo's request that he obtain certain information from the Department to assist with the case, but he never did so. Mr. Battle arbitrated both grievants cases (Ezozo and Yadegaran) at the same time although Ms. Ezozo believes they are two different cases. Ms. Ezozo at Step I of the grievance procedure accepted a 50% position.[4] The University never contacted her about this position. She brought this to Mr. Battle's attention, but he did nothing about it. After arbitration, she asked Mr. Battle if she could grieve the fact she never got the 50% position. *Mr.* Battle indicated he would get back to her but he never did.

In Ms. Ezozo's May 21, 1998 Grievance Fact Sheet, she believes she was laid off under the guise of a reorganization, which was a pretext for race discrimination. She had a "discriminatory complaint" regarding her seniority but Mr. Battle did not allow Ms. Ezozo to grieve the Department's actions as a discriminatory complaint. Ms. Ezozo feels that her separation was due to her race. Because of winning a race complaint in 1990, Tom Foerstel, Administrator harassed Ms. Ezozo on a continual basis. Ms. Ezozo was required to pass a written and skill evaluation test as a Certified Ophthalmic Technician before she was reclassified as a Hospital Lab Technician II. Her Caucasian peers in the Department were not required to pass the test. Even though Ms. Ezozo was laid off in the reorganization, her Caucasian peers, with less seniority, were not. Ms. Ezozo had superior experience over her Caucasian peers and did not have any performance problems. She was only permitted to consider in exercising her seniority in lieu of layoff, a 50% position. The 100% and 50% positions had the same job duties.

I note that Article 4, Nondiscrimination in Employment, section A.1 provides in part that the University shall not discriminate against members of the bargaining unit on the basis of race. Article 4, section E.3, Grievability/Arbitrability, provides,

> Grievances which allege a violation of Article 4-Nondiscrimination in Employment and a non-arbitrable provision of this Agreement shall be eligible to be grieved in accordance with Article 6-Grievance Procedure,.. In no circumstance shall such grievance be

[4]This point is not clear. Mr. Foerstel testified at the arbitration hearing that Ms. Ezozo declined a 50% career position. Also, Ms. Ezozo testified that she initially declined the 50% position, but changed her mind at the Step 2 grievance meeting by expressing interest in it.

eligible for appeal to Article 7 - Arbitration Procedure of this Agreement.

Article 4, section E.4 provides,

> Grievances which allege a violation of Article 4 - Nondiscrimination in Employment and an arbitrable provision of this Agreement shall be eligible to be grieved/arbitrated in accordance with Article 6- Grievance Procedure and Article 7-Arbitration Procedure of this Agreement.

Based on the above facts, the charge fails to state a prima facie violation of the DFR.

Charging Party has alleged that the exclusive representative denied Charging Party the right to fair representation guaranteed by EERA section 3544.9 and thereby violated section 3543.6(b). The duty of fair representation imposed on the exclusive representative extends to grievance handling. (Fremont Teachers Association (King) (1980) PERB Decision No. 125; United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258.) In order to state a prima facie violation of this section of EERA, Charging Party must show that the Association's conduct was arbitrary, discriminatory or in bad faith. In United Teachers of Los Angeles (Collins). the Public Employment Relations 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. [Citations.]
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> 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.

In order to state a prima facie case of arbitrary conduct violating the duty of fair representation, a Charging Party:

> ". . . 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. (Emphasis added.)" [Reed District

Teachers Association, CTA/NEA (Reyes) (1983) PERB Decision No. 332, p. 9, citing Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124.]

The facts demonstrate that AFSCME processed the Ezozo grievance (regarding seniority and casual employees) all the way to binding arbitration, which was decided in the University's favor on February 27, 1999. The facts do not demonstrate that AFSCME's conduct was arbitrary, discriminatory or in bad faith. Mr. Keith Uriarte of AFSCME executed the grievance form on October 14, 1997. The grievance was taken over in or about November 1997 by Mr. Battle at Step 2. It is unclear whether the above race discrimination allegations were brought to AFSCME's attention by Ms. Ezozo at Steps I or II to allow for a possible amendment to the grievance. Mr. Battle appealed to Step III on February 19, 1998. According to the collective bargaining agreement, a grievance may be filed by an individual employee or AFSCME. See Article 6, section A.1 and 4. This would permit an employee to raise in the grievance all the allegations he or she wishes to. Also, it appears that the race discrimination allegations may have not have been brought to AFSCME by Ms. Ezozo until May 21, 1998, at the time the AFSCME Grievance Fact Sheet was executed by Ms. Ezozo. Even if AFSCME had knowledge of the alleged race discrimination allegations at Steps I and II, a rational decision to not pursue, or possible negligence in not pursuing this defense to the layoff does not violate the DFR. Also, the fact one of the grievants was Caucasian may have dissuaded AFSCME from bringing this discrimination claim. A union is not under an obligation to process a claim which it feels it cannot win. Finally, it is unclear that this discrimination claim was arbitrable since at least one of the issues was not arbitrable. See Article 4, section E.3 above.

The facts regarding the offer of a 50% position are unclear because initially, Ms. Ezozo declined such a position. Even if AFSCME was negligent in not assisting Ms. Ezozo to obtain such a position, such conduct does not violate the DFR. This is because no bad faith has been demonstrated.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts which would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be

served on the respondent's representative[5] and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before August 19, 1999, I shall dismiss your charge. If you have any questions, please call me at (213) 736-3543.

Sincerely,

Marc S. Hurwitz
Regional Attorney

[5]AFSCME's representative is Robert Battle.