STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

RICHARD MALAMUD, Charging Party, v. CALIFORNIA FACULTY ASSOCIATION, Respondent.	Case No. LA-CO-74-H PERB Decision No. 1482-H May 30, 2002

Appearances: Richard Malamud, on his own behalf; Rothner, Segall & Greenstone by Ricardo Ochoa, Attorney, for California Faculty Association.

Before Baker, Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (Board) on appeal by Richard Malamud (Malamud) of a Board agent's dismissal (attached) of his unfair practice charge. The charge alleged that the California Faculty Association (CFA) violated the Higher Education Employer-Employee Relations Act (HEERA) section 3583.5[1] by collecting non-chargeable agency fees.

[1]HEERA is codified at Government Code section 3560 et seq. Section 3583.5 provides, in pertinent part:

> (a)(1) Notwithstanding any other provision of law, any employee of the California State University or the University of California, other than faculty of the University of California who are eligible for membership in the Academic Senate, who is in a unit for which an exclusive representative has been selected pursuant to this chapter, shall be required, as a condition of continued employment, either to join the recognized employee organization or to pay the organization a fair share service fee. The amount of the fee shall not exceed the dues that are payable by members of

The Board has reviewed the entire record in this matter including the unfair practice charge as amended, the warning and dismissal letters, Malamud's appeal and CFA's response. Malamud's appeal reiterates arguments made to the Board agent contesting inclusion of expenditures of CFA's affiliates within the agency fee and contesting the agency fee being based on a percentage of membership dues, arguing it should instead be based upon CFA's actual expenditures. As the Board agent correctly noted in the dismissal letter, an agency fee arbitration was held in this matter and each of Malamud's contentions were presented to and rejected by the arbitrator. The Board agent correctly found that the arbitrator's decision was not repugnant to HEERA with regard to either of Malamud's contentions before the Board. The Board finds the Board agent's dismissal letter to be free from prejudicial error and adopts it as the decision of the Board itself.

> the employee organization, and shall cover the cost of negotiation, contract administration, and other activities of the employee organization that are germane to its functions as the exclusive bargaining representative. Upon notification to the employer by the exclusive representative, the amount of the fee shall be deducted by the employer from the wages or salary of the employee and paid to the employee organization.
>
> (2) The costs covered by the fee under this section may include, but shall not necessarily be limited to, the cost of lobbying activities designed to foster collective bargaining negotiations and contract administration, or to secure for the represented employees advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and conferring with the higher education employer.

A non-substantive revision of Section 3583.5 became effective January 1, 2002 (Stats.2001, c. 159 (S.B. 662), sec. 104.) subsequent to the filing of this charge. The revision has no bearing on the Board's consideration of this case.

ORDER

The unfair practice charge in Case No. LA-CO-74-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Baker and Neima joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1515 Clay Street, Suite 2201
Oakland, CA 94612
Telephone: (510) 622-1016
Fax: (510) 622-1027

September 17, 2001

Richard Malamud
11614 Texas Avenue
Los Angeles, CA 90025

Re: Richard Malamud v. California Faculty Association
Unfair Practice Charge No. LA-CO-74-H
DISMISSAL LETTER

Dear Mr. Malamud:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on May 4, 2001. Richard Malamud alleges that the California Faculty Association violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by collecting non-chargeable agency fees.

I indicated to you in my attached letter dated August 22, 2001, 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 31, 2001, the charge would be dismissed. I later extended this deadline to September 7, 2001.

On August 30, 2001, Charging Party filed a first amended charge. The amended charge raises two allegations: (1) CFA does not have valid affiliation agreements with other unions; and (2) the amount CFA collected is not a "fair share." These issues were subject to an arbitration hearing, in which the arbitrator found in favor of CFA. In raising these issues, Charging Party is arguing the arbitrator's decision is repugnant to the HEERA.

Generally, PERB will defer to an arbitrator's award in an agency fee case and refuse to issue a complaint where (1) the arbitration proceedings were fair and regular; and (2) the arbitrator's award is not clearly repugnant to the purposes of the Act. (ABC Federation of Teachers, AFT Local 2317 (1998) PERB Decision No. 1295.) As there are no facts alleged in the charge which contend the proceedings were unfair or procedurally defective, I will address only the repugnancy allegation and will take each of Charging Party's allegations in turn.

[1]HEERA is codified at Government Code section 3560 et seq. The text of the HEERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

With regard to the affiliation agreements, Charging Party contends the union has not met its burden of demonstrating that the agreements are valid. More specifically, Charging Party contends that only affiliation agreements between local, state, and national associations are valid. Additionally, Charging Party contends the affiliation fees do not provide benefits to bargaining unit employees as allegedly required in Lehnert v. Ferris Faculty Association (1991) 500 U.S. 507.

As noted in my August 22, 2001, letter, Charging Party misinterprets the definition of "affiliate." In Cumero, the California Supreme Court addressed the issue of whether a local teachers union could charge nonmembers expenses incurred through affiliation agreements with state and national teachers unions. In finding that such affiliation expenses chargeable, the court stated:

> that section 3540.1, subdivision (d), by expanding the definition of an employee organization to include persons authorized to act on the organization's behalf, was intended to permit a local union to act through an affiliate in discharging the union's representational obligations under the EERA. Accordingly, for the purposes of determining nonmembers' rights to object to uses of their service fees under an organizational security arrangement, service fee funds spent by an authorized affiliate in support of the union's representational obligations must be treated as if spent by the union itself. (emphasis added.)

(Id. at 604.) Charging Party asserts that Cumero stands for the proposition that only payments to parent affiliates are acceptable in calculating chargeable expenses. However, Cumero specifically states that funds spent by an authorized affiliate are chargeable expenses to the extent they would be chargeable by the union itself. Moreover, policy reasons behind such decisions further illustrate that affiliation expenses are not limited to parent organizations.

In Lehnert v. Ferris Faculty Association (1991) 500 U.S. 507, the U.S. Supreme Court addressed the issue of affiliation fees where nonmembers asserted only expenses for activities undertaken directly on behalf of the unit were chargeable. The Court stated:

> [W]e have never interpreted that test to require a direct relationship between the expense at issue and some tangible benefit to the dissenters' bargaining unit.
>
> We think that to require so close a connection would be to ignore the unified-membership structure under which many unions, including those here, operate. Under such arrangements, membership in the local union constitutes membership in the state and national parent organizations. (Citing Cumero)

> The essence of the affiliation relationship is the notion that the parent will bring to bear its often considerable economic, political and informational resources when the local is in need of them.
>
> * * * * *
>
> We therefore conclude that a local bargaining representative may charge objecting employees for their pro rata share of the costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit.

(Id. at 524.)

As noted above, neither the California nor U.S. Supreme Court have restricted affiliate fees to parent organizations. While neither case dealt with affiliation agreements such as those considered herein, the arbitrator is not required to find such affiliation agreements void simply because they have not been addressed by the Supreme Courts. Moreover, Cumero specifically allows unions to charge fees for authorized affiliates. As such, the arbitrator's decision to allow the affiliate expenses is consistent with federal and state case law, and not repugnant to the Act. Thus, this allegation fails to state a prima facie case and must be dismissed.[2]

Charging Party also attacks the wisdom of such affiliation agreements. However, PERB is not charged with addressing the wisdom of such affiliation agreements. PERB is charged with ensuring that the only expenses charged to agency fee payers are those considered "chargeable" expenses related to the representational functions of the union. As such, this allegation fails to state a prima facie case.

Charging Party further contends that the expenses charged by the affiliate organizations are not chargeable expenses. In the instant charge, the arbitrator found that CFA's affiliation expenses were chargeable to the extent such expenses would have been chargeable by CFA themselves. In so holding, the arbitrator considered Charging Party's arguments, as well as financial statements and testimony by each of the affiliate organizations. In finding such expenses chargeable, the arbitrator relied on Cumero and Lehnert, and held that such affiliation agreements were consistent with both holding. Indeed, it appears that CFA has valid affiliation agreements with each of the organizations and that membership in CFA automatically grants membership in each of the affiliates. Neither the California courts, nor the federal court, have held such affiliation agreements to be outside the rules set forth above, and as such, the arbitrator's award is not repugnant to the Act. As such, this allegation must be dismissed.

---

[2] Additionally, the definition of "affiliate" in The American Heritage Dictionary does not support Charging Party's position. The dictionary defines an "affiliate" as "a person or organization associated with another in a subordinate relationship."

Charging Party also contends the calculation of the fair share fee is repugnant to the Act. More specifically, Charging Party contends that if the arbitrator's decision stands, the union's collections of fees and dues will exceed the amount of chargeable and non-chargeable expenses by one million dollars. It is unclear how Charging Party came to this conclusion, nor is it even clear how much agency fee payers are required to pay CFA for their representational activities. The following is clear, however. Government Code section 3583.5 allows CFA to an agency fee. That amount shall not exceed the dues that are payable by members of CFA and shall cover the cost of negotiations, contract administration and other activities germane to its functions as the exclusive representative. Based on its 1999 budget and the auditor's report, CFA charged agency fee payers 73% of the amount charged to union members. After analyzing the union's financial statements, chargeable and non-chargeable expenses, and relevant case law, the arbitrator concluded the 73% was an accurate assessment of CFA's chargeable expenses. Nothing in the charge demonstrates the arbitrator's findings were inconsistent with federal or state case law, and as such, this allegation must be dismissed.

Right to Appeal

Pursuant to PERB Regulations,[3] 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. (Regulation 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. (Regulations 32135(a) and 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 Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Regulations 32135(b), (c) and (d); see also Regulations 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

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

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. (Regulation 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 Regulation 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. (Regulation 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. (Regulation 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 _____
Kristin L. Rosi
Regional Attorney

Attachment

cc: Ricardo Ochoa, Esq.

KLR

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1515 Clay Street, Suite 2201
Oakland, CA 94612
Telephone: (510) 622-1016
Fax: (510) 622-1027

August 22, 2001

Richard Malamud
11614 Texas Avenue
Los Angeles, CA 90025

Re: Richard Malamud v. California Faculty Association
Unfair Practice Charge No. LA-CO-74-H
WARNING LETTER

Dear Mr. Malamud:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on May 4, 2001. Richard Malamud alleges that the California Faculty Association violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by collecting non-chargeable agency fees.

Investigation of the charge revealed the following. Charging Party is a Professor at California State University Dominguez Hills. As such, Charging Party is exclusively represented by the California Faculty Association (CFA), however Charging Party is not a member of CFA. CFA and the University are parties to a collective bargaining agreement which expired on June 30, 2001. With regard to agency fee, Government Code section 3583.5 provides in relevant part:

> (a)(1) Notwithstanding any other provision of law, any employee of the California State University or the University of California, other than faculty of the University of California who are eligible for membership in the Academic Senate, who is in a unit for which an exclusive representative has been selected pursuant to this chapter, shall be required, as a condition of continued employment, either to join the recognized employee organization or to pay the organization a fair share service fee. The amount of the fee shall not exceed the dues that are payable by members of the employee organization, and shall cover the cost of negotiation, contract administration, and other activities of the employee organization that are germane to its functions as the exclusive bargaining representative. Upon notification to the

[1] HEERA is codified at Government Code section 3560 et seq. The text of the HEERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

> employer by the exclusive representative, the amount of the fee shall be deducted by the employer from the wages or salary of the employee and paid to the employee organization.

In January 2000, CFA notified all nonmember faculty that it would begin to deduct agency fees from their paycheck, pursuant to Government Code section 3583.5. This notice included the auditor's report as well as an explanation as to how the expenses were calculated and determined. Nonmembers were informed that their agency fee would be substantially less than that of union members. Specifically, nonmembers were to be charged 73% of the membership dues. Additionally, agency fee payers were informed they could appeal the accuracy of the calculations through arbitration.

After receiving a number of objections, CFA contacted the American Arbitration Association to schedule an arbitration hearing on the expenses charged to nonmembers. Arbitration hearings were held on July 26 and 27, 2000 in Sacramento, on October 23, 2000 in San Francisco, and on October 24 and 25, 2000, in Los Angeles. Present at the hearing were representatives from CFA, and CFA's affiliate organizations.[2]

During the hearing, CFA and its affiliates presented evidence regarding how fees were calculated and what the fees were used for. Agency fee objectors present were each afforded the opportunity to present their arguments. Charging Party specifically objected to the affiliate fees and to the use of federal law in determining the merits of Charging Party's objections. Specifically, Charging Party argued the arbitrator could not use the allegedly more expansive federal precedent in determining whether an expense was chargeable or nonchargeable. Additionally, Charging Party argued that fair share fee payers should not be charged under the fiscal year 2000 budget, which was more than double the fiscal year 1999 budget.

On March 6, 2001, Arbitrator Louis Zigman issued his decision. With regard to Charging Party's objections, the arbitrator stated in relevant part:

> In view of the fact that I agree than [sic] one must consider determinations and rulings of the U.S. Supreme Court along with the Supreme Court of California, I did not find Objector Malamud's contention that a consideration of federal law was inappropriate. Furthermore, I did not find Objector Malamud's contention as persuasive to the effect that federal law is more expansive than state law, i.e. SB 645.

---

[2] CFA has affiliation agreements with the California School Employees Association, the California Teachers Association, the Service Employees International Union, the American Federation of Labor-Congress of Industrial Organizations, the National Education Association, and the American Association of University Professors. CFA members receive automatic membership in each of these organizations. The financial support provided to these organizations, by CFA, is specified in the auditor's report along with those expenses that are chargeable and nonchargeable.

* * * * *

> Turning next to the objections raised by several Objectors as to the large amount of additional funds which the employee organizations, i.e. CFA, received as a result of the passage of SB 645, I did not find their arguments persuasive that this additional funding by itself invalidated the calculations of agency fees. In this regard, I note that the legislation did not impose limits/caps on the organizations' expenditures, other than in terms of their representational activities. As for example, the legislation did not mandate that the organizations could only spend the same amount of money as it did in 1999.
>
> Quite frankly, the fact that employee organizations received a large increase in funds did create the opportunity for them to have a [sic] significantly expanded their budgets and to have expanded their ability to increase expenditures in their representational activities. The fact that a number of nonmembers objected to the increased activities by these organizations does not constitute a basis, by itself, for invalidating the calculations. As such, the objections based on the fact that these organizations received a rather large increase in funds are not deemed as a relevant objection with regard to the propriety of the calculations and determination of the categories of expenses.

With regard to affiliate fees, the arbitrator stated:

> Turning next to Dr. Gordon's objection that the employee organizations' determination of chargeable expenses should not be decided by the employee organizations' own interpretation of the court cases, I agree. The question however is whether these organizations' interpretations are in accordance with the law then they shall be upheld and vice versa.
>
> In noting the various objections raised by a number of different Objectors as to particular expenditures not being within the definition of chargeable expenses under the statute and/or under the court decisions, I considered the evidence proffered in the hearing along with the definition in SB 645 and the applicable court decisions. In this regard I also considered the specific items raised by Dr. Biles which are enumerated above.
>
> After having reconsidered the evidence following my review of the Objector's challenges I did not find that the objections,

> challenges and arguments raised by the Objectors was [sic] persuasive. From the evidence in this record, I find and conclude that the expenditures as described by the employee organizations were properly characterized as chargeable and/or nonchargeable.
>
> As for example, while I noted that there were a number of objections to the expenditures to affiliates, I also noted that the majority of the Lehnert Court upheld such expenditures.

Finally, with regard to Charging Party's contention that California case law restricted agency fee, the arbitrator stated:

> Turning next to Objector Malamud's objection based on the Gerawan decision, I did not find Malamud's arguments persuasive inasmuch as the Gerawan decision does not deal with the specific issues involved in this proceeding and Malamud's arguments in the face of the aforementioned U.S. and California Supreme Court decisions were simply not persuasive.

On May 4, 2001, Charging Party filed an amended charge, reiterating his arguments regarding affiliate fees and California case law. Additionally, Charging Party reiterates his concern over the budget and CFA's charge for calendars.

Based on the above provided facts, the charge as presently written, fails to state a prima facie violation of the HEERA, for the reasons provided below.

Generally, PERB will defer to an arbitrator's award in an agency fee case and refuse to issue a complaint where (1) the arbitration proceedings were fair and regular; and (2) the arbitrator's award is not clearly repugnant to the purposes of the Act. (ABC Federation of Teachers, AFT Local 2317 (1998) PERB Decision No. 1295.) As there are no facts alleged in the charge which contend the proceedings were unfair or procedurally defective, I will address only the repugnancy allegation and will take each of Charging Party's allegations in turn.

I. Calendars

Charging Party contends the calendars CFA printed and distributed to all bargaining unit members should not be considered a chargeable expense. CFA includes in its list of chargeable expenses, an $8800 expense for calendars. These calendars include the names and phone numbers of CFA officers and staff members, as well as the dates of union meetings. Additionally, the calendars contain information regarding those University officials who have responsibility for contract administration. It is unclear whether Charging Party raised this issue in front of the arbitrator, however it appears the arbitrator heard testimony regarding the calendars and considered the calendar a chargeable expense to nonmembers.

In Ellis v. Railway Clerks (1984) 466 U.S. 435, the United States Supreme Court held that publications are the "union's primary means of communicating information concerning collective bargaining, contract administration, and employees' rights." (Id. at 450.) As such, to the extent these publications serve an important representational purpose, they constitute a chargeable expense to nonmembers. Moreover, the Supreme Court has found that charging nonmembers for such publications does not violate the First Amendment. (Lehnert v. Ferris Faculty Association (1991) 500 U.S. 507.)

Charging Party objects to the $8800 expense for calendars distributed to all bargaining unit members. However, the arbitrator's decision to consider such a publication a chargeable expense is not repugnant to the Act, but instead follows federal and state case law. As the calendar provides relevant collective bargaining information, such as the names of officers and dates of representational meetings, the calendar's publication is germane to the union's representational duty. As such, this allegation fails to state a prima facie violation of the HEERA.

Even assuming the calendar is a nonchargeable expense, the allegation still fails to state a prima facie violation of the HEERA. The U.S. Supreme Court has held that "absolute precision" is not required in the calculation of agency fee. (Chicago Teachers Union v. Hudson (1986) 475 U.S. 292, 307, fn.18; ABC Federation of Teachers, AFT Local 2317, supra at pg. 5.) In ABC Federation of Teachers, supra, the Board found that while the arbitrator erred in failing to adjust the union's budget after an admitted error in employee expenses, such an error represented one-tenth of one percent of the union's budget, and was insignificant, and thus not repugnant to the Act.

Herein, assuming the calendar is a nonchargeable expense, the arbitrator's failure to adjust CFA's chargeable expenses of $3,873,172 by the calendar's cost of $8800, results in an error of two-tenths of one percent (.23%), and as such is clearly insignificant. Thus, the arbitrator's failure to adjust the chargeable expenses by $8800 is not repugnant to the Act.

II. Affiliate Fees

Charging Party asserts that none of the affiliates expenses should be chargeable as the affiliation agreements are not between local, state or national chapters. In so asserting, Charging Party relies on the California Supreme Court case Cumero v. Public Employment Relations Board (1989) 49 Cal.3d 575. However, Charging Party misunderstands Cumero's holding and fails to consider other relevant case law, including U.S. Supreme Court precedent.

In Cumero, the California Supreme Court addressed the issue of whether a local teachers union could charge nonmembers expenses incurred through affiliation agreements with state and national teachers unions. In finding that such affiliation expenses to be chargeable, the court stated:

> that section 3540.1, subdivision (d), by expanding the definition of an employee organization to include persons authorized to act

> on the organization's behalf, was intended to permit a local union to act through an affiliate in discharging the union's representational obligations under the EERA. Accordingly, for the purposes of determining nonmembers' rights to object to uses of their service fees under an organizational security arrangement, service fee funds spent by an authorized affiliate in support of the union's representational obligations must be treated as if spent by the union itself. (emphasis added.)

(Id. at 604.) Charging Party asserts that Cumero stands for the proposition that only payments to local, state and national affiliation agreements are acceptable in calculating chargeable expenses. However, Cumero holding specifically states that funds spent by an authorized affiliate are chargeable expenses to the extent they would be chargeable by the union itself. Moreover, policy reasons behind such decisions further illustrate that affiliation expenses are not limited to parent organizations.

In Lehnert v. Ferris Faculty Association (1991) 500 U.S. 507, the U.S. Supreme Court addressed the issue of affiliation fees where nonmembers asserted only expenses for activities undertaken directly on behalf of the unit were chargeable. In so holding, the Court stated:

> [W]e have never interpreted that test to require a direct relationship between the expense at issue and some tangible benefit to the dissenters' bargaining unit.
>
> We think that to require so close a connection would be to ignore the unified-membership structure under which many unions, including those here, operate. Under such arrangements, membership in the local union constitutes membership in the state and national parent organizations. (Citing Cumero)
>
> The essence of the affiliation relationship is the notion that the parent will bring to bear its often considerable economic, political and informational resources when the local is in need of them.
>
> * * * * *
>
> We therefore conclude that a local bargaining representative may charge objecting employees for their pro rata share of the costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit.

(Id. at 524.)

In the instant charge, the arbitrator found that CFA's affiliation expenses were chargeable to the extent such expenses would have been chargeable by CFA themselves. In so holding, the arbitrator considered Charging Party's arguments, as well as financial statements and testimony by each of the affiliate organizations. In finding such expenses chargeable, the arbitrator relied on Cumero and Lehnert, and held that such affiliation agreements were consistent with both holding. Indeed, it appears that CFA has valid affiliation agreements with each of the organizations and that membership in CFA automatically grants membership in each of the affiliates. Neither the California courts, nor the federal court, have held such affiliation agreements to be outside the rules set forth above, and as such, the arbitrator's award is not repugnant to the Act.

III. Use of federal case law

Charging Party also takes issue with the arbitrator's use of federal case law in analyzing the objector's claims. Charging Party contends the arbitrator erroneously applied the U.S. Supreme Court's holding in Lehnert in determining which expenses were chargeable. Charging Party argues, instead, that the arbitrator should apply only Cumero, supra, in determining chargeable expenses. Charging Party also contends, both in this charge and at arbitration, that California agency fee case law is more restrictive than federal case law, and as such, only California law should apply. In support of his contention that California case law is more restrictive, Charging Party cites Gerawan Farming, Inc. v. William J. Lyons, Jr. (2000) 24 Cal.4th 468.

In Lehnert, decided three years after Cumero, the court fashioned a three prong test for determining chargeable and nonchargeable expenses. First, such activities must be "germane" to collective bargaining. Second, the expenditures must be "justified by the government's vital policy interest in labor peace and avoiding free riders." Third, objecting employee can be charged only for activities as to which compulsory financial support does not "significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop. (Id. at 528-529.) In so holding, the Supreme Court not only cites past federal cases regarding agency fee, but cites with approval the California Supreme Court's holding in Cumero.

Charging Party concludes somehow, that federal case law is more restrictive than California case law on this issue. However, Charging Party fails to note the court's decision in Cumero relies entirely on federal precedent, as does PERB's own case law on this subject. The court does not find that Cumero supercedes federal case law, but instead fashions its holding to rest squarely with existing federal case law at that time. Moreover, nothing in Cumero indicates its holding is more restrictive than Lehnert. The court in Cumero applies the federal test for affiliate fees, political expenses, and organizing and recruiting expenses. (Id. at 600-604.) Indeed, Cumero relies heavily on Ellis v. Railway Clerks, supra, and Abood, supra in determining each of the tests it fashions. (Id. at 600, 605.)

It is unclear why Charging Party believes Gerawan Farming, Inc. is controlling or even applicable to agency fee cases. In Gerawan Farming, Inc., a plum producer brought an action against the California Secretary of Food and Agriculture challenging the state's plum marketing program. More specifically, plum producers argued that their First Amendment rights were violated when they were compelled to fund a state plum marketing. Although Gerawan Farming, Inc. cites Abood v. Detroit Board of Education (1977) 431 U.S. 209, a First Amendment case regarding agency fee, such a fact does not render Gerawan Farming, Inc. applicable to agency fee cases. In Abood, the United State Supreme Court held that to the extent an agency fee arrangement is used to finance union expenditures for the purpose of collective bargaining, contract administration and grievance adjustment, it is constitutionally valid. (Id. at 225-226.) The Court's holding is neither modified nor repealed by Gerawan Farming, Inc., and as such, Gerawan Farming, Inc. is inapplicable to agency fee cases. Moreover, Gerawan Farming, Inc. does not modify Cumero's holding or the test for determining chargeable expenses in agency fee cases.

As the arbitrator applied current federal and state case law to the expenses charged, and as the Charging Party fails to identify specific expenses which should not be allowed under his restrictive case law theory, the arbitrator's decision is not repugnant to the Act.

IV. "Fair Share" Definition

Charging Party makes several arguments regarding the validity of the calculations made by CFA. Specifically, Charging Party objects to CFA's increased fiscal year 2000 budget, questions the definition of "fair share," and argues Government Code section 3583.5 is unconstitutional. Each of these contentions will be addressed in turn.

With regard to the year 2000 budget, Charging Party argues that nonmembers should not be required to pay an agency fee based on a budget that includes their money. In the years prior to the enactment of Government Code section 3583.5, CFA's ability to collect money from agency fee payers was extremely limited. As such, CFA's budget was based primarily on the dues of union members, although such money benefited members and nonmembers alike. After the passage of SB 645, CFA began collecting agency fee from nonmembers. The increased fees obviously increased CFA's revenue, allowing them to spend more money, a majority of which went to representation. Charging Party asserts that nonmember fair share fees should not be based on a percentage of the new budget, but instead should be based on prior years budgets. Charging Party fails to cite, however, any precedent for such a conclusion. Indeed, the arbitrator addressed this contention in his decision, as noted on page 3, above. As the arbitrator's decision on this issue is consistent with statutory and case law, his decision is not repugnant to the Act.

Charging Party also asserts the definition of "fair share" should have been interpreted differently by the arbitrator. Charging Party contends:

> Since we are not members, I believe that the fair share can only be calculated at the end of each year based on the actual

> expenditure from member fees only. Thus, any budget that continues the .95% fee for union member dues, for which reimbursement is sought as fair share, is not, by definition fair share. Thus, I object to all expenditures in the budget by the CFA that exceed 0.95% times the members (dues paid by members) as that is the only possible calculation of fair share.

Government Code section 3583.5 provides that a fair share fee or agency fee[3] shall cover the cost of negotiation, contract administration, and other activities germane to its functions as the exclusive representative. The statute does not state the fee must be calculated after spending member fees or in any other way hypothesized by the Charging Party.[4] Moreover, neither the Senate bill nor the statute limit the amount of money a union may spend on representational activities. As the arbitrator's decision is consistent with California case law, the allegation must be dismissed.

Finally, Charging Party contends Government Code section 3583.5 is unconstitutional. The constitutionality of agency fee provisions has been addressed and upheld in both federal and state case law. (See, Cumero, supra at 605-606; Abood, supra at 225-226.) As such, the arbitrator's decision regarding this issue is not repugnant to the Act.

---

[3] Charging Party seems also to argue that there is a difference between an "agency fee" and a "fair share fee." However, PERB Regulation 32990 and above mentioned case law clearly demonstrate the terms are interchangeable.

[4] Charging Party also cites to CFA's dissolution clause, asking what would happen to dues if CFA were decertified as the exclusive representative. However, any future decertification of the union is speculative at best, and would not require the dissolution of the corporation itself. Thus, it is unclear how such an argument is relevant to the collection of agency fees while CFA is, in fact, the exclusive representative.

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 that 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 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 31, 2001, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Kristin L. Rosi
Regional Attorney

KLR