

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



JOHN BUSSMAN,

Charging Party,

v.

ALVORD EDUCATOR'S ASSOCIATION,

Respondent.

Case No. LA-CO-1329-E

PERB Decision No. 2046

June 30, 2009

Appearances: John Bussman, on his own behalf; California Teachers Association by John F. Kohn, Attorney, for Alvord Educator's Association.

Before Dowdin Calvillo, Acting Chair; McKeag and Wesley, Members.

DECISION

WESLEY, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by John Bussman (Bussman) of a Board agent's dismissal (attached) of his unfair practice charge. The charge alleged that the Alvord Educator's Association (AEA) breached its duty of fair representation in violation of the Educational Employment Relations Act (EERA)¹ by failing to properly represent him in a challenge to the legality of certain contract provisions, and by failing to represent him regarding a change in teaching assignments.

The Board has reviewed the dismissal and the record in light of Bussman's appeal, AEA's response and the relevant law. Based on this review, the Board finds the Board agent's warning and dismissal letters to be a correct statement of the law and well reasoned, and

¹ EERA is codified at Government Code section 3540 et seq.

therefore adopts them as the decision of the Board itself, as supplemented by the discussion below.²

DISCUSSION

Bussman's appeal for the first time alleges that AEA provided false information to PERB, and provides supplemental details in support of the duty of fair representation claim regarding the contract dispute. However, Bussman's appeal does not provide information regarding the nature of the alleged falsities, nor does it demonstrate good cause why this allegation, or the supplemental details in support of his duty of fair representation claim, were not included in either the original or amended charge. PERB Regulation 32635(b)³ requires that "[u]nless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." Therefore, the Board did not consider the new allegation or new information on appeal.

The Board also rejects Bussman's argument on appeal that a September 17, 2007, email from the California Teachers Association (CTA) indicates a renewed promise of representation with respect to the alleged illegal contract terms so as to bring a duty of fair representation claim against AEA within the six month statute of limitations. Specifically, Bussman appears to argue that although the letter he received from AEA on January 30, 2007, denying representation on this issue, is outside the statute of limitations, he believed AEA and CTA to be one and the same entity. Thereby, the September 17 email from CTA should, for purposes of this unfair practice

² In *Long Beach Community College District* (2009) PERB Decision No. 2002, the Board held that the statute of limitations is not an affirmative defense but an element of the charging party's prima facie case. The Board agent's warning letter at page 3 states that "The statute of limitations has also been raised by the respondent as an affirmative defense in this case." In light of the holding in *Long Beach*, the Board does not address this issue.

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

charge, be treated as if it was from AEA, thus bringing his claim against AEA within the limitations period. However, nothing in the email, or any other evidence presented by Bussman, demonstrates a valid legal argument that CTA's statements or actions can be imputed to AEA. Furthermore, the September 17 email does not, as Bussman claims, demonstrate that he was being provided representation by either CTA or AEA as of that date, in that it specifically rebukes Bussman for any assumption that his individual needs should dictate further action, and indicates that any action CTA was taking to resolve problems regarding the disputed contract terms was done on behalf of all affected bargaining unit members, not Bussman individually. Therefore, the January 30, 2007, letter from AEA denying Bussman representation regarding the disputed contract terms, starts the statute of limitations on that issue. Since this date is approximately one year prior to the filing of the unfair practice charge, dismissal is proper.

ORDER

The unfair practice charge in Case No. LA-CO-1329-E is hereby dismissed WITHOUT LEAVE TO AMEND.

Acting Chair Dowdin Calvillo and Member McKeag joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8386
Fax: (916) 327-6377



February 3, 2009

Nandita Murthy, Attorney
Kodam & Associates Law Office
41880 Kalmia Street, Suite 115
Murrieta, CA 92562

Re: John Bussman v. Alvord Educator's Association
Unfair Practice Charge No. LA-CO-1329-E
DISMISSAL LETTER

Dear Ms. Murthy:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on January 22, 2008. John Bussman (Bussman or Charging Party) alleges that the Alvord Educator's Association (AEA or Respondent) violated the Educational Employment Relations Act (EERA or Act)¹ by violating its duty of representation.

Charging Party was informed in the attached Warning Letter dated November 25, 2008, 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 that 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 December 2, 2008, the charge would be dismissed.

On December 1, 2008 you requested and were granted an extension of time in which to file an amended charge and, on December 31, 2008 you filed a First Amended Charge to include allegations that AEA violated EERA by: (1) retaliating against a union member and (2) making defamatory comments about Charging Party and damaging his reputation.

Factual Background As Amended

Bussman has been employed with the Alvord Unified School District (AUSD or District) as a high school history/government teacher since 2001. His duties in that capacity "held the consistent pattern of teaching require that he teach high school students generally on two subjects per semester."

AEA is, and at all times relevant to this charge has been, the recognized employee organization and exclusive representative for the certificated employees of the District. Craig Adams (Adams) and Meg Decker (Decker) are AEA representatives.

¹ EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

In 2005-2006, the District and AEA were in negotiations for a new contract. In early October 2006, AEA announced that a contract had been reached between the parties, but did not provide details of the contract to its members.

Prior to the ratification vote by the AEA membership, Bussman learned some details of the contract. According to the charge, part of the contract was that teachers "with 3-14 years of experience would have their salaries step level brought back two notches while those with 19 or more years or more of experience would be unaffected. Additionally, AEA members with two or less years would be shifted back to level one."

On or about October 11, 2006, Bussman questioned AEA representative Decker about the contract. At all relevant times herein, Decker was a teacher at Norte Vista High School, Department Chair of Social Studies at Norte Vista High School, Union official for AEA and a bargaining spokesperson for AEA. Allegedly, Decker stated that Bussman "should not worry about the inequity of the contract as it was this or just minimal increases." Decker stated that "it was a good deal."

On or about October 12, 2006, Bussman met with Decker and other AEA representatives. During the meeting, "it was discovered that new employees under the contract would receive positioning based on their years of experience while those working for the District would be two steps behind."

On or about October 23, 2006, Bussman forwarded a letter to Decker and Adams expressing his concerns about the contract.

After receiving no response from AEA, Bussman contacted the California Teacher's Association (CTA) and forwarded his October 23rd letter to CTA Representatives Karen Kyne (Kyne) and Bruce Matlock (Matlock). Bussman was then "referred to Barbara Kerr with CTA."

On December 7, 2006, Kerr informed Bussman that "[CTA] could not intervene in elections."

During the week of December 17, 2006, Kyne told Bussman that "the local association has to first be approached before CTA can step in."

On or about January 30, 2007, Bussman contacted Decker about having AEA represent him on the violations in the contract. According to the charge, "[w]ithout reason, [AEA] declined to represent Bussman, which eventually resulted in Bussman seeking the assistance of CTA."

In or about March 2007, AEA advised Bussman and other AEA members "that a new contract had been reached."

On or about March 16, 2007, Bussman again raised his concerns about violations of the Education Code and "other inequities contained in the contract" but was "shouted down" by AEA representatives.

On or about March 21, 2007, Bussman was initially denied access to a meeting and "Adams attempted to kick [sic] [Bussman] out." Afterwards, a CTA representative advised AEA of the "illegalities of both contracts" but AEA "continued to deny such violations and stated the vote would continue."

On or about March 26, 2007, new District hires were advised by AEA and the District that they would have to "pay back a portion of their current salary." In addition, the charge alleges that Adams then "improperly and illegally laid blame on [Bussman] to teachers who had to pay back their salary."

On or about April 13, 2007, CTA sent an e-mail message to Bussman. The e-mail stated in pertinent part: "[Karen Bost] is prepared to give Marianne Reynolds some of the background information related to the AEA bargaining and provide you with a legal referral to see her."

The amended charge next states the following:

This e-mail served as a direct affirmation by CTA to represent Bussman in the dealings with AUSD on the modified salary structure. The scope of CTA's representation was made clear to Bussman at the outset. Because of this communication to Bussman, Bussman assumed that CTA was taking responsibility for any and all matters related to AUSD bargaining without limitations.

On or about April 20, 2007, Bussman was "advised of further disparaging remarks by Respondents Adams and Decker."

In or about May 2007, Bussman met with CTA legal counsel Marianne Reinhold (Reinhold) and was advised later in the month that she would be filing a lawsuit on his behalf.

On or about June 19, 2007, Bussman was advised by CTA that they were "awaiting approval of legal assistance even though such was given on April 13, 2007."

Between June 2007 and August 2007, Bussman attempted to reach CTA and specifically Reinhold, however, CTA allegedly failed to respond.

On July 31, 2007, Bussman sent a "strongly worded" e-mail message to CTA officials voicing his displeasure with his lack of representation and received a telephone call from Reinhold the same afternoon. Reinhold allegedly promised to notify AUSD of pending legal action on Bussman's behalf.

On or about August 10, 2007, Bussman received a letter sent by AEA to the District requesting that the District "meet with AEA members to fix the contracts."

On or about August 16, 2007, Bussman received a welcome letter from District Principal Santos Campos advising him that if he had not yet received a notice of a schedule change, then his schedule would remain the same. At the time Bussman received the August 16 letter, he had not received any notice of a schedule change.

According to the amended charge, Social Science department members typically were told by Decker prior to the end of the prior school year that they could expect the same class assignments for the upcoming school year.

On or about August 23, 2007, Bussman received notice of a schedule change from the District. According to the amended charge, Bussman had taught three sections of American Government and two sections of AP US History for the past three years. His revised schedule contained two sections of American Government, two sections of AP US History and one section of US History. The amended charge states that “[a]lthough A.P. U.S. History and U.S. History both contain similar terms, they are completely different courses. There are different textbooks, pacing guides, assignments, and tests for each of these classes.”

The amended charge further states that although Bussman’s “new” schedule was not beyond his capabilities, his new schedule required three classes to prepare for daily and “could have easily been remedied to everyone’s satisfaction.”

On or about August 27, 2007, Bussman met with AEA officials regarding the “tardy assignment change but to no avail.”

Discussion

1. Jurisdiction

Charging Party alleges that AEA representatives made defamatory comments about Charging Party and “thereby damaged his reputation.”

PERB’s jurisdiction is limited to the determination of unfair labor practice claims arising under EERA and a few other public sector labor statutes. (California School Employees Association, Chapter 245 (Waymire) (2001) PERB Decision No. 1448; Sweetwater Union High School District (2001) PERB Decision No. 1417.) PERB’s jurisdiction does not include, inter alia, enforcement of the Americans with Disabilities Act, the U.S. Constitution, the Whistleblower Protection Reporting Act, laws governing improper government activity, laws governing sexual harassment, laws governing defamation, or laws governing the unemployment insurance process. Thus, Charging Party’s allegation that AEA representatives made defamatory comments about him, damaging his reputation, are dismissed as being outside of PERB’s jurisdiction.

2. Statute of Limitations

As amended, Charging Party continues to allege that AEA failed to properly represent him “in enjoining the passage of an illegal employment contract reached by AEA and AUSD.” As discussed in detail in the attached Warning Letter, in cases alleging a breach of the duty of fair representation, the statute of limitations begins to run when the charging party knew or should have known that further assistance from the union was unlikely. (California State Employees Association (Chen) (2005) PERB Decision No. 1736-S.)

The charge was filed on January 22, 2008. AEA informed Charging Party on or about January 30, 2007 that it declined to represent him and as a result, Charging Party sought the assistance of CTA. Therefore, Charging Party knew on or about January 30, 2007 that further assistance from AEA was unlikely. As such, the allegation that AEA failed to properly represent him with respect to the agreement negotiated by AUSD and AEA occurred outside of the statutory time period and is dismissed.

Furthermore, the amended charge appears to allege a separate theory that AEA retaliated against Charging Party for “raising concerns about the negotiations and the agreements between AUSD and AEA.” As stated in the attached Warning Letter, the limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.)

Though unclear, it appears that Charging Party is asserting that the following actions are evidence of AEA’s retaliatory conduct toward Charging Party: (1) AEA initially denied Charging Party access to a meeting and attempted to kick Charging Party out of the same meeting on March 21, 2007; (2) AEA representative Adams “improperly and illegally laid blame on [Charging Party] to teachers who had to pay back their salary” on March 26, 2007; and (3) on April 20, 2007, Charging Party was advised of “further disparaging remarks by [AEA representatives] Adams and Decker.” Assuming that the conduct described above is Charging Party’s evidence of AEA’s retaliatory conduct, Charging Party knew about AEA’s conduct on or about April 20, 2007. Therefore, the allegation that AEA retaliated against Charging Party, as amended, is not timely and is dismissed.

The only conduct by AEA cited in the amended charge occurring within the six-month statute of limitations occurred on August 27, 2007 when Charging Party communicated with AEA officials “regarding the tardy assignment change but to no avail.” This conduct is discussed in greater detail below.

3. Duty of Fair Representation

As amended, the charge also appears to allege that AEA violated its duty of fair representation when Charging Party communicated with AEA officials “regarding the tardy assignment change but to no avail.”

As stated in the attached Warning Letter, 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 Respondent'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 omitted.]

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.

(Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Decision No. 332, p. 9, quoting Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124; emphasis in original.)

With regard to when "mere negligence" might constitute arbitrary conduct, the Board observed in Coalition of University Employees (Buxton) (2003) PERB Decision No. 1517-H that, under federal precedent, a union's negligence breaches the duty of fair representation "in cases in which the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim." (Quoting Dutrisac v. Caterpillar Tractor Co. (9th Cir. 1983) 749 F.2d 1270, at p. 1274; see also, Robesky v. Quantas Empire Airways Limited (9th Cir. 1978) 573 F.2d 1082.)

In the amended charge, Charging Party states only that he communicated with AEA officials "regarding the tardy assignment change but to no avail." Charging Party alleges no other facts to demonstrate AEA abused its discretion or that its actions were without a rational basis or devoid of honest judgment. (International Association of Machinists (Attard), *supra*, PERB Decision No. 1474-M; United Teachers – Los Angeles (Wyler), *supra*, PERB Decision No. 970.) As such, the charge fails to state a prima facie violation of the duty of fair representation and is dismissed.

Right to Appeal

Pursuant to PERB Regulations,² Charging Party 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 during a regular PERB business day. (Cal. Code Regs, tit. 8, secs. 32135(a) and 32130; see also Gov. Code, sec. 11020(a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB 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. (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 95811-4124
(916) 322-8231
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.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs, tit. 8, sec. 32135(c).)

² PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

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,

TAMIR R. BOGERT
General Counsel

By _____
Katharine Nymman
Regional Attorney

Attachment

cc: John F. Kohn, Attorney

PUBLIC EMPLOYMENT RELATIONS BOARD



Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8386
Fax: (916) 327-6377



November 25, 2008

Nandita Murthy, Attorney
Kodam & Associates Law Office
41880 Kalmia Street, Suite 115
Murrieta, CA 92562

Re: John Bussman v. Alvord Educator's Association
Unfair Practice Charge No. LA-CO-1329-E
WARNING LETTER

Dear Ms. Murthy:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on January 22, 2008. John Bussman (Bussman or Charging Party) alleges that the Alvord Educator's Association (AEA or Respondent) violated the Educational Employment Relations Act (EERA or Act)¹ by violating its duty of representation. Investigation of the charge revealed the following information.

Factual Background

Bussman has been employed with the Alvord Unified School District (District) as a high school history/government teacher since 2001.

The AEA is, and at all times relevant to this charge has been, the recognized employee organization and exclusive representative for the certificated employees of the District. In 2005-2006, the District and AEA were in negotiations for a new contract. In early October 2006, AEA announced that a contract had been reached, but did not provide details of the contract to its members.

Prior to the ratification vote by the AEA membership, Bussman learned some details of the contract. According to the charge, part of the contract was that teachers "with 3-14 years of experience would have their salaries step level brought back two notches while those with 19 or more years or more of experience would be unaffected. Additionally, AEA members with two or less years would be shifted back to level one."

On or about October 11, 2006, Bussman questioned AEA representative Meg Decker (Decker) about the contract. Allegedly, Decker stated that Bussman "should not worry about the inequity of the contract as it was this or just minimal increases." Decker stated that "it was a good deal."

¹ EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

On or about October 12, 2006, Bussman met with Decker and other AEA representatives. During the meeting, "it was discovered that new employees under the contract would receive positioning based on their years of experience while those working for the district would be two steps behind."

On or about the week of October 23, 2006, Bussman forwarded a letter to Decker and another AEA Representative, Craig Adams (Adams), expressing his concerns about the contract.

After receiving no response from AEA, Bussman contacted the California Teacher's Association (CTA) and forwarded his October 23rd letter to CTA Representatives Karen Kyne (Kyne) and Bruce Matlock (Matlock). Bussman was then "referred to Barbara Kerr with CTA."

On December 7, 2006, Kerr stated that "[CTA] could not intervene."

During the week of December 17, 2006, Kyne told Bussman that "the local association has to first be approached before CTA can step in."

On or about January 30, 2007, Bussman contacted Decker about having AEA represent him on the violations in the contract. According to the charge, "[AEA] declined to represent [Bussman] and in fact [was] very hostile towards him."

In or about March 2007, AEA advised Bussman and other members "that a new contract had been reached."

On or about March 16, 2007, Bussman again raised his concerns about violations of the Education Code and "other inequities contained in the contract" but was "shouted down" by AEA.

On or about March 21, 2007, Bussman was initially denied access to a meeting and "Adams attempted to give [sic] [Bussman] out." Afterwards, a CTA representative advised AEA of the "illegalities of both contracts" but AEA "continued to deny such violations and stated the vote would continue."

On or about March 26, 2007, new District hires were advised by AEA and the District that they would have to "pay back a portion of their current salary." In addition, the charge alleges that Adams then "improperly and illegally laid blame on [Bussman] to teachers who had to pay back their salary."

On or about April 13, 2007, CTA agreed to provide Bussman with legal counsel and provided him with the requisite authorization forms.

On or about April 20, 2007, Petitioner was "advised of further disparaging remarks by Respondents Adams and Decker."

In or about May 2007, Bussman met with CTA legal counsel Marianne Reinhold (Reinhold) and was advised that she would be filing a lawsuit later in the month on his behalf.

On or about June 19, 2007, Bussman was advised by CTA that they were "awaiting approval of legal assistance even though such was given on April 13, 2007."

Between June 2007 and August 2007, Bussman attempted to reach CTA and specifically Reinhold, however, CTA allegedly failed to respond.

On or about August 10, 2007, Bussman received a letter sent by AEA to the District requesting that the District "meet with AEA members to fix the contracts."

On or about August 16, 2007, Bussman received a welcome letter from District Principle Santos Campos advising him that if he had not yet received a notice of a schedule change, then his schedule would remain the same. At the time Bussman received the August 16 letter, he had not received any notice of a schedule change.

On or about August 23, 2007, Bussman received notice of a schedule change from the District.

On or about August 26, 2007, Bussman demanded that CTA file a "suit on his behalf due to the contracts to Respondent CTA but [received] no response."

On or about August 27, 2007, Bussman met with AEA officials regarding the "tardy assignment change which obviously is in retaliation as it breaches the logical mind on assignments considering other teacher's schedules." The charge further alleges that the District "failed and continues to fail to give [Bussman] all the tools he needs to effectively teach" all three of his classes.

In September 2007, CTA and their legal counsel Reinhold, responded to and advised Bussman that "they are refusing to properly represent [him] as required."

Discussion

1. Statute of Limitations

EERA section 3541.5(a)(1) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.) A charging party bears the burden of demonstrating that the charge is timely filed. (Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.) The statute of limitations has also been raised by the respondent as an affirmative defense in this case. (Long Beach Community College District (2003) PERB Decision No. 1564.)

On or about January 20, 2007, Charging Party was informed that AEA “declined to represent” him on the violations in the contract and “in fact were very hostile towards him.” In a duty of fair representation case, the statute of limitation begins to run when the charging party knew or should have known that further assistance from the union was unlikely. (California State Employees Association (Chen) (2005) PERB Decision No. 1736-S.) Charging Party knew on or about January 20, 2007 that further assistance from AEA was unlikely. However, Charging Party did not file his charge until January 22, 2008, approximately one-year after receiving notice from AEA. Further, the charge does not explain Charging Party’s failure to file within the six month time-frame. As such, the charge as presently written, does not demonstrate that the charge is timely filed.

2. Duty of Fair Representation

Even if the charge is timely filed, the charge does not present facts demonstrating AEA violated its duty of representation to Charging Party.

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 Respondent’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 omitted.]

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.

(Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Decision No. 332, p. 9, quoting Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124; emphasis in original.)

With regard to when "mere negligence" might constitute arbitrary conduct, the Board observed in Coalition of University Employees (Buxton) (2003) PERB Decision No. 1517-H that, under federal precedent, a union's negligence breaches the duty of fair representation "in cases in which the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim." (Quoting Dutrisac v. Caterpillar Tractor Co. (9th Cir. 1983) 749 F.2d 1270, at p. 1274; see also, Robesky v. Quantas Empire Airways Limited (9th Cir. 1978) 573 F.2d 1082.)

Charging Party appears to be asserting that AEA violated its duty of fair representation by negotiating a contract which provided for preferential and differential treatment of teachers, and allegedly violated the Education Code. However, the Board has specifically held that an exclusive representative is not expected or required to satisfy all members of the unit it represents, and the duty of fair representation does not mean that an exclusive representative is barred from making contracts which may have unfavorable effects on some members. (California School Employees Association and its Chapter 107 (Chacon) (1995) PERB Decision No. 1108.) Even poor judgment on the union's part would not be enough to establish a violation of its duty of fair representation. (Id.)

Charging Party alleges no other facts to demonstrate AEA abused its discretion or that its actions were without a rational basis or devoid of honest judgment. (International Association of Machinists (Attard), supra, PERB Decision No. 1474-M; United Teachers – Los Angeles (Wyler), supra, PERB Decision No. 970.) As such, the charge fails to state a prima facie violation of the duty of fair representation.

If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may 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 an authorized agent of 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 an amended charge or withdrawal is not filed on or before December 2, 2008, PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Katharine ~~Nyman~~
Regional Attorney

KN