STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

PATRICIA O'NEIL, ERNEST SALGADO and EMIL BARHAM, Charging Parties, v. SANTA ANA EDUCATORS ASSOCIATION, Respondent.	Case No. LA-CO-1170-E PERB Decision No. 2087 December 30, 2009

Appearances: Patricia O'Neil, for Patricia O'Neil, Ernest Salgado and Emil Barham; California Teachers Association by Robert E. Lindquist, Staff Attorney, for Santa Ana Educators Association.

Before McKeag, Neuwald and Wesley, Members.

DECISION

NEUWALD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Patricia O'Neil (O'Neil), Ernest Salgado (Salgado) and Emil Barham (Barham) (collectively Charging Parties) of the dismissal of their unfair practice charge (UPC).[1] The UPC alleged that the Santa Ana Educators Association (SAEA or Association) violated the Educational Employment Relations Act (EERA)[2] by denying Charging Parties the opportunity to participate in union activities and by failing to meet its duty of fair representation. The Charging Parties alleged that this conduct constituted a violation of EERA sections 3543.6(a), 3543.6(b) and 3544.9.

[1] The original Charging Parties included O'Neil, Salgado and Barham. Although only O'Neil's name appears on the appeal documents filed with the Board, the documents indicate that they were filed on behalf of all of the Charging Parties named in the charge.

[2] EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

The Board has reviewed the entire record in this matter, including, but not limited to, the UPC, the amended UPC, the warning and two dismissal letters, the Charging Parties' appeal of the dismissal and the Association's response to the appeal. Based on our review, we affirm the dismissal of the charge for the reasons set forth herein.

PROCEDURAL HISTORY

On April 15, 2004, Charging Parties filed a UPC alleging that the Association denied them the opportunity to participate in union activities and violated the duty of fair representation in connection with obtaining member ratification of two agreements reached through collective bargaining. Charging Parties filed a First Amended Charge on April 16, 2007.[3] On June 5, 2007, a Board agent dismissed the UPC, finding that that charge, as amended, failed to state a prima facie case.

BACKGROUND/FACTS

SAEA is the exclusive representative for approximately 3100 certificated employees (including Charging Parties) in the Santa Ana Unified School District (District).

February 27, 2004 Memo to Bargaining Unit Members

On February 27, 2004, SAEA's Co-Executive Directors Gladys Hall-Kessler (Hall-Kessler) and Joe Krause (Krause) issued a memo to bargaining unit members outlining the efforts to reach an agreement with the District on a successor collective bargaining agreement (CBA). The February 27 memo described the District's financial condition as "desperate" due to both a $29 million shortfall for the following fiscal year and the State's education spending

[3] After the charge was initially dismissed based upon a Board agent's determination that the charge did not state a prima facie case, the Board remanded the case for further investigation based upon Charging Parties' assertion that they did not receive the Board agent's letter warning them that the charge would be dismissed if they did not file an amended charge. (*Santa Ana Education Association (O'Neil, et al.)* (2005) PERB Decision No. 1776.)

cuts. The memo described the severity of the financial crises by emphasizing that the District began the 2002-2003 school year "with a razor thin margin in [its] reserve." The memo stated, in relevant part:

> The State doesn't allow school districts to go bankrupt. So the District was forced to come to us to get needed money. At the table, they continued to demand medical benefits cuts and caps, step and column freezes, furlough days, and longer hours. When we wouldn't budge, they tried cutting programs, and several were cut. They tried getting rid of class size reduction, but it didn't turn out to save them anywhere near the four and half million dollars they were hoping for. So in the end, they still needed money and they were either going to get taken over by the state (in lieu of bankruptcy), impose a settlement on teachers and face a strike, or find a way to settle with SAEA on a bail out.
>
> Obviously we weren't looking forward to being taken over by the State. The State would have the right to do all the cuts without negotiations, if that happened. The District would be in the hands of appointed overseers from outside for however long it took to get things in order. And our contract and its protections would be seriously curtailed. The idea of an imposition by the District was equally disturbing. After going through impasse mediations, we would then go on to a fact-finding hearing which would produce a recommendation which could be ignored by the District, a process called imposition. After that we could strike. That is not a pretty solution because even after striking, we would still be $29 million short of meeting our budget over the next couple of years. We might be able to stop the District from imposing by winning an unfair labor practice charge for failing to bargain in good faith. If we win that ruling, the District would be allowed to impose, but they would still need $29 million in order to stay afloat.
>
> The long and the short of it is that no matter how we get there, we will have to find $29 million to bail the District out. There are no alternatives to that.
>
> [¶] . . . [¶]
>
> We don't like this[,] but the alternative is much worse. Even if we strike, we would be striking for restoration and benefits. Striking won't find the missing money. Soon, if all goes the way we think it will, we will be asking you to vote yes to ratify the contract changes we will be presenting to you. Your Reps will be given all the information on the changes to the contract along

> with explanations. If you vote, not [sic] you may be asked to picket and even strike down the road. However, if we picket and strike we will still have to bail them out to the tune of $29 million.

The memo advised members that agreeing to the District's demands would not be in the best interest of unit members. Instead, SAEA proposed that, for the next two years (2004-05 and 2005-06), it would agree to: (1) a reduction in the yearly calendar from 186 days to 185 days (equating to a 1 percent reduction in pay); (2) a 3 percent reduction in per diem pay; and (3) a "Retirement Incentive Program." The Association's proposal equated to an annual 4 percent reduction in the salary of bargaining unit employees for two years.

Tentative Agreements and Ratification Election

On or about March 1, 2004, SAEA reached the following two tentative agreements with the District: (1) re-openers from the 2002/2003 and 2003/2004 school years; and (2) a successor, three-year agreement, effective July 1, 2004. The tentative agreements included the annual 4 percent salary reduction substantially as described in SAEA's February 27 memo.

On March 2, 2004, the voters passed Proposition 57, a measure that Charging Parties assert "generated significant additional revenue for the District."

On March 3, 2004, SAEA held an Emergency Representative Council meeting, at which a vote was taken to determine whether the tentative agreements would be sent to the membership for ratification. Each site representative in attendance at this meeting was provided a packet of information, including the tentative agreements, and directed to leave copies in the front office and the teachers' lounge and to inform members that they could obtain a copy of the tentative agreements on the Association's website. Charging Parties allege that this meeting was held in violation of the Association's bylaws.

Also on March 3, 2004, the District school board held a meeting. During that meeting, one of the representatives on the superintendent's Teachers' Cabinet asked the District

superintendent whether it was true the District faced a State takeover in two weeks. The superintendent replied that, although the District needed to reduce expenditures, it was not facing an imminent State takeover. The same day, District Superintendent Al Mijares (Mijares) issued a memorandum informing the Associaton that ratification of the tentative agreements would help save the Class Size Reduction (CSR) program. Additionally, a memorandum dated January 23, 2004 from Superintendent Mijares informed employees that "The Board President has stated publicly that State takeover of SAUSD is not an option." Charging Parties also allege that, at an unspecified time, representatives from the Orange County Department of Education Fiscal Management Department stated that the District was "fine for this year."

After the SAEA representative council approved the tentative agreements, SAEA scheduled a ratification election from March 5 to March 12, 2004, in which members were asked to vote whether to accept or reject the March 2004 tentative agreements.[4] SAEA conducted three informational meetings, on March 8, 9 and 10, 2004, to explain the terms of the tentative agreements to employees.[5] In addition, SAEA sent each member a ballot and a synopsis of the tentative agreements, and informed the membership that the full tentative agreements could be accessed on a website. Charging Parties alleged that, at the March 8, 2004 informational meeting, when Salgado attempted to speak against the ratification, he was interrupted by President Tom Harrison (Harrison) and told that "*this was their forum, not his.*" (Italics in original.) Charging Parties further alleged that, at the March 10, 2004 informational

[4] The meetings and voting occurred during the cycle change of the District's year-round school schedule, when the largest number of Association members would be available.

[5] The first meeting occurred at Saddleback High School. The second and third meetings occurred at the Association's headquarters.

meeting, Hall-Kessler "rose and went to the front of the assembly where she attempted to end Mr. Salgado's questions and comments."

Throughout the ratification process, O'Neil actively opposed the tentative agreements. She believed that the Association had failed to negotiate an adequate agreement because there was "an inadequate exchange in compensation made for four percent (4 percent) pay cut" and because other alternatives to a pay cut were possible and could have been negotiated by SAEA.

Charging Parties further alleged that, on March 5, 2004, during a visit to Hoover Elementary School, Hall-Kessler and President Harrison stated that, "if we did not ratify this contract, we would 'very possibly be taken over by the State in two weeks and faced with a potential *10% pay cut and nullification of our contract*' (emphasis added)." Charging Parties also assert that members were told at this meeting and others that saving the CSR program depended upon ratification of the contract.[6]

Use of Employee Mailboxes

On March 8, 2004, Charging Parties attempted to use employee mailboxes to distribute materials urging members to vote against ratification of the contract. The first page of the materials, entitled "Unanswered Questions and Other Reasons to Vote 'NO' on the Contract Ratification," indicates that it was prepared by O'Neil in her capacity as "[SAEA Board of Directors (non-voting) resignation submitted]." The second page is entitled "Vote 'NO' on the Settlement," and indicates that it was promulgated by the "Coalition of Concerned Teachers of Santa Ana Unified." That day, President Harrison issued a memorandum to SAEA site representatives and District secretaries requesting that "an anonymous yellow flyer" called "Vote NO on the Settlement" that had been deposited in District mailboxes be removed

[6] Charging Parties also alleged that, at the March 5 meeting, Hall-Kessler embarrassed O'Neil in public before her peers. Charging Parties did not appeal the dismissal of that portion of the charge that alleged that this conduct constituted unlawful discipline or retaliation.

immediately, and asserted that both the District and SAEA agreed that the distribution of such anonymous flyers was illegal under the CBA.[7] Charging Parties further allege that Walker Elementary School Principal Robert Deberry informed Barham that he could not distribute materials against ratification in the District's mailboxes. Charging Parties further alleged that Krause informed O'Neil that SAEA would "seek disciplinary action by the District of anyone who distributed 'Vote No' materials, and that it would be a problem even for those people who had stopped distributing materials when told to do so."

During the period of March 5 to March 12, 2004, the Association disseminated a flyer to members entitled "VOTE YES ON THE CONTRACT SETTLEMENT." The flyer stated, in part:

- A 'YES' guarantees no outside state agency takeover of the district's budget.
- A 'NO' doesn't make $29 million dollars appear out of thin air.

. . .

- A 'No' will delay any resolution on class-size reduction indefinitely.

The SAEA membership voted to ratify the reopener tentative agreement by a margin of 1804 to 433 with 99 invalid ballots, and to ratify the successor agreement by a margin of 1740 to 494 with 99 invalid ballots.

On March 16, 2004, the District's Board of Education ratified the tentative agreements.

On March 23, 2004, SAEA President Harrison stated that the March 2 vote on Proposition 57 would not have impacted negotiations because the District had already included a 1.84 percent COLA in its revenue projections for 2004-2005. Charging Parties assert that, at some unspecified date, SAEA informed Charging Parties that the District had to immediately

[7] There appears to be no dispute that the "anonymous yellow flyer" referred to at least the second page of the materials provided by Charging Parties.

pay back $15 million of the "Tustin Land Settlement Money." Charging Parties also assert that they were informed that the District was not legally required to pay this money back, although it may be politically favorable to do so.

DISCUSSION

On appeal, Charging Parties argue that the Association's conduct in negotiating and gaining ratification of the tentative agreements violated its duty of fair representation by the following conduct: (1) making misrepresentations of fact in order to secure ratification of the tentative agreements; (2) failing to provide adequate opportunity for members to consider and comment on the tentative agreements prior to ratification; (3) failing to follow its own by-laws regarding ratification; (4) preventing members from distributing materials opposing ratification; and (5) agreeing to the tentative agreements without a rational basis.

In order to state a prima facie case of breach of the duty of fair representation in violation of section 3543.6(b), Charging Parties must plead facts that show that the Association's conduct was arbitrary, discriminatory or in bad faith. (*United Teachers of Los Angeles (Collins)* (1982) PERB Decision No. 258 (*Collins*).) As a general rule, an exclusive representative enjoys a wide range of bargaining latitude. As the United States Supreme Court stated in *Ford Motor Co. v. Huffman* (1953) 345 U.S. 330, 338:

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

Acknowledging the need for such discretion, PERB has determined that an exclusive representative is not expected or required to satisfy all members of the unit it represents.

(*California School Employees Association (Chacon)* (1995) PERB Decision No. 1108.) Moreover, the duty of fair representation does not mean an employee organization is barred from making an agreement which may have an unfavorable effect on some members, nor is an employee organization obligated to bargain a particular item benefiting certain unit members. (*Ibid.*; *Los Rios College Federation of Teachers (Violett)* (1991) PERB Decision No. 889.) The mere fact that Charging Parties were not satisfied with the agreement is insufficient to demonstrate a prima facie violation. (*Ibid.*)

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 [*Reed*], quoting *Rocklin Teachers Professional Association (Romero)* (1980) PERB Decision No. 124 [*Rocklin*].)

I. Misrepresentation of Facts to Secure Ratification

On appeal, Charging Parties contend that the Board agent erred in failing to find that the following statements by SAEA constituted unlawful misrepresentations of fact made to its members in order to secure ratification of the tentative agreements: (1) that saving CSR depended on contract ratification; (2) that the District faced a state takeover in lieu of bankruptcy; (3) that the CBA would be nullified in the event of a state takeover; (4) that there was no alternative to bailing out the District for $29 million; (5) that the District had a $15 million debt that needed to be repaid immediately; and (6) that the cost of living increase resulting from Proposition 57 had already been incorporated into the District's budget projections.

PERB has recognized its authority to review the contract ratification process vis-à-vis the union's duty of fair representation. (See, e.g., *Oxnard Educators Association (Gorcey and Tripp)* (1988) PERB Decision No. 681 [PERB can examine union conduct in communicating bargaining information to constituents].) The intentional misrepresentation of fact in order to obtain contract ratification is a demonstration of bad faith and a violation of the duty of fair representation. (*San Juan Teachers Association, CTA/NEA (Himes, et al.)* (1999) (*Himes*), PERB Decision No. 1322; *California State Employees' Association (O'Connell)* (1986) PERB Decision No. 596-H (*O'Connell I*).) A prima facie case of a breach of the duty of fair representation has been stated where it is alleged that the exclusive representative knowingly misrepresented a fact in order to secure from its constituents their ratification of a contract. (*O'Connell I.*)

Subsequently, PERB clarified that the standard set forth in *O'Connell I* was "but one example of 'bad faith'," and that "[w]hen dealing with matters of internal union business, the fact misrepresented must have a substantial impact on the relationships of the unit members to their employer to give rise to the duty of fair representation." (*California State Employees Association (O'Connell)* (1989) PERB Decision No. 726-H (*O'Connell II*), citing *Service Employees International Union, Local 99 (Kimmett)* (1979) PERB Decision No. 106 (*Kimmett*).) The Board further held, however, that "[a] breach of the duty will not be found where the exclusive representative is guilty of 'mere negligence or poor judgment'." (*O'Connell II.*)

Based upon the foregoing, in order to state a prima facie breach of the duty of fair representation by misrepresentation of facts to secure contract ratification, the charging party must show that: (1) the exclusive representative made an untrue assertion of fact (or conduct equivalent to an untrue assertion of fact); (2) the exclusive representative's assertion was made

with knowledge of its falsity; (3) the exclusive representative's assertion was made to secure ratification of a contract; and (4) the fact misrepresented must have a substantial impact on the relationships of the unit members to their employer. However, "[a] breach of the duty will not be found where the exclusive representative is guilty of 'mere negligence or poor judgment'." (*O'Connell II.*)

A. Statement that Saving Class Size Reduction Program (and Corresponding Jobs) Depended on Contract Ratification.

Charging Parties assert that the Board agent erred in dismissing the allegation that SAEA misrepresented to its members that voting against ratification of the tentative agreements would delay resolution of funding issues associated with the CSR program. According to Charging Parties, the statements were false because the District had already voted to restore the CSR program. As noted by the Board agent, however, Charging Parties also provided evidence showing that the District contemplated eliminating CSR in the future as one means to help solve its budget issues. Thus, the Board agent concluded, it is plausible that SAEA believed that making salary concessions would preserve the CSR program in the future.

Charging Parties have failed to establish that SAEA's statements were untrue assertions of fact. Instead, the information provided by Charging Parties indicates that, while the District had not eliminated the CSR program for the 2004-2005 school year, it continued to view elimination of CSR as a possible option to address its financial issues in the future. Thus, SAEA merely expressed its opinion that ratification of the contract could help preserve the CSR program.

In their appeal, Charging Parties argue that it was "highly unlikely" that SAEA was referring to saving the CSR in a future school years (such as 2005-2006 or 2006-2007), because of the following statements contained in a memorandum entitled "SAEAnswers Update from the Accountability Committee": (1) "we did no such thing" as take a pay cut to

save CSR; (2) "While most of us understand the importance of CSR, it was not in jeopardy"; and (3) "Before we voted on our contract, the District stated that they were not ending CSR." Charging Party also asserts that there are no facts indicating that the Association was not referring to the 2004-2005 school year when it made the statements concerning CSR. Although the memo is undated, Charging Parties assert that it was issued *after* ratification of the contract. Thus, this memo cannot be used as evidence of misrepresentations made to induce the members to ratify the contract.

Even assuming SAEA's statements referred to the 2004-2005 school year, the evidence presented fails to demonstrate that SAEA knowingly misrepresented facts to its membership in order to induce them to ratify the tentative agreements based upon the erroneous conclusion that saving the CSR program depended on ratifying the tentative agreement. The record includes a memorandum from Superintendent Mijares to SAEA dated March 3, 2004, stating that ratification of the tentative agreements would help save the CSR program. Thus, SAEA may well have believed that the CSR was at risk. There are no facts showing that SAEA made the statements with knowledge that it was false. Even if untrue, the statements would, at most, reflect simple negligence, not deliberate misrepresentation. (See e.g., *California School Employees Association (Ciaffoni, et al.)* (1984) PERB Decision No. 427 [holding that the union engaged in mere negligence when it failed to fully explain terms of a settlement agreement].) Accordingly, the evidence fails to establish that the Associaiton acted in bad faith or in an arbitrary manner by stating in a March 2004 flyer and at meetings that a "no" vote would delay resolution of funding issues associated with CSR.

B. Statement that the District Faced State Takeover in Lieu of Bankruptcy

Charging Parties argue that the Board agent erred in finding that SAEA did not deliberately misrepresent the facts concerning the possibility of an imminent state takeover of

the District. Specifically, Charging Parties assert that the following statement contained in SAEA's February 27, 2004 memo constituted a deliberate misstatements of fact: "[The District was] either going to get taken over by the state (in lieu of bankruptcy), impose a settlement on teachers and face a strike, or find a way to settle with SAEA on a bail out." Charging Parties assert that this statement by SAEA indicates that the District was "nearing a position of bankruptcy," which could have resulted in a state takeover as early as March 2004 if members failed to ratify the contract. In support of their position, Charging Parties assert that the Board agent failed to consider the following evidence: (1) a January 23, 2004[8] District memo stating that the District was able to pay its vendors and meet payroll; (2) a statement by a representative of the Orange County Department of Education, Fiscal Management Department, that the District was "fine for this year [i.e., 2003-2004]"; and (3) a statement by the superintendent at the March 3, 2004 meeting that, while the District did need to reduce expenditures, it was not facing imminent takeover. Charging Parties assert that these facts support their theory that the District was not facing bankruptcy or a state takeover.

A review of the February 27, 2004 memo does not demonstrate that SAEA deliberately misled members into ratifying the TA. The February 27 memo emphasizes that the District was facing a severe solvency problem and that a strike by members would not alleviate such concerns, and voices several possible options to alleviate the problem: the District would either be taken over by the state (in lieu of bankruptcy), impasse resolution procedures would "impose a settlement on teachers and face a strike", or "find a way to settle with SAEA on a bail out." These statements do not constitute untrue assertions of fact, but merely express SAEA's opinion as to what might happen in the event a contract was not reached.

[8] The appeal mistakenly refers to this memo as dated February 24, 2004.

Whether that opinion was well or ill founded, the law permits a substantial amount of rhetoric, especially during labor negotiations. (See e.g., *Linn v. United Plant Guard Workers of America, Local 113, et al.* (1966) 383 U.S. 53 [libel suit dismissed against union in the absence of malicious intent in making false statements]; see also, *Sierra Publishing Company v. NLRB* (9th Cir. 1989) 889 F.2d 210 [finding that "the law does favor a robust exchange of viewpoints" in the context of labor negotiations].) Accordingly, the charge fails to establish that SAEA knowingly misrepresented facts to bargaining unit employees or that its statements were made without a rational basis or devoid of honest judgment.

C. Statement that the CBA would be Nullified in the Event of a State Takeover

Charging Parties argue that the Board agent erred in dismissing the allegation that SAEA misled its members to ratify a contract by stating that the CBA would be nullified in the event of a state takeover. In support of this position, Charging parties rely on the following statement in the February 27, 2004 memo:

> Obviously we weren't looking forward to being taken over by the State. The State would have the right to do all the cuts without negotiations, if that happened. . . . And our contract and its protections would be seriously curtailed.

Charging Parties further assert: (1) that a member of the bargaining team told teachers at Macarthur Intermediate that, in the case of a state takeover, their tenured status would be at risk and they would lose their seniority; and (2) that, at the March 5, 2004 meeting at Hoover Elementary School, SAEA President Harrison stated that, if the members did not ratify the contract, "we would 'very possibly be taken over by the State in two weeks and faced with a potential 10% pay cut and nullification of our contract.'"

The quoted portion of the February 27, 2004, memo does not contain a misrepresentation of fact. Nothing in the memo states that the CBA "would be nullified" in the event of a state takeover. Instead, it merely expresses SAEA's opinion that, *if* the State were to

take over the District and *if* the State elected to cut wages and benefits, the existing contract and its protections "would be seriously curtailed." Similarly, the alleged statements by SAEA representatives do not contain misrepresentations of fact, but merely express an opinion as to the possible impact of a state takeover. Therefore, the Board agent properly dismissed this allegation.

D. Statement that There was No Alternative to Bailing Out the District for $29 Million

Charging Parties argue that the Board agent erred in dismissing the allegation that SAEA engaged in misrepresentation by stating to employees that there was no alternative but to "bail out" the District. This position is based upon the following statements:

February 27 memo:

> The long and short of it is that no matter how we get there, we will have to find $29 million to *bail* the District out. There are no alternatives to that.
>
> . . . . they were either going to get taken over by the state (in lieu of bankruptcy), impose a settlement on teachers and face a strike, or find a way to settle with SAEA on a *bail out*.

(Emphasis added.)

Undated SAEAnswers memo:

> We, the members of the Association, voted to underwrite SAUSD and bail them out of their financial crises.
> ...
> Repeat after me, 'We took a 4% pay cut to save SAUSD from becoming insolvent.'

Charging Parties assert that the statements constituted misrepresentations because, as acknowledged by SAEA, there were other alternatives to a "bail out," namely, a state takeover and "imposition" of a contract (via the statutory impasse resolution) process. We disagree that sufficient evidence has been presented to establish that the above statements referencing a "bail out" were untrue assertions of fact. Instead, the statements merely express SAEA's opinion

that agreeing to contract terms including a salary reduction was the best course of action, given the other alternatives. In this context, the term "bail out" simply indicates that SAEA believed its salary concessions served to ameliorate the District's $29 million budget shortfall. Moreover, as indicated above, because the SAEAAnswers memo was issued *after* ratification, any statements therein cannot form the basis of a charge of misrepresentation. Therefore, the Board agent properly dismissed this allegation.

E. Statement that the District had a $15 million debt that needed to be repaid immediately

Charging Parties assert that the Board agent erred in dismissing the allegation that SAEA misinformed its members that the District had a $15 million debt that needed to be repaid immediately. Charging Parties assert that this statement constituted a misrepresentation of fact because the District failed to inform the members that it was not legally required to pay the money back "immediately," although it may have been "politically" advantageous to do so.

PERB Regulation 32615(a)(5)[9] requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." The charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S (*Department of Food and Agriculture*), citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

Charging Parties failed to meet their burden under *Department of Food and Agriculture*. Neither the original charge, the amended charge, nor the appeal identify when the

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

statement was made, by whom, and to whom it was made. Moreover, Charging Parties have failed to identify any specific authority for the proposition that the District was not "legally" required to pay back the debt. Accordingly, the Board agent properly dismissed this allegation.

F. Statement that cost of living increase resulting from Proposition 57 had already been incorporated into the District's Projections

Charging Parties assert that the Board agent erred in finding that the March 23, 2004 statement from President Harrison, that waiting until after the Proposition 57 vote to ratify the tentative agreements would not have changed the need for a 4 percent salary reduction, was a misrepresentation of fact made to secure ratification. Given that the statement was made after ratification, we agree with the Board agent that the charge fails to demonstrate that the Association misrepresented a fact to secure ratification of the tentative agreements.

II. Opportunity for Employees to Comment Prior to Ratification

Charging Parties assert that the Board agent erred in finding that SAEA did not violate its duty of fair representation by failing to provide members sufficient time to comment prior to holding the tentative agreement ratification election. Specifically, Charging Parties allege that SAEA denied Salgado the opportunity to make comments at the March 8 and 10, 2004 informational meetings.

Generally, PERB will not review matters concerning internal union affairs unless they have a substantial impact on the relationship of unit members to their employer so as to give rise to the duty of fair representation. (*Kimmet*; see also, *California State Employees Association (Hutchinson, et al.)* (1998) PERB Decision No. 1304-S; *California State Employees Association (Hard, et al.)* (1999) PERB Decision No. 1368-S; *California State Employees Association (Gonzalez-Coke, et al.)* (2000) PERB Decision No. 1411-S.) However, "[t]he duty of fair representation implies some consideration of the views of various groups of employees and some access for communication of those views, but there is no requirement that

formal procedures be established." (*Kimmett,* citing *Letter Carriers, Branch 6000 v. NLRB* (1979) 595 F.2d 808, 813; *Waiters Union, Local 781 v. Hotel Association* (D.C. Cir. 1974) 498 F.2d 998, 1000.) When weighing the means of notice and communication, the Board has determined that the denial of formal voting structure to nonmembers does not constitute a "substantial impact" on the relationship of unit members to their employer. (*El Centro Elementary Teachers Association* (1982) PERB Decision No. 232 (*El Centro*).) Instead, so long as the views of employees are given "some consideration" in advance of a ratification election, the duty of fair representation is satisfied. (*Ibid.; Himes.*)

Charging Parties have failed to demonstrate that the attempted refusal to permit one individual to speak at two informational meetings had a substantial impact on their employment relationship with the District so as to violate the duty of fair representation. The record indicates that Charging Parties and other employees were provided ample notice of the proposed contracts prior to the ratification vote, including the opportunity to attend the March 3, 2004 Emergency Representative Council meeting and three informational meetings on March 8, 9 and 10, 2004. SAEA sent all members a ballot and a synopsis of the tentative agreements, and provided access to the full tentative agreements on its website. Charging Parties have not established that they were deprived of the opportunity to voice their concerns about the contracts. O'Neil actively opposed the tentative agreements. Moreover, in their amended charge, Charging Parties assert that, although Salgado was told that the March 8 meeting was SAEA's forum, not his, the members present at that meeting indicated their desire to hear what he had to say and "a vote was taken through which it was determined that a majority of those in attendance wanted to hear Mr. Salgado speak." The amended charge further alleges that, at the March 10 meeting, Hall-Kessler only *attempted* to end Salgado's questions and comments, and concludes with the question, "Is the requirement to provide the

'opportunity to comment at the informational meeting' met if the member is told he does not have the right to speak but speaks anyway?" Thus, the amended charge indicates that, in fact, Salgado did speak at both meetings. In addition, while the charge alleges that Charging Parties were not permitted to utilize SAEA's informational meetings and District mailboxes to communicate their views to other employees, the charge does not establish that SAEA prevented members from expressing their views to SAEA and to other members by other means. Accordingly, the Board agent properly dismissed this allegation.

III. Compliance With Union By-Laws

Charging Parties assert that the Board erred in finding that the amended charge failed to establish that SAEA's alleged failure to adhere to its internal rules had a substantial impact on Charging Parties' employment relationship, or that any violations were made without a rational basis or devoid of honest reason. In their appeal, Charging Parties assert that "it was obvious that the vote would have been different" had SAEA not violated its internal by-laws governing the requisite notice, meetings, and materials to be provided to members prior to contract ratification elections. Charging Parties further assert that following the bylaws would have allowed members to hear challenges to SAEA's alleged misrepresentations of fact, criticisms to SAEA's analysis of the District's budget or alternative analyses, and lobbying for other alternatives, all of which "could reasonably be expected to have persuaded the membership to vote against ratification of a 4% pay cut."

The alleged failure to comply with internal union rules governing the ratification process does not violate the duty of fair representation in the absence of a substantial impact on the relationship of employees to their employer. (*California State Employees Association (Hackett)* (1993) PERB Decision No. 1012-S.) Mere speculation, conjecture or legal conclusions are insufficient to establish a prima facie case. (*United Teachers-Los Angeles*

(Ragsdale) (1992) PERB Decision No. 944; *Regents of the University of California* (2005) PERB Decision No. 1771-H.)

Charging Parties' position that compliance with SAEA's internal rules would have affected the outcome of the ratification vote is based upon speculation without any supporting facts. PERB will not speculate that the contract would not have been ratified if SAEA had followed its bylaws or that the ratification vote would have somehow been different. The various acts described, even if negligent, do not show that SAEA acted in an arbitrary, discriminatory, or bad faith manner. Thus, a prima facie case has not been established.

IV. Refusal to Permit Charging Parties to Use District Mailboxes to Distribute Materials

Charging Parties do not appeal the Board agent's dismissal of that portion of the charge alleging that SAEA unlawfully threatened to impose discipline on them for attempting to use District mailboxes to distribute materials. They do, however appear to assert on appeal that SAEA's failure to allow them to access District mailboxes violated SAEA's internal rules and had a significant effect on their employment relationship, namely, the ratification of the contract resulting in a 4 percent pay cut. As indicated above, Charging Parties' speculation that compliance with internal union rules would have had a substantial impact on their employment relationship is insufficient to establish a prima facie case. Moreover, the right of access to employer mailboxes under EERA attaches only to the employee organization, not individual employees. (EERA, § 3543.1(b); *Los Rios Community College District* (1990) PERB Decision No. 833.) In addition, there is no evidence that Charging Parties were prevented from communicating to members via alternative communication channels, other than the District's mailbox system. Therefore, the amended charge fails to demonstrate a prima facie breach of the duty of fair representation.

V. SAEA's Conduct in Negotiating Agreement with a 4 Percent Pay Cut

Charging Parties assert that the Board agent erred in dismissing the allegation that SAEA's conduct was without a rational basis and went beyond mere negligence or poor conduct because: (1) SAEA entered into a tentative agreement for a 4 percent pay cut days before a ballot measure passed granting a 1.84 percent COLA that was not included in the District's projections; and (2) the agreement to the 4 percent pay cut did not include language on "deficit-reduction and equalization revenue when using a formula to determine the amount of anticipated COLA to later be applied to the salary schedule. (Failure to include this language later led to serious ramifications related to benefits.)"

As noted above, to establish a violation of the duty of fair representation in the context of contract negotiations, a party must show that the exclusive representative's conduct was arbitrary, discriminatory or in bad faith. (*Collins.*) Thus, to establish a prima facie case, Charging Parties must allege sufficient facts to establish the manner in which the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment. (*Reed, Rocklin.*)

Charging Parties have failed to allege sufficient facts to establish that SAEA's decision to agree to a contract with a 4 percent salary cut was without a rational basis or devoid of honest judgment. There is no question that the District was facing a severe financial crisis. The evidence presented to the Board agent reveals that SAEA considered other alternatives during the course of negotiations, but ultimately concluded that the pay cut was in the best interest of its members overall. While reasonable minds may differ as to whether or not it was absolutely necessary for SAEA to agree to the pay cut in order to ameliorate the District's financial situation, the charge does not allege facts showing that SAEA's conduct was arbitrary, discriminatory or in bad faith. Charging Parties' assertion that SAEA failed to

consider the impact of Proposition 57 on the District's finances and to include additional language to determine the amount of the COLA are insufficient to demonstrate that the Association breached its duty of fair representation.

ORDER

The unfair practice charge in Case No. LA-CO-1170-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Wesley joined in this Decision.