

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



INTERNATIONAL UNION, UNITED
AUTOMOBILE, AEROSPACE &
AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA, AFL-CIO, & ITS LOCAL
UNION 4123,

Charging Party,

v.

TRUSTEES OF THE CALIFORNIA STATE
UNIVERSITY,

Respondent.

Case No. LA-CE-1007-H

PERB Decision No. 2151-H

December 14, 2010

Appearances: Schwartz, Steinsapir, Dohrmann & Sommers by Amanda R. Canning, Attorney, for International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, AFL-CIO, & its Local Union 4123; Marc D. Mootchnik, University Counsel, for Trustees of the California State University.

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

DECISION

WESLEY, Member: This case is before the Public Employment Relations Board (Board) on appeal by the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, AFL-CIO, & its Local Union 4123 (Union) of a Board agent's dismissal (attached) of its unfair practice charge. The charge alleged that the Trustees of the California State University (University) violated the Higher Education Employer-Employee Relations Act (HEERA),¹ section 3571, by making a misrepresentation of fact to a factfinding panel formed pursuant to HEERA section 3591. An amended charge filed by the Union also alleged that the University violated HEERA by failing to provide requested information. The

¹ HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

Board agent dismissed the charge finding that the information request allegation was not timely filed, and that the misrepresentation allegation did not state a prima facie case.

The Board has reviewed the dismissal and the record in light of the Union's appeal, the University's response to the appeal 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 therefore adopts them as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. LA-CE-1007-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

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) 327-8383
Fax: (916) 327-6377



November 26, 2008

Henry M. Willis, Attorney
Schwartz, Steinsapir, Dohrmann & Sommers
6300 Wilshire Boulevard, Suite 2000
Los Angeles, CA 90048-5268

Re: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, AFL-CIO, & Its Local Union 4123 v. Trustees of the California State University
Unfair Practice Charge No. LA-CE-1007-H
DISMISSAL LETTER

Dear Mr. Willis:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on May 14, 2007. The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, and its Local Union 4123 (Union or Charging Party) alleges that the Trustees of the California State University (CSU or Respondent) violated section 3571, subsections (b), (c), and (e) of the Higher Education Employer-Employee Relations Act (HEERA)¹ by making misrepresentations of fact to a factfinding panel formed pursuant to HEERA section 3591.

Charging Party was informed in the attached Warning Letter dated October 20, 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 October 31, 2008, the charge would be dismissed. This deadline was subsequently extended at Charging Party's request, and a First Amended Charge was timely filed on November 14, 2008.

The Warning Letter

As noted, the charge as filed in May 2007 focused solely on the contention that CSU had made misrepresentations of fact during the factfinding phase of the statutory impasse procedures. In the Warning Letter, the conclusion that this allegation failed to state a prima facie violation of HEERA section 3571(e) was summarized in relevant part as follows:

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

The allegation that a party to a factfinding hearing, in advocating for its position, violates HEERA by failing to present all information that the other party wishes it would, or violates HEERA by putting its own "spin" on the data, is unsupported by any citation to case law. This assertion also ignores the fact that both parties had an opportunity to present facts and argument to the factfinding panel, the opportunity being evidenced by the attachment of both a dissenting opinion and a concurring opinion to the final report. The facts alleged by the Union in this case are easily distinguished from the type of misrepresentation that was held to be an indicia of bad faith in Gavilan Joint Community College District (1996) PERB Decision No. 1177 (Gavilan).

The Warning Letter further explained that misrepresentation during factfinding, even if established, would not constitute a per se violation of the Act, but would instead be analyzed as an indicia of bad faith under a totality standard. (Gavilan, supra, PERB Decision No. 1177.)

First Amended Charge

The First Amended Charge, while re-framing certain allegations of fact² and adding citations to legal authority, largely focuses on the introduction of new facts regarding a request for information made in July 2006. Specifically, the Union alleges that it sent an e-mail message on July 28, 2006, requesting:

[A]ll notes, letters, email, memos, correspondence and any other documentation reflecting the "considerable discussion and deliberation" undertaken by CSU with respect to the provision of fee waivers.

All notes, letters, email, memos, correspondence and any other documentation from Labor Relations relating to efforts to acquire and/or allocate funding sufficient to provide the fee waiver benefit specified in Article 9 of the Collective Bargaining Agreement.

² For example, the First Amended Charge replaces the assertion that "CSU claimed that providing the fee waiver would be too large an increase in the . . . compensation base," with the allegation that "CSU claimed that it had insufficient funding to pay for a fee waiver in any amount." However, as discussed in the Warning Letter, the chairperson of the factfinding panel observed in the written report that CSU had "not raised an inability to pay defense and that its position here manifests what may be characterized as an unwillingness to pay what is a substantial increase in the Unit's total compensation."

All documents, email, and/or other correspondence from the CSU to the California Legislature or Governor's Office relating to or regarding funding sufficient to provide the fee waiver benefit specified in Article 9 of the Collective Bargaining Agreement.

Any analysis of the cost to CSU of providing the fee waiver benefit specified in Article 9 of the Collective Bargaining Agreement.

The Union further alleges that, on a date or dates not specified, CSU denied that the requested documents existed. It was, however, on April 20, 2007, that the Union alleges it first learned that the information presented by CSU during the factfinding hearings was "false."

Citing to Trustees of the California State University (1987) PERB Decision No. 613-H and Stockton Unified School District (1980) PERB Decision No. 143, the Union contends that the Respondent's refusal to provide relevant and necessary information is both a "hallmark violation" and a "patent violation" of the Act. Making the violation even more egregious, reasons the Union, is CSU's subsequent misleading of the factfinding panel on the information requested earlier by the Union. In fact, "CSU's refusal to supply material information on the one issue in dispute prevented meaningful good faith bargaining from taking place," according to the Union. In sum, the Union's First Amended Charge makes clear its theory that the failure by CSU to provide information independently violated the Act, and strengthens the case for also finding a violation based on the misrepresentation of facts during the factfinding process.

Discussion

PERB Regulation 32615(a)(5)³ 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, 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.)

The charging party's burden also includes alleging facts showing that the unfair practice charge was timely filed; i.e., that the alleged unfair practice occurred no more than six months prior to the filing of the charge. (Los Angeles Unified School District (2007) PERB Decision No. 1929; City of Santa Barbara (2004) PERB Decision No. 1628-M.) PERB is prohibited 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. (Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board (2005) 35 Cal.4th 1072.)

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

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.)

Request for Information

As noted, the allegations regarding the July 2006 request for information, and CSU's failure to provide the information, were not included in the charge as originally filed. Thus, this allegation was first raised on November 14, 2008, with the filing of the First Amended Charge.

However, while the charge does not specify when CSU responded to the July 28, 2006 request,⁴ it is evident that the Union held the belief not later than the date this charge was filed—May 14, 2007—that CSU had earlier held back information. Thus, it appears clear that the allegation that CSU refused to provide information was not filed until 18 months had passed.

HEERA section 3563.2(a) 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, supra, 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.)

Generally, the statute of limitations for a new allegation contained in an amended charge begins to run based on the filing date of the amended charge, rather than the date the original charge was filed. (Sacramento City Teachers Association (Marsh) (2001) PERB Decision No. 1458.) The relation back doctrine is inapplicable here to excuse the late filing, because while the First Amended Charge does introduce a new legal theory, it does so based on facts not included in the original charge. (Sacramento City Teachers Association (Franz) (2008) PERB Decision No. 1959; The Regents of the University of California (Lawrence Livermore National Laboratory) (1997) PERB Decision No. 1221-H.)

For these reasons, the factual allegations regarding CSU's alleged refusal to provide information, and the legal theories dependent on that violation, must be dismissed.

Alleged Misrepresentation

While the Union has provided citations to legal authority for its allegation that the Respondent violated the Act by misrepresenting material information during factfinding, the First Amended

⁴ The failure to provide a specific date can itself result in the dismissal of an unfair practice charge, as a charging party fails to meet its burden when it omits such information. (City of Santa Barbara, supra, PERB Decision No. 1628-M.)

Charge does not provide additional facts in this regard. For the following reasons, this allegation still fails to state a prima facie violation of HEERA section 3571(e).

As was briefly discussed in the Warning Letter, even if the claim that CSU engaged in misrepresentation or presentation of false information during factfinding is accepted as true, this is not sufficient to establish bad faith under the applicable standard. The standard generally applied to determine whether good faith negotiations have occurred is called the totality of conduct test. (University of California, Lawrence Livermore National Laboratory (1995) PERB Decision No. 1119-H.) Under the totality of conduct test, the allegation of a single indicia of bad faith bargaining does not establish a prima facie case of bad faith bargaining. (Oakland Unified School District (1996) PERB Decision No. 1156.) An allegation of bad faith in violation of HEERA section 3571(e) is analyzed using the same totality of conduct standard as is applied to allegations of bad faith bargaining in violation of HEERA section 3571(c). (Moreno Valley Unified School District v. Public Employment Relations Board (1983) 142 Cal.App.3d 191 (Moreno Valley); Ventura County Community College District (1998) PERB Decision No. 1264.)

The federal precedent relied upon by Charging Party does not alter the conclusion that the single indicia provided by the alleged misrepresentation is insufficient to establish a prima facie violation. Two of the cases cited by the Union—Coal Age Service Corp. (1993) 312 NLRB 572 and National Labor Relations Board v. Truitt Manufacturing Co. (1956) 351 U.S. 149—were likewise decided by the application of a totality of conduct test. The third case—Waymouth Farms, Inc. (1997) 324 NLRB 960—does not appear to apply the totality standard but addresses the arguably distinguishable issue of concealment of plans to relocate a plant. More important, in a case that is on point with respect to the issue of misrepresentation during factfinding, the Board held that a totality of conduct standard was appropriate. (Gavilan, *supra*, PERB Decision No. 1177; see also, Rio School District (2008) PERB Decision No. 1986 [misrepresentation of proposals in negotiations update is evidence of bad faith].)

Conclusion

Therefore, the charge is hereby dismissed based on the facts and reasons set forth in this letter and in the October 20, 2008 Warning Letter.

Right to Appeal

Pursuant to PERB Regulations, 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).)

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,

TAMI R. BOGERT
General Counsel

By _____
Les Chisholm
Division Chief

Attachment

cc: Marc D. Mootchnik

PUBLIC EMPLOYMENT RELATIONS BOARD



Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
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October 20, 2008

Henry M. Willis, Attorney
Schwartz, Steinsapir, Dohrmann & Sommers
6300 Wilshire Boulevard, Suite 2000
Los Angeles, CA 90048-5268

Re: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, and its Local Union 4123 v. Trustees of the California State University
Unfair Practice Charge No. LA-CE-1007-H
WARNING LETTER

Dear Mr. Willis:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on May 14, 2007. The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, and its Local Union 4123 (Union or Charging Party) alleges that the Trustees of the California State University (CSU or Respondent) violated section 3571, subsections (b), (c), and (e) of the Higher Education Employer-Employee Relations Act (HEERA)¹ by making misrepresentations of fact to a factfinding panel formed pursuant to HEERA section 3591.

Background

The Union is the exclusive representative of a bargaining unit including academic student employees of CSU (Unit 11). The Union and CSU are parties to a collective bargaining agreement (CBA) for the period of 2005-2008. The CBA defines a "fee waiver" benefit as "the waiver of full State University and campus fees for bargaining unit employees with a 25% time base appointment in a given term, or who work 160 hours per semester (110 hours per quarter)." CBA Section 9.3 provides, in pertinent part, as follows:

No sooner than July 1, 2006, the Union may ask for a response on the CSU's determination whether it has received sufficient funding to implement the cost of this [fee waiver] benefit. The CSU must respond within 30 days. If the CSU administration responds that it has not received funding sufficient to implement the cost of fee waivers defined above for fiscal year 2006/2007,

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

then the parties shall re-open bargaining on whether to provide fee waivers in fiscal year 2006/07.

Pursuant to CBA Section 9.3, the Union did seek a determination from CSU as to whether "sufficient funding to implement the cost" of the fee waiver benefit had been received for the 2006-2007 academic year. When the CSU responded that it had not received sufficient funding, negotiations were reopened and the parties ultimately proceeded to factfinding to resolve the issue.²

According to the charge,

In those factfinding proceedings CSU claimed that providing the fee waiver would be too large an increase in the [the Union's] compensation base. Based on that representation the panel, with one dissent, ruled against the Union's claim that employees should be allowed a fee waiver.

The Union alleges further that it learned on April 20, 2007, "after [the factfinding] proceedings were concluded," that CSU had received, for the 2005-2006 academic year, over four million dollars more than it actually expended for salaries paid to academic student employees represented by the Union. The Union asserts that CSU not only did not share this information during the factfinding hearing but actually argued that "it had no additional resources in its compensation base for the fee waiver benefit."

The Union argues that this misrepresentation was material to the factfinding panel's recommendations, because knowledge of the additional resources budgeted in 2005-2006 would have supported the Union's argument. More specifically, the Union contends that the additional resources would have supported the argument that the Union's proposal was within the range of the CSU's agreement with the California Faculty Association (CFA),³ and that CSU had enough reserve funds to pay nearly half the benefit sought by the Union for 2006-2007.

Because the Union learned of the alleged misrepresentation after the panel had "issued its decision," it could only ask that the panel modify its decision, which the panel declined to do.

² Notice is taken of PERB records concerning PERB Case No. LA-IM-3386-H, including the Factfinding Report and Recommendations issued with respect to the parties' dispute over the fee waiver benefit.

³ CFA is the exclusive representative of CSU Bargaining Unit 3-Faculty.

The Factfinding Report and Recommendations

The chairperson's opinion, dated April 17, 2007, includes as a statement of fact that the compensation base for Unit 11 for 2006-2007 was \$34.8 million. Based on a projected cost for the fee waiver benefit as totaling \$14.6 million, the opinion noted that granting the full fee waiver would represent approximately a 42 percent increase in the bargaining unit's compensation base. The opinion continues, however, as follows:

The Chairperson notes that the [CSU] has not raised an inability to pay defense and that its position here manifests what may be characterized as an unwillingness to pay what is a substantial increase in the Unit's total compensation. In such regard, it is emphasized that bargaining with respect to Unit 11 does not occur in a vacuum, for [CSU] bargains with a number of other bargaining unit units and Unions. The reality of public sector bargaining is that to avoid union "whip saw" bargaining strategies employers in large multi-unit jurisdictions rarely give compensation increases to one union that are significantly larger than the pattern settlement. While as pointed out by the Union, the salary increases recently negotiated with the Faculty Unit exceed the funds provided in the "Governor's Compact," it does not appear that any CSU bargaining unit was given a total compensation increase of the percentage here sought by the Union. Indeed, the percentage increase in Unit 11's total compensation that flows from the Union's fee waiver proposal far exceeds any such increase in the California public sector of which the Chairperson is aware. It is further noted that no other CSU bargaining unit receives a fee waiver comparable to that proposed by the Union and that bargaining with some units has been ongoing for some 25 years.

After a discussion of other factors and arguments, and the consideration of recommending a compromise, the chairperson recommended that the fee waiver program not be implemented for the 2006-2007 fiscal year in Unit 11.

In its dissenting opinion, dated May 2, 2007, the Union offered argument in support of its proposal of the full fee waiver benefit and addressed CSU's failure to disclose "critical financial information." Referencing the Union's recent discovery of the unspent \$4 million, the dissent opines that earlier disclosure of this information "would likely have made a difference in the fact finder's recommendations for at least three reasons." The Union cites the following three reasons: (1) CSU had already received nearly one-half of the money needed to fund the cost of the fee waiver; (2) having to fund only the additional half of the cost would have changed the calculation as to the percentage increase in compensation sought by the Union, reducing the percentage to 14 percent over the prior year; and (3) the chairperson's

ability and willingness to encourage at least a compromise on the issue would have been enhanced.

In a concurring opinion, dated May 3, 2007, CSU largely focused on responding to the assertions and argument contained in the Union's dissent. First, CSU contested the characterization that it "budgets" a specific amount for salaries for a specific bargaining unit. Instead, according to CSU, its budget estimates the aggregate amounts required for payment of salaries and other compensation, and many "intervening variable" can result in the actual expenditures increasing or decreasing from the amounts estimated. CSU also argues that the amounts estimated and expended in 2005-2006 are irrelevant to the dispute over compensation for 2006-2007. CSU, while acknowledging that the compensation base for 2006-2007 was "mistakenly presented" as \$34.8 million, asserts that the inaccurate presentation either had no impact on the factfinding proceedings, or could have had the effect if corrected of making the "projected percentage cost increase of the fee waiver benefit sought [by the Union] even larger and less acceptable to the CSU, as well as the neutral Fact-finder."

Discussion

The charge alleges that CSU's conduct violates HEERA section 3571, subsections (b), (c), and (e). However, the alleged violations of the Act set forth in the charge only concern events that occurred after the parties submitted their dispute to the statutory impasse procedures under HEERA. For conduct occurring during and prior to the exhaustion of the statutory impasse procedure, HEERA section 3571(e) is at issue and conduct within that time-frame cannot also be the basis for a violation of HEERA section 3571(c). (Moreno Valley Unified School District v. Public Employment Relations Board (1983) 142 Cal.App.3d 191 (Moreno Valley); Ventura County Community College District (1998) PERB Decision No. 1264; Regents of the University of California (1996) PERB Decision No. 1157-H.) An allegation of bad faith in violation of HEERA section 3571(e) is analyzed using the same totality of circumstances standard as is applied to allegations of bad faith bargaining in violation of HEERA section 3571(c). (Ventura County Community College District, *supra*, PERB Decision No. 1264; Moreno Valley, *supra*, 142 Cal.App.3d 191.)

In this case, the Union's allegations that CSU violated HEERA by attempting to mislead the Union and the neutral factfinding chairperson, and presented incomplete or inaccurate information during the hearing, is not persuasive. PERB Regulation 32615(a)(5) 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, 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.)

The allegation that a party to a factfinding hearing, in advocating for its position, violates HEERA by failing to present all information that the other party wishes it would, or violates

HEERA by putting its own “spin” on the data, is unsupported by any citation to case law. This assertion also ignores the fact that both parties had an opportunity to present facts and argument to the factfinding panel, the opportunity being evidenced by the attachment of both a dissenting opinion and a concurring opinion to the final report. The facts alleged by the Union in this case are easily distinguished from the type of misrepresentation that was held to be an indicia of bad faith in Gavilan Joint Community College District (1996) PERB Decision No. 1177 (Gavilan).⁴

In Gavilan, an exclusive representative alleged that it had agreed to eliminate a tax-sheltered annuity plan in earlier bargaining only because the employer had represented that the plan would also be eliminated for other employees. The focus of the charge and the analysis was on the misrepresentation of the employer’s position to the exclusive representative, not on how the employer presented its case before the factfinding panel. (*Ibid.*) Even accepting that misrepresentation is an indicia of bad faith, Gavilan does not support finding the CSU’s conduct in the instant case to evidence bad faith.⁵

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, 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

⁴ The Board’s discussion in Gavilan actually focused on whether the alleged misrepresentation was timely filed, and on whether there were sufficient indicia of bad faith to find a violation under a totality standard. Though finding the charge timely filed, the Board dismissed the charge, finding insufficient evidence to support finding bad faith on the employer’s part. (Gavilan, *supra*, PERB Decision No. 1177.) Thus, Gavilan would not support finding a per se violation of the duty to participate in good faith in statutory impasse procedures based on an allegation of misrepresentation during factfinding.

⁵ While not relied upon for this analysis, it is also difficult to ignore the logic of CSU’s concurring opinion with respect to the impact a correction of the compensation base might have had on the chairperson’s analysis in his opinion, since a reduction in the base figure could only have increased the percentage effect of the fee benefit waiver proposed by the Union.

LA-CE-1007-H
October 20, 2008
Page 6

PERB. If an amended charge or withdrawal is not filed on or before October 31, 2008, PERB will dismiss the Union's charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Les Chisholm
Division Chief