STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JOHN W. ADAMS, Charging Party, v. UNITED TEACHERS OF LOS ANGELES, Respondent.	Case No. LA-CO-1407-E PERB Decision No. 2205 September 27, 2011

Appearance: John W. Adams, on his own behalf.

Before McKeag, Dowdin Calvillo and Huguenin, Members.

DECISION

HUGUENIN, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by John W. Adams (Adams) of a Board agent's dismissal (attached) of his unfair practice charge. The charge alleged that by failing to file grievances, and failing to enforce rights under a settlement agreement, the United Teachers of Los Angeles (UTLA) violated section 3544.9 of the Educational Employment Relations Act (EERA)[1] by denying Adams the fair representation guaranteed by EERA. The Board agent found that Adams failed to state a prima facie case and denied Adams' request that the Board agent disqualify himself. Accordingly, the Board agent dismissed the charge.

On appeal, Adams challenges the dismissal and urges anew that the Board agent was biased and should have disqualified himself. We have reviewed the entire record in this matter and find the warning and dismissal letters well-reasoned, adequately supported by the record and in accordance with applicable law. Accordingly, we adopt the warning and dismissal

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

letters as the decision of the Board itself,[2] but review separately Adams' contention of bias and request for disqualification of the Board agent.

PROCEDURAL HISTORY

On December 7, 2009, Adams filed an unfair practice charge alleging that UTLA violated EERA by declining to file grievances over two of Adams' issues, medical coverage and return to work rights. Adams sought, in addition, to have PERB review issues already decided in a prior unfair practice charge, Case No. LA-CO-1339-E.

On January 29, 2010, UTLA responded to Adams' allegations.

On February 4, 2010, the Board agent issued a warning letter, informing Adams that he had not stated a prima facie case on the grievance issues and could not relitigate issues from Case No. LA-CO-1339-E.

On March 11, 2010, Adams amended his charge. The amended charge was accompanied by a request that the Board agent disqualify himself.

On March 17, 2010, Adams again amended his charge, and reiterated his request that the Board agent disqualify himself.

On April 2, 2010, UTLA responded to the amended charges.

On April 30, 2010, the Board agent responded by letter to Adams' request that the Board agent disqualify himself. The Board agent declined to do so, noting Adams had raised no grounds therefor.

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[2] In the warning letters, the Board agent cited *City of Porterville* (2007) PERB Decision No. 1905-M (*Porterville*) for the proposition that the doctrines of res judicata and collateral estoppel bar the relitigation of an allegation that has been dismissed. In *Grossmont Union High School District* (*Meridith*) (2010) PERB Decision No. 2126, the Board overruled *Porterville* to the extent it granted preclusive effect to a dismissal of an unfair practice charge based solely upon a Board agent's charge investigation. Accordingly, we do not rely on *Porterville* as authority for dismissal of the instant charge. We nonetheless find that the dismissal of the charge in this case was proper for the other reasons set forth in the Board agent's dismissal and warning letters and the discussion herein.

On April 30, 2010, the Board agent issued a second warning letter to Adams.

On May 10, 2010, Adams faxed to PERB a third amended charge.[3]

On May 18, 2010 the Board agent dismissed the charge.

On June 10, 2010, Adams appealed the Board agent's dismissal and reiterated his charge of bias against the Board agent.

DISCUSSION

As noted above, we adopt the Board agent's warning and dismissal letters. We write separately to address Adams' contention that the Board agent was biased and should have disqualified himself. We look first at the duties of a Board agent processing an unfair practice charge and the standards for Board agent disqualification, and then at Adams' allegations of bias.

I. Duties of a Board Agent

An unfair practice charge must include a clear and concise statement of the facts and conduct by the respondent alleged to constitute an unfair practice. (PERB Reg. 32615(a)(5);[4] *State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S; *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient, and the charging party bears the burden of alleging all material facts necessary to state a prima facie case. (*Los Angeles Unified School District* (1984) PERB Decision No. 473.) In processing a charge, the Board agent has a duty to:

> (1) Assist the charging party to state in proper form the information required by section 32615;
>
> (2) Answer procedural questions of each party regarding the processing of the case;

[3] The third amended charge was "filed" by fax only. Nonetheless, the Board agent did consider the new allegations in the subsequent dismissal letter.

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

(3) Facilitate communication and the exchange of information between the parties;

(4) Make inquiries and review the charge and any accompanying materials to determine whether an unfair practice has been, or is being, committed, and determine whether the charge is subject to deferral to arbitration, or to dismissal for lack of timeliness.

(5) Dismiss the charge or any part thereof as provided in Section 32630 if it is determined that the charge or the evidence is insufficient to establish a prima facie case; or if it is determined that a complaint may not be issued in light of Government Code Sections 3514.5, 3541.5, 3563.2, 71639.1(c) or 71825(c), or Public Utilities Code Section 99561.2; or if it is determined that a charge filed pursuant to Government Code section 3509(b) is based upon conduct occurring more than six months prior to the filing of the charge.

(6) Place the charge in abeyance if the dispute arises under MMBA, HEERA, TEERA, Trial Court Act or Court Interpreter Act and is subject to final and binding arbitration pursuant to a collective bargaining agreement, and dismiss the charge at the conclusion of the arbitration process unless the charging party demonstrates that the settlement or arbitration award is repugnant to the purposes of MMBA, HEERA, TEERA, Trial Court Act or Court Interpreter Act, as provided in section 32661.

(7) Issue a complaint pursuant to Section 32640.

(PERB Reg. 32620.)

While the Board agent's duties include assisting the charging party in stating the proper form of the charge, making inquiries and reviewing the charge and any accompanying materials, the ultimate responsibility remains with the charging party to provide a clear and concise statement of the facts constituting a prima facie case. (*Regents of the University of California* (2004) PERB Decision No. 1585-H; *Regents of the University of California* (2004) PERB Decision No. 1592-H.)

In this case, the Board agent communicated on several occasions with Adams in an attempt to assist him in filing an unfair practice charge that, if the facts alleged were proven, would constitute a prima facie case against UTLA for breach of its duty of fair representation. The Board agent allowed Adams to amend his charge three times and spoke with Adams by

telephone on at least one occasion. On February 4, 2010 and April 30, 2010, the Board agent issued warning letters clearly advising Adams of deficiencies in the charge. Thus, the Board agent assisted Adams to state the proper form of the charge, made inquiries and reviewed the charge and accompanying materials. However, the responsibility remained with Adams as charging party to provide a clear and concise statement of the facts constituting a prima facie case.

II. Standards for Board Agent Disqualification

PERB Regulation 32155 provides, in relevant part, as follows:

> (c) Any party may request the Board agent to disqualify himself or herself whenever it appears that it is probable that a fair and impartial hearing or investigation cannot be held by the Board agent to whom the matter is assigned. Such request shall be written, or if oral, reduced to writing within 24 hours of the request. The request shall be under oath and shall specifically set forth all facts supporting it. The request must be made prior to the taking of any evidence in an evidentiary hearing or the actual commencement of any other proceeding.
>
> If such Board agent admits his or her disqualification, such admission shall be immediately communicated to the General Counsel or the Chief Administrative Law Judge, as appropriate, who shall designate another Board agent to hear the matter.
>
> Notwithstanding his or her disqualification, a Board agent who is disqualified may request another Board agent who has been agreed upon by all parties to conduct the hearing or investigation.
>
> (d) If the Board agent does not disqualify himself or herself and withdraw from the proceeding, he or she shall so rule on the record, state the grounds for the ruling, and proceed with the hearing or investigation and the issuance of the decision. The party requesting the disqualification may, within ten days, file with the Board itself a request for special permission to appeal the ruling of the Board agent. If permission is not granted, the party requesting disqualification may file an appeal, after hearing or investigation and issuance of the decision, setting forth the grounds of the alleged disqualification along with any other exceptions to the decision on its merits.

PERB has held that a "fixed anticipatory prejudgment" against a party must be shown to establish "prejudice"[5] sufficient for Board agent disqualification. (*Gonzales Union High School District* (1985) PERB Decision No. 480 (*Gonzales*); *Coachella Valley Mosquito & Vector Control District* (2009) PERB Decision No. 2031-M.) Such prejudgment is established through statements or conduct by the Board agent indicating a clear predisposition against a party. (*Gonzales*).

Adverse rulings by a Board agent against a party in a previous case, or erroneous legal or factual rulings, do not in themselves indicate prejudice. (*Chula Vista Elementary EA, CTA (Larkins)* (2003) PERB Order No. Ad-322 (*Chula Vista*).)

III. Adams' March 11 and March 17, 2010 Request that the Board Agent Disqualify Himself

On March 11 and 17, 2010, Adams requested that the Board agent disqualify himself. Adams advanced two arguments that the Board agent was biased against him. The Board agent responded on April 30, 2010. The arguments were as follows: (1) The Board agent's statements in the February 4, 2010 warning letter indicate bias favoring UTLA; (2) A board agent's dismissal of Adams' earlier unfair practice charge[6] indicated bias by the Board agent.

We look at Adams' arguments to determine whether they meet the standard set forth in *Gonzales*. We conclude, as did the Board agent, that they do not.

A. Statements in the February 4, 2010 Warning Letter

In his March 17, 2010 request for disqualification,[7] Adams argues that the Board agent should have disqualified himself because the Board agent's statements in the February 4, 2010

[5] The term "prejudice" is used in *Gonzales,* however the Board has used the term "bias" in its articulation of when disqualification is appropriate.

[6] Unfair Practice Charge No. LA-CO-1339-E in *United Teachers of Los Angeles (Adams)* (2009) PERB Decision No. 2012.

[7] Adams' March 17, 2010 request for disqualification is dated March 11, 2010. However, the request was filed with PERB on March 17, 2010.

warning letter indicate bias favoring UTLA. In his April 30, 2010 denial of Adams' request for disqualification, the Board agent concluded that "there is no authority for the proposition that issuance of a warning letter constitutes grounds for disqualification." We agree with the Board agent's response, and supplement the response as follows.

The Board agent's statements in the February 4, 2010 warning letter, to the effect that Adams had failed to allege a prima facie case, did not indicate bias but rather a candid and appropriate appraisal of Adams' allegations. The statements in the warning letter were made to assist Adams in stating a prima facie case. They do not indicate that the Board agent had a fixed anticipatory prejudgment against Adams. Furthermore, the Board agent allowed Adams to amend his charge several times, conduct indicative of assistance, not bias.

B. Dismissal of Adams' Earlier Unfair Practice Charge

Adams argues, in his March 17, 2010 request for disqualification and subsequently in his exceptions to the Board agent's dismissal letter, that the dismissal of his earlier unfair practice charge indicates that the Board agent in the current charge is biased. In his April 30, 2010 denial of Adams' request for disqualification, the Board agent concluded that Adams' "disagreement [with the outcome in the prior charge] and his arguments related to it do not constitute grounds for disqualification." We agree with the Board agent's response, and supplement as follows.

In the earlier unfair practice charge, a different Board agent investigated the charge and issued the dismissal and warning letters. Since adverse rulings against a party in a previous case do not themselves constitute prejudice, a Board agent's dismissal of Adams' earlier unfair practice charge does not establish bias. (*Chula Vista.*) Furthermore, there can be no bias attributed to the Board agent in this case based on an earlier dismissal of a different charge by a different Board agent. (*Ibid.*)

In sum, the Board agent properly rejected Adams' March 17, 2010 request for disqualification.

IV. Adams' Allegations of Bias Put Forth In His Exceptions to the Board Agent's Dismissal

In his exceptions to the Board agent's dismissal, Adams again claims that the Board agent was biased. The allegations are as follows: (1) The Board agent ignored Adams' amendments to his current unfair practice charge; (2) The Board agent incorrectly calculated the statute of limitations on Adams' charge; (3) The Board agent incorrectly told Adams that he was tardy in filing the amendments to his charge; (4) The Board agent erroneously told Adams that he could file his own grievances against the Los Angeles Unified School District (LAUSD).

We evaluate these allegations of bias to determine whether they meet the *Gonzales* standard. We conclude that they do not.

A. The Board Agent's Treatment of Adams' Charge Amendments

Adams argues in his exceptions to the Board agent's dismissal letter that the Board agent ignored amendments to his charge. We review the charge, the amendments and the Board agent's evaluation of the amendments.

On December 7, 2009, Adams filed the current unfair practice charge. In the initial charge, he alleged that the UTLA violated its duty of fair representation by not representing Adams with regard to a medical coverage issue and a return to work issue.

On February 4, 2010, the Board agent issued a warning letter to Adams. The letter explained to Adams that he had not established a prima facie case with regard to the medical coverage issue because the charge failed to provide the "who, what, when, where and how" of an unfair practice charge.[8] The letter also explained that Adams had not established a prima facie case with regard to the return to work issue because he did not show how UTLA's conduct was arbitrary, discriminatory, or in bad faith.[9]

[8] *State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S.

[9] *Alvord Educator's Association (Bussman)* (2009) PERB Decision No. 2046.

On March 11, 2010, Adams amended his charge, reiterating the same allegations, and adding two additional allegations. The new allegations charged that UTLA failed to represent him when LAUSD did not adhere to the terms of a settlement agreement in PERB unfair practice Case No. LA-CE-5177-E, and that UTLA failed to represent him concerning a payroll issue.

On April 30, 2010, the Board agent issued a second warning letter to Adams. With regard to the medical coverage issue, the letter reiterated to Adams that the allegation concerning the medical coverage issue did not state a prima facie case. The Board agent also informed Adams that, under the UTLA-LAUSD agreement, he had the right to file his own grievance against LAUSD, but UTLA had no duty to do so, and UTLA's failure to file did not extinguish his right to pursue his grievance if he filed it in a timely manner.[10]

With regard to the return to work issue, the Board agent informed Adams that UTLA did not owe a duty to him with respect to enforcement of the settlement agreement, and that UTLA's decision not to pursue a grievance on the matter did not "completely extinguish" Adams' opportunity to pursue a grievance. (*Chestangúe*.)

With regard to the settlement agreement, the Board agent informed Adams that an exclusive representative does not owe a duty of fair representation to unit members in a forum over which the union does not exclusively control over the means to a particular remedy. (*Chestangúe*.)

As to the payroll issue, the Board agent informed Adams that he did not establish a prima facie case of a breach of the duty of fair representation, and that the allegation was subject to dismissal because Adams had the ability to file the grievance on his own, and because the issue concerned enforcement of a settlement agreement.

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[10] *San Francisco Classroom Teachers Association, CTA/NEA (Chestangúe)* (1985) PERB Decision No. 544 (*Chestangúe*).

On May 10, 2010, Adams faxed to PERB his third amended charge. The third amended charge reiterated the arguments Adams made in the second amended charge, but failed to address the Board agent's concerns in the second warning letter that Adams could have filed grievances himself over any alleged violations of the collective bargaining agreement.[11] Adams did, in the third amended charge, allege UTLA's lack of response to demands he made on them during the investigation of the charge for proof of certain factual assertions made by them, and even for evidence that would allow Adams to prove his allegation that UTLA had produced falsified documents. In dismissing the charge, the Board agent informed Adams that the burden is on the charging party to show how an exclusive representative abused its discretion, and not on the exclusive representative to show how it properly exercised its discretion.[12]

We conclude that the Board agent addressed appropriately the amendments Adams made to his charge, and that Adams has not established that the Board agent ignored his charge amendments. Further, even though Adams' third amended charge was not properly filed, the Board agent nonetheless considered and addressed the amended allegations in the dismissal letter. The Board agent's review of the allegations in the third amended charge is further indication that the Board agent had no fixed anticipatory judgment against Adams.

We conclude that as to handling of charge amendments, Adams has not established that the Board agent demonstrated a fixed anticipatory judgment against him. (*Gonzales.*)

B. Incorrect Calculation of the Statute of Limitations

Adams argues in his exceptions to the Board agent's dismissal letter that the initial filing of the current charge was timely, and that the Board agent's conclusion that the charge was untimely is in an indication of bias. We concur with the Board agent's resolution of the

[11] *Coalition of University Employees (Buxton)* (2003) PERB Decision No. 1517-H.

[12] *United Teachers-Los Angeles (Vigil)* (1992) PERB Decision No. 934.

limitations issue. Moreover, an adverse ruling on a legal issue is not of itself sufficient to indicate bias. (*Chula Vista.*) And, the Board agent addressed the merits of Adams' charge, regardless of whether it had been timely filed. We conclude that as to the statute of limitations, Adams has not established that the Board agent demonstrated a fixed anticipatory prejudgment against him. (*Gonzales.*)

C. Tardy Filings

Adams argues in his exceptions to the Board agent's dismissal letter that he was not tardy in filing amendments to his charge and that the Board agent thus was biased in dismissing his charge. The deadline for Adams to file his third amended charge was May 13, 2010. While Adams sent his third amended charge via facsimile on May 9, 2010,[13] PERB did not timely receive the original and copy required by PERB Regulation 32135(c). Thus, the third amended charge was not properly filed. Nevertheless, the Board agent considered the allegations in Adams' third amended charge. We conclude that as to the incomplete filing of the third amended charge, Adams has not established that the Board agent demonstrated a fixed anticipatory prejudgment against him.

D. Adams Filing His Own Grievances Against LAUSD

Adams argues in his exceptions that the Board agent, in informing Adams that he could file his own grievances against LAUSD, demonstrated bias. However, as noted above, the Board agent's duties include assisting the charging party in stating the proper form of the charge, making inquiries and reviewing the charge and any accompanying materials. By informing Adams that he could file his own grievances against LAUSD, the Board agent performed his duties pursuant to PERB Regulation 32155. We conclude that as to informing a charging party

[13] Because May 9, 2010 was a Sunday and not a regular PERB business day, the filing date of the third amended charge would be denoted as May 10, 2010, in accordance with PERB Regulation 32135(c). Adams had been reminded on more than one occasion, including in the April 30, 2010 warning letter, of the applicable filing requirements.

of his right to file grievances, Adams has not established that the Board agent demonstrated a fixed anticipatory prejudgment against him.

In sum, we conclude that Adams has failed to establish any of the claims advanced in his exceptions of bias by the Board agent.

After review of the entire record, including allegations of bias set forth by Adams in his March 11 and March 17, 2010 request that the Board agent disqualify himself and in Adams' exceptions to the Board agent's dismissal of his charge, we find the Board agent's conduct appropriate and free of bias. Accordingly, we affirm the Board agent's decision of April 30, 2010 denying the request for disqualification, and we deny Adams' request in his exceptions that the Board agent be disqualified.

ORDER

The unfair practice charge in Case No. LA-CO-1407-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Dowdin Calvillo joined in this Decision.

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8383
Fax: (916) 327-6377

May 18, 2010

John W. Adams
24 17th Avenue #207
Venice, CA 90291

Re: *John W. Adams v. United Teachers of Los Angeles*
Unfair Practice Charge No. LA-CO-1407-E
DISMISSAL LETTER

Dear Mr. Adams:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on December 7, 2009, and amended on March 11 and 17, 2010. John W. Adams (Adams or Charging Party) alleges that the United Teachers of Los Angeles (UTLA or Respondent) violated the Educational Employment Relations Act (EERA or Act)[1] by denying him the right to fair representation guaranteed by the Act.

Charging Party was informed in the attached Second Warning Letter dated April 30, 2010, that the above-referenced charge did not state a prima facie case.[2] 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 May 13, 2010, the charge would be dismissed.

On May 9, 2010, PERB received a Third Amended Charge from Adams via facsimile transmission. Because May 9 was a Sunday and not a "regular PERB business day," the filing date of the Third Amended Charge would be denoted as May 10, 2010, in accordance with PERB Regulation 32135. However, the fax filing of the Third Amended Charge is explicit in stating that the "filing" is by fax only, and the required original and copy have not been received as of this writing. Thus, the Third Amended Charge is not properly filed pursuant to PERB Regulation 32135(c).[3] In addition, while it appears that a copy of the Third Amended

[1] EERA is codified at Government Code section 3540 et seq. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the EERA and PERB Regulations may be found at www.perb.ca.gov.

[2] An earlier Warning Letter, dated February 4, 2010, was re-issued to Adams on February 8, 2010. This letter is also attached.

[3] Adams has been reminded on more than one occasion, including in the Second Warning Letter, of the applicable filing requirements.

Charge was sent by fax to UTLA's designated representative, the proof of service submitted with the Third Amended Charge does not show service on UTLA or UTLA's representative in accordance with PERB Regulation 32140.

Despite the above-described filing deficiencies, the information contained in the statement of the Third Amended Charge has been considered by the undersigned and is addressed in the following discussion.

Discussion

For the following reasons, the Third Amended Charge does not cure the deficiencies in Adams's charge that were identified earlier, and the charge fails to state a prima facie case demonstrating that UTLA breached its duty of fair representation to Adams in violation of EERA section 3544.9.

First, the Third Amended Charge makes more explicit the fact that the individual issues on which Adams sought representation from UTLA arose out of the implementation and enforcement of a Settlement Agreement between Adams and his employer, the Los Angeles Unified School District (District), resolving an earlier unfair practice charge filed by Adams against the District.

As discussed in the Second Warning Letter:

> An exclusive representative does not owe a duty of fair representation to unit members in a forum over which the union does not exclusively control the means to a particular remedy. (*San Francisco Classroom Teachers Association, CTA/NEA (Chestangúe)* (1985) PERB Decision No. 544.) The Board has also previously held that, since PERB is a forum outside the collective bargaining agreement, the union does not owe members a duty of fair representation in proceedings involving PERB. (*SEIU Local 1000, CSEA (Burnett)* (2007) PERB Decision No. 1914-S.) Thus, for example, the union's refusal to file an unfair practice charge with PERB on an employee's behalf does not violate the duty of fair representation. (*Ibid.*) Likewise, the Board held that, where a charge did not contain facts to indicate that the exclusive representative possessed exclusive control over the enforcement of a settlement agreement which was negotiated on charging party's behalf with the employer, no breach of the duty of fair representation could be found. (*San Bernardino Teachers Association, CTA/NEA (Cooksey)* (2000) PERB Decision No. 1387.)

Thus, even if there were possible contract violations subject to the grievance procedure under the collective bargaining agreement (CBA) negotiated by UTLA and the District, the fact that

the alleged violations arose out of the Settlement Agreement means that UTLA cannot be found to have breached the duty of fair representation for the simple reason that the duty does not attach to enforcement or resolution of disputes arising out of a Settlement Agreement of an unfair practice charge. (*SEIU Local 1000, CSEA (Burnett)*, *supra*, PERB Decision No. 1914-S; *San Bernardino Teachers Association, CTA/NEA (Cooksey)*, *supra*, PERB Decision No. 1387.)

In addition, Adams does not address in the Third Amended Charge the conclusion, stated in the Second Warning Letter, that he could have filed grievances himself over any alleged violations of the CBA and, thus, UTLA's refusal or failure to file grievances on his behalf did not "extinguish" his opportunity to pursue his claims under the CBA. (See, *Coalition of University Employees (Buxton)* (2003) PERB Decision No. 1517-H.) In another case, the Board declined to find a breach of the duty of fair representation where an employee was able to file a grievance but instead relied solely on the union to do so and then filed an unfair practice charge when her union did not do so. (*College of the Canyons Faculty Association (Lynn)* (2004) PERB Decision No. 1706.) The Board reasoned, in part, that "[the employee] had a concomitant responsibility to read the [collective bargaining agreement], learn of her right to file a grievance, and to take the necessary steps to do so. She cannot fault the [union] for her personal failure to take this action." (*Ibid.*)

Adams does address UTLA's lack of response to demands he has made on them during the investigation of the instant charge for proof of certain factual assertions made by them, and even for evidence that would allow Adams to prove his allegation that UTLA has produced falsified documents. However, as was previously discussed in the February 4, 2010 Warning Letter, in duty of fair representation cases, the burden is on the charging party to show how an exclusive representative abused its discretion, and not on the exclusive representative to show how it properly exercised its discretion. (*United Teachers-Los Angeles (Vigil)* (1992) PERB Decision No. 934.)

Conclusion

Therefore, the charge is hereby dismissed based on the facts and reasons set forth above, as well as in the February 4, 2010 Warning Letter and April 30, 2010 Second 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, § 32635, subd. (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, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (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, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 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, § 32635, subd. (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, § 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, § 32135, subd. (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, § 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

Attachments

cc: Dana S. Martinez

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8383
Fax: (916) 327-6377

April 30, 2010

John W. Adams
24 17th Avenue #207
Venice, CA 90291

Re: *John W. Adams v. United Teachers of Los Angeles*
Unfair Practice Charge No. LA-CO-1407-E
SECOND WARNING LETTER

Dear Mr. Adams:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on December 7, 2009. John W. Adams (Adams or Charging Party) alleges that the United Teachers of Los Angeles (UTLA or Respondent) violated the Educational Employment Relations Act (EERA or Act)[1] by denying him the right to fair representation guaranteed by the Act.

Charging Party was informed in a Warning Letter dated February 4, 2010, that the above-referenced charge did not state a prima facie case.[2] You were advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in the 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 February 24, 2010, the charge would be dismissed. This deadline was later extended, at Adams's request, to March 11, 2010.

On March 11, 2010, Adams filed a First Amended Charge. On March 17, 2010, Adams filed a Revised/Second Amended Charge. Both the First and Second Amended Charges (amended charges) were accompanied by a letter requesting that the undersigned disqualify himself from investigating his charge.[3] The undersigned is also in receipt of two fax copies of a letter dated April 14, 2010, transmitted on April 14 and 20, 2010, and addressed to UTLA's representative in this matter from Mr. Adams. Because only fax copies have been received, these documents

[1] EERA is codified at Government Code section 3540 et seq. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the EERA and PERB Regulations may be found at www.perb.ca.gov.

[2] The Warning Letter dated February 4, 2010 was addressed to the person identified as the representative of Mr. Adams on a Notice of Appearance Form submitted by Mr. Adams. Upon notice that Mr. Adams was not represented by that person, the Warning Letter was re-issued on February 8, 2010.

[3] The motion to disqualify the undersigned is addressed in separate correspondence.

are not considered properly "filed" in accordance with PERB Regulation 32135, and are not included in the case file.[4]

The First and Second Amended Charges

PERB Regulation 32621 provides as follows:

> Before the Board agent issues or refuses to issue a complaint, the charging party may file an amended charge. The amended charge must contain all allegations on which the charging party relies and must meet all of the requirements of Section 32615. The amended charge shall be processed pursuant to Section 32620.

(Emphasis added.)

As originally filed, Mr. Adams's charge focused in large part on a "Second Request for Appeal on Unfair Practice Charge No. LA-CO-1339-E." In the February 4, 2010 Warning Letter, I explained that, "To the extent that the instant filing seeks to either 'amend' or 'appeal' the dismissal of LA-CO-1339-E, the charge must be dismissed," citing *City of Porterville* (2007) PERB Decision No. 1905-M [the doctrines of res judicata and collateral estoppel bar the re-filing of an allegation that has been dismissed] and *Marin County Law Library* (2004) PERB Order No. Ad-338-M [a charging party may not attempt to amend a charge after it has been dismissed]. In amending his present charge, apart from a discussion in the motion to disqualify the undersigned referenced above, Mr. Adams does not address this issue. Thus, this issue appears to have been effectively withdrawn by Mr. Adams through his filing of the First and Second Amended Charges. In the alternative, the allegations related to a purported "Second Request for Appeal on Unfair Practice Charge No. LA-CO-1339-E" will be dismissed for the reasons set forth in the February 4, 2010 Warning Letter.

The remaining allegations from the charge as originally filed concern requests by Mr. Adams for UTLA's assistance regarding medical coverage and his transfer on his return to work to a different school site. In addition, Mr. Adams now alleges that UTLA failed to represent him concerning a payroll issue. These three "counts" will be addressed in turn below.

However, before turning to the individual issues, it is important to note other, additional information provided with the First Amended Charge. Attached to the First Amended Charge as Exhibit 12 is a document entitled, "Settlement Agreement," entered into by Adams and the Los Angeles Unified School District (District) in November 2008. The Settlement Agreement was reached in order to resolve PERB Unfair Practice Case No. LA-CE-5177-E. The Settlement Agreement provided in part that the District would "retroactively reinstate Adams as a permanent certificated teacher," and that Adams would be "required to report to work,

[4] Adams was reminded, in a telephone conversation on March 15, 2010, concerning his amended charges, that submitting fax copies alone does not constitute "filing."

upon the District's notice to him of his new assignment." The Settlement Agreement further called for the District to "make Adams whole," specifying an amount due both for lost earnings and a less specific requirement to reimburse Adams for various medical expenses. In return, Adams agreed to withdraw Unfair Practice Charge No. LA-CE-5177-E.

The First Amended Charge also provides evidence that various disputes arose between the District and Adams over the implementation of the Settlement Agreement. For example, Exhibit 10 includes a series of e-mail messages between an attorney representing Adams and the District's attorney, concerning allegations that Adams had not been properly compensated pursuant to the Settlement Agreement. Also, a the January 21, 2009 e-mail message to UTLA requesting assistance with respect to an alleged violation of Article XVI of the collective bargaining agreement (CBA) between the District and UTLA, Adams stated he was also seeking assistance with regard to the District's alleged "nullification" of the Settlement Agreement.

The foregoing summary of the Settlement Agreement and the dispute over its implementation are relevant here because it appears that each of the issues discussed further below, where Adams sought assistance from UTLA, arose out of the implementation of the Settlement Agreement and Adams's return to work pursuant to the Settlement Agreement.

An exclusive representative does not owe a duty of fair representation to unit members in a forum over which the union does not exclusively control the means to a particular remedy. (*San Francisco Classroom Teachers Association, CTA/NEA (Chestangúe)* (1985) PERB Decision No. 544.) The Board has also previously held that, since PERB is a forum outside the collective bargaining agreement, the union does not owe members a duty of fair representation in proceedings involving PERB. (*SEIU Local 1000, CSEA (Burnett)* (2007) PERB Decision No. 1914-S.) Thus, for example, the union's refusal to file an unfair practice charge with PERB on an employee's behalf does not violate the duty of fair representation. (*Ibid.*) Likewise, the Board held that, where a charge did not contain facts to indicate that the exclusive representative possessed exclusive control over the enforcement of a settlement agreement which was negotiated on charging party's behalf with the employer, no breach of the duty of fair representation could be found. (*San Bernardino Teachers Association, CTA/NEA (Cooksey)* (2000) PERB Decision No. 1387.)

Thus, to the extent that Adams alleges that UTLA breached the duty of fair representation by not providing requested assistance regarding issues and/or disputes that arose out of the Settlement Agreement, the charge fails to state a prima facie case and must be dismissed.

1. Medical Coverage Grievance

In this portion of the charge, Adams alleges that UTLA breached its duty of fair representation with respect to the issue of Adams's medical coverage upon his return to work in January 2009. Adams made his request for assistance, by sending via fax a grievance form and request

for assistance, to UTLA on January 26, 2009.[5] In the February 4, 2010 Warning Letter, I noted that UTLA asserts that UTLA informed Adams not later than early February 2009 of the determination that his grievance would not be meritorious and that UTLA would not pursue the issue. I further noted that, if these facts are correct, then this allegation concerns conduct that occurred outside the six-month statute of limitations period, and must be dismissed as untimely. (*Los Angeles Unified School District* (2007) PERB Decision No. 1929.)

Adams disputes, however, that UTLA communicated with him regarding the medical coverage issue in February 2009, or anytime prior to September 2009. As noted in the earlier Warning Letter, Adams alleges UTLA did not respond to him until September 15, 2009, and thus the "statute of limitations is still active" on this issue. However, the September 15, 2009 e-mail message referenced in the charge and amended charges solely concerns the issue raised later regarding Adams' work assignment, and not his medical coverage.

In cases alleging a breach of the duty of fair representation, the six-month statutory limitations period begins to run on the date when the charging party, in the exercise of reasonable diligence, knew or should have known that further assistance from the union was unlikely. (*SEIU, United Healthcare Workers West (Rivera)* (2009) PERB Decision No. 2025-M.) Thus, given that the instant charge was filed on December 7, 2009, the charge may be deemed timely filed only if one concludes that, even with "the exercise of reasonable diligence," Adams did not know until after June 7, 2009 that his January 2009 request for assistance on the medical coverage issue was not being answered affirmatively. Charging Party has not his burden to provide sufficient evidence to support this claim and/or that this allegation was timely filed.

In any event, Adams argues that this charge allegation is timely filed, his grievance had merit, and his right to pursue the issue was "completely extinguished" by UTLA's inaction. Adams appears to be addressing, in part, the standards for a prima facie case summarized in the earlier Warning Letter. With regard to when "mere negligence" might constitute arbitrary conduct that violates the duty of fair representation, 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.)

However, it is not apparent that UTLA did or could "completely extinguish" Adams's right to pursue his grievance in a timely manner. UTLA notes that Article V of its CBA with the District provides that a grievance may be filed "by the affected employee or by UTLA." Thus,

[5] In the amended charges, Adams further asserts that he actually requested the filing of two grievances, with the second issue being a missing paycheck from December 2008. However, Adams also acknowledges that he received the missing paycheck in March 2009.

it is not evident from the facts that Adams was barred from filing his grievance even if UTLA failed to respond to his request for assistance.

2. Return to Work/Transfer Issue

The gravamen of this charge allegation is the contention that Adams was entitled to a return to his former work location, and that UTLA refused to enforce applicable requirements of the CBA that are relevant to this issue. Adams and UTLA each cite various articles of the CBA in support of their respective positions as to the merits of the claim.

However, as noted earlier, the Settlement Agreement between Adams and the District provided in part that Adams was "required to report to work, upon the District's notice to him of his new assignment." (Emphasis added.) It is at best unclear, based on the information provided by Adams, that his agreement with the District envisioned his return to his former position at his former site location. In any event, as discussed above, UTLA does not owe a duty to Adams with respect to enforcement of the Settlement Agreement.

Further, assuming that the District's assignment of Adams implicated any terms of the CBA between UTLA and the District, Adams was able to file a grievance on his own and thus UTLA's decision not to pursue the matter did not "completely extinguish" the opportunity to pursue the grievance.

3. Payroll Issue

In the amended charges, Adams also alleges that UTLA failed to respond to his requests for assistance regarding an allegation that the District failed to pay him for seven days. From the account given of this payroll dispute in the charge documents, it appears that this issue also arises out of the payments made (or not made) by the District under its "make whole" obligation from the Settlement Agreement.

In December 2009, Adams opened a "payroll inquiry" with the District. On February 4 and 19, 2010, Adams contacted a UTLA representative to request that a grievance be filed. Adams contends that he received no response from UTLA.

By letter dated April 2, 2010, however, UTLA alleges that it did investigate the issue and sent a letter to Adams in that regard on February 23, 2010. UTLA also asserts that it sent with the letter an "Overpayment Data Form" and requested that Adams complete the form and return it by March 19, 2010. UTLA did not receive the requested form from Adams.

Thus, with respect to this issue, Adams has not met his burden of providing prima facie evidence of a breach of the duty of fair representation.

In addition, this charge allegation is subject to dismissal because it appears Adams had the ability to file a grievance on his own, and because the issue concerns enforcement of the Settlement Agreement, for the reasons previously discussed.

Conclusion

For these reasons the charge, as presently written, does not state a prima facie case.[6] 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 Third 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 May 13, 2010,[7] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Les Chisholm
Division Chief

[6] In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make "a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Ibid.*)

[7] A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8383
Fax: (916) 327-6377

February 4, 2010

John K. Fu, Attorney
Law Offices of John K. Fu
1505 N. San Fernando Blvd. #A
Burbank, CA 91504

Re: *John W. Adams v. United Teachers of Los Angeles*
Unfair Practice Charge No. LA-CO-1407-E
WARNING LETTER

Dear Mr. Fu:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on December 7, 2009. John W. Adams (Adams or Charging Party) alleges that the United Teachers of Los Angeles (UTLA or Respondent) violated section 3543.5(b) of the Educational Employment Relations Act (EERA or Act)[1] by denying rights guaranteed by the Act.[2]

In the statement of the charge, Adams initially states that this filing concerns:

> Second Request for Appeal on Unfair Practice Charge No. LA-CO-1339-E & Filing of New Charge against United Teachers of Los Angeles for new/additional Unfair Practice Charges[.]

Unfair Practice Charge No. LA-CO-1339-E

Adams filed the unfair practice charge identified as LA-CO-1339-E on April 3, 2008, and amended the charge on June 13 and July 31, 2008. This earlier charge also alleged that UTLA had violated EERA by breaching its duty of fair representation. The charge was dismissed by a PERB regional attorney on August 7, 2008, and Adams appealed the dismissal to the Board itself.

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[1] EERA is codified at Government Code section 3540 et seq. The text of the EERA and PERB Regulations may be found at www.perb.ca.gov.

[2] For reasons further explained below, the charge will be analyzed instead under a theory that UTLA breached Adams' right to fair representation guaranteed by EERA section 3544.9 and thereby violated section 3543.6(b). EERA section 3543.5 defines unfair practices by a public school employer, and the instant charge is filed against UTLA rather than Adams' employer—Los Angeles Unified School District (District or LAUSD). Thus, the allegation that UTLA violated EERA section 3543.5(b) must be dismissed.

On March 13, 2009, in *United Teachers of Los Angeles (Adams)* (2009) PERB Decision No. 2012, the Board affirmed the regional attorney's decision, and dismissed Adams' charge without leave to amend. According to PERB case records, Adams did not seek reconsideration of the Board's decision pursuant to PERB Regulation 32410.[3]

To the extent that the instant filing seeks to either "amend" or "appeal" the dismissal of LA-CO-1339-E, the charge must be dismissed. (*City of Porterville* (2007) PERB Decision No. 1905-M [the doctrines of res judicata and collateral estoppel bar the re-filing of an allegation that has been dismissed]; *Marin County Law Library* (2004) PERB Order No. Ad-338-M [a charging party may not attempt to amend a charge after it has been dismissed].)[4]

The "New Charge" against UTLA

Adams initially states that he is filing "a new charge against [UTLA] for the continued failure to provide fair representation." The statement of the "new charge" consists, verbatim, of the following:

> 4. The District violated UTLA-LAUSD Collective Bargaining Agreement XVI 5.0 Enrollment, *"For the hospital, dental, and vision care plans, an unenrolled employee eligible for enrollment may submit an application for enrollment at any time. . . . The District shall process applications so as to make coverage effective on the earliest practical date consistent with the plans provisions, and in no case shall this be later than the first day of the calendar month following the receipt of the completed application."* My Medical Coverage did not begin until January 9 and Dental did not begin until February 1, though I submitted my application in person on December 21, 2008. LAUSD forced me to work without full medical benefits arbitrarily on January 22, 2009 resulting in a said loss of 7 sick days which did not need to be used until after February 1, 2009. The statute of limitations is still active on the issue because Mr. Williams did not respond

[3] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. Copies may be purchased from PERB's Publications Coordinator, 1031 18th Street, Sacramento, CA 95811-4124, and the text is available at www.perb.ca.gov.

[4] The fact that the Los Angeles County Superior Court, in October 2009, dismissed a claim brought by Adams against UTLA, finding that the Court was an improper venue for a claim that the EERA duty of fair representation had been breached, does not change the conclusion stated above. Pursuant to EERA section 3541.5, PERB has exclusive initial jurisdiction over alleged violations of EERA, and a determination by PERB to dismiss an unfair practice charge and refuse to issue a complaint is not subject to judicial review under EERA section 3542(b).

to this issue until September 15, 2009 in his E-mail. And, my understanding is that by filing a lawsuit the statute of limitations can be arrested, which I did in October. Finally, the arbitrary demand that I report to work by LAUSD Attorney Kathleen E. Collins, before I had full medical benefits originally stemmed from my 14-month employer retaliatory work blockage, thus encompassing Protected Activity, Employer Knowledge and (additionally) Adverse Action. See enclosed Exhibit #5 Kinko Copied Fax of ignored grievance. Finally, Bruce Williams' Email used vague rational (also as motive) marked Exhibit #6.

PROTECTIVE ACTIVITY: UTLA-LAUSD Article XVI 5.0 Enrollment.

EMPLOYER'S KNOWLEDGE: I will send the E-mail that was sent to LAUSD Attorney Collins regarding filing of the aforementioned grievance.

ADVERSE ACTION: LAUSD Attorney Collins forced me to start work on January 22, 2009 despite warning of the latter UTLA-LAUSD Contractual Violation. Further, arbitrarily Collins would not allow me to see the District Doctor for a exam and only a referral to my neurologist would suffice since my primary declined, Dr. Douglas Hopper, since my conditions were neurological. It is my understanding that by contract returning employees are required to see the District's Doctor.

5. Second and finally, Bruce Williams refused to file a grievance regarding a school transfer and expended too much time making arbitrary excuses as to why LAUSD was in the right. Mr. Williams' Emailed "thorough and complete analysis" marked Exhibit #7, solidifies my arguments that UTLA refuses to represent me no matter how severe the consequences. Most telling, see enclosed response to Mr. Williams' aforementioned Email by Employment Law Attorney Chuong Q. Phung of Parker-Stanbury Law Firm marked Exhibit #8. As such, the new PERB Charge entails:

PROTECTIVE ACTIVITY: UTLA-LAUSD Article XVI 24.10 Return Rights: *"An employee returning from a Family Care and Medical Leave/Absence shall be returned to the same or comparable from which on leave and the same location from which the leave was taken, except that the employee may be transferred if such a transfer would have been made had the employee been on duty."*

> EMPLOYER'S KNOWLEDGE: I spoke with LAUSD Placement Coordinator Ezekiel Gonzalez about this matter as a violation of the UTLA-LAUSD Contract and other medical placement personnel whose name I must research.
>
> ADVERSE ACTION: Scheduled for Clay Middle School, UTLA has ignored further E-mails demanding a grievance, will also send in as an amendment.
>
> Remedy: Return of ALL union dues 4 years prior to 2008 and All union dues since, reasonable attorney fees. All enclosed said monetary damages, consequential and compensatory damages, interest.

The four exhibits referenced by the statement of the "new charge" are summarized as follows, and are discussed in chronological rather than exhibit number order:

Exhibit #5 is a copy of a Grievance Form for Certificated Employees, apparently completed by Adams regarding his complaint that the "District (LAUSD) has ordered me back to work although I will not have full medical benefits (Dental) until Feb. 1, 2009 (2/1/2009). No other LAUSD Certified employee works under these conditions." The copy attached is undated, and does not include any information showing to whom it was submitted.

Exhibit #7 includes a portion of an e-mail message sent by Adams to Bruce Williams[5] on September 3, 2009, and Williams' response dated September 10, 2009. In his e-mail message, Adams wrote that he was "authorizing, requesting and directing" Williams to file a grievance regarding LAUSD's violation of Adams' return rights as evidenced by the assignment of Adams to Clay Middle School rather than a high school, Bravo Medical Magnet. Williams' response, declining to file a grievance, included the following:

> After investigating the facts of the matter, as well as a thorough and complete analysis of these facts applied to the contractual provision you have cited, UTLA has reached the honest and reasonable conclusion that your claim of a violation is without merit and that you would not prevail in any arbitration which may result in any such filing. An assignment to Clay Middle School is certainly not the "same" as Bravo Medical Magnet but, indeed, your assignment qualifies as a "comparable" one, thereby satisfying the contractual standard or requirement. Both assignments require a secondary teaching credential, are in a secondary school setting or site, and both are in a departmentalized, instructional framework or organizational

[5] Williams is an Area Representative for UTLA.

> structure. Similarly, both assignments use exactly the same assignment identification code (0736, Secondary Teacher) and require single-/CORE subject instructional planning and instruction. In addition, in both your previous and new assignments, students periodically pass from teacher to teacher over the course of the day, as opposed to elementary, self-contained classroom settings with one teacher all day.

Exhibit #6 includes Adams' subsequent response to Williams' message. In his September 11, 2009 e-mail message to Williams, Adams wrote in part[6] as follows:

> Despite my numerous inquiries and requests for grievances and assistance with LAUSD retaliatory work blockage, this is your first response to me as paying UTLA member since March 19, 2008.
>
> As such, my UTLA East Area Reps have a history of, including but not limited to, arbitrarily ignoring my grievances or undermining them including siding with the District.
>
> Case at hand: Are there other UTLA members who have filed grievances (Article XII 24.10 Return Rights) to remain at the high school level rather than be transfered [sic] to a middle school upon returning from sick leave[?]

Williams' response to the September 11, 2009 message from Adams reads as follows:

> Your response is not persuasive.
>
> Rather than attempting to provide any evidence to support your claim of a violation of Article XII, Section 24.10, or advancing your argument beyond a request into the realm of a rationale and its merit, you have digressed into other unrelated issues and still unsubstantiated claims of arbitrary treatment by UTLA. You have not put forth one reason to support your contention that a middle school assignment is not comparable to a high school assignment.
>
> Further, as to your questions, the mere existence of another case regarding said Article/Section, in and of itself, does nothing to substantiate your own claim. Every claim is judged on its merits, which yours is lacking. Similarly, the case of Mr. Caputo-Pearl

[6] It is unclear whether Exhibit #6 includes the totality of Adams' message.

> was not related to the issue of return rights from leave so the relevance of it being raised herein escapes me.
>
> Finally, as to your claimed history of "UTLA East Area Reps . . . arbitrarily ignoring my grievances . . .," you need not be further concerned. Though this is false and unsubstantiated as well, your new assignment places you outside the UTLA East Area, thereby rendering said history concluded. In other words, I am no longer your Area Representative.

Exhibit #8 is, as referenced by the statement of the charge, a September 25, 2009 letter to Williams from Mr. Phung, an attorney with the Parker-Stanbury law firm. In his letter, Phung urges UTLA and Williams to "immediately investigate the facts and circumstances regarding [Adams'] potential assignment to Clay MS rather than Bravo HS, and take all actions necessary to ensure that his rights are not being violated." Phung's letter, in part, recited his understanding that Article XII, Section 24.10 required the return of an employee "to the same or comparable position from which on leave **and the same location** from which the leave was taken."[7] (Emphasis in original.) Phung also argued that Adams was entitled to reasonable accommodation under the California Fair Employment and Housing Act, based on an existing autoimmune disorder, and that the Clay Middle School location, in a heavy industrial area of Los Angeles, did not provide such accommodation.

Analysis of New Charge

Charging Party has alleged that UTLA denied Charging Party the right to fair representation guaranteed by EERA section 3544.9 and thereby violated section 3543.6(b).[8] 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:

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[7] Both Adams, in his statement of the charge, and UTLA, in its position statement responding to the charge, quote the contract language concerning the "same location" requirement as being qualified to allow an exception where "the employee may be transferred if such a transfer would have been made had the employee been on duty."

[8] The statement of the charge also makes various assertions that would be more relevant if the charge were filed against the District, and if Charging Party was attempting to establish a prima facie discrimination violation by the District. However, as noted above, the instant charge is filed against UTLA and not the District. Notice is taken that Adams filed an unfair practice charge (LA-CE-5304-E) against the District on March 16, 2009, and that case is currently pending.

> 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.)

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 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.)

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.)

1. Medical Coverage Issue

Though not entirely clear, it appears that Adams is alleging UTLA breached its duty of fair representation with respect to the issue of Adams' medical coverage upon his return to work in January 2009. However, aside from language quoted from the UTLA-LAUSD contract, the only information provided by the charge is an undated copy of a grievance form. The charge does not establish that Adams requested assistance on this issue from UTLA or, if so, what action UTLA took in response. Thus, the charge fails to provide the "who, what, when, where and how" of an unfair practice and must be dismissed. (*State of California (Department of Food and Agriculture)*, *supra*, PERB Decision No. 1071-S.)

According to UTLA's position statement,[9] Adams asked Williams on January 26, 2009, to file a grievance on his behalf. UTLA further asserts that Williams informed Adams not later than early February 2009 of the determination that such a grievance would not be meritorious and that UTLA would not pursue the issue. If these facts are correct,[10] then this allegation concerns conduct that occurred outside the six-month statute of limitations period, and must be dismissed as untimely. (*Los Angeles Unified School District*, *supra*, PERB Decision No. 1929.)

2. Return to Work Issue

Here, it is clear that Adams made a request to UTLA for assistance in filing a grievance over the alleged violation of his return rights with respect to the location and nature of his assignment. It is also clear that UTLA declined to pursue the grievance.

As discussed above, however, it is not enough to allege that an exclusive representative has refused or failed to pursue a grievance on an employee's behalf. To establish a prima facie

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[9] Except where the facts are disputed, PERB case law does not require a Board agent to ignore information provided by the Respondent and consider only the facts provided by the Charging Party. (*Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M.)

[10] Adams alleges in the statement of the charge that Williams did not respond to him until September 15, 2009, and thus the "statute of limitations is still active" on this issue. However, the September 15, 2009 e-mail message referenced in the charge concerns the issue raised later regarding Adams' assignment, and not his medical coverage. Adams also argues that the statute of limitations is "arrested" by his filing of a lawsuit in October 2009, but he offers no legal authority for this position and the undersigned is unaware of any such support for this novel theory.

case for violation of the duty of fair representation, the Charging Party must allege facts showing that the union's actions were arbitrary, discriminatory or in bad faith. (*Alvord Educator's Association (Bussman)* (2009) PERB Decision No. 2046.) Thus, where a charging party complained that he communicated to union officials regarding an alleged improper assignment change, "to no avail," but failed to allege any additional facts to demonstrate that the union abused its discretion or that its actions were without a rational basis or devoid of honest judgment, the Charging Party failed to set forth a prima facie case for violation of the duty of fair representation. (*Ibid.*) In duty of fair representation cases, the burden is on the charging party to show how an exclusive representative abused its discretion, and not on the exclusive representative to show how it properly exercised its discretion. (*United Teachers-Los Angeles (Vigil)* (1992) PERB Decision No. 934.)

With respect to the alleged violation of Adams' return rights under Article XI, Section 24.10, Williams responded to Adams' request for assistance on September 10 and September 15, 2009. In both communications, Williams provided an explanation of UTLA's reasons for declining to pursue what UTLA viewed as a non-meritorious grievance. In both communications, Williams was responsive to the concerns and arguments expressed by Adams, which focused on his assignment to a middle school rather than a high school and his belief that his treatment was inconsistent with that afforded other, similarly situated teachers.

On September 25, 2009, an attorney representing Adams raised two other issues with Williams, namely, the allegation that Adams was entitled to return to the "same location" and that his new assignment raised issues with respect to reasonable accommodation under the California Fair Employment and Housing Act. The charge does not reflect any response to this letter by Williams or any other UTLA representative.[11] Two factors mitigate against finding these facts as sufficient to establish a prima facie case. First, the letter from Phung did not accurately quote the relevant contract language, in that language was omitted, and the "same location" concern was not the one expressed by Adams when he asked UTLA to file a grievance. Second, with respect to the reasonable accommodation issue, the charge does not establish that UTLA's contract with the District provides for such accommodation. The duty of fair representation is limited to contractually-based remedies under the union's exclusive control and does not extend to a request for reasonable accommodation for a disability under cover of state or federal law. (*California State Employees Association (Chen)* (2005) PERB Decision No. 1749-S.)

[11] It is noted that Williams, in his e-mail message to Adams dated September 15, 2009, had informed Adams that he was no longer the UTLA representative for Adams.

Conclusion

For these reasons the charge, as presently written, does not state a prima facie case.[12] 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 February 18, 2010,[13] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Les Chisholm
Division Chief

[12] In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make "a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Ibid.*)

[13] A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)