STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

WERNER WITKE, Charging Party, v. UPTE-CWA LOCAL 9119, Respondent.	Case No. LA-CO-516-H PERB Decision No. 2253-H April 23, 2012

Appearance: Werner Witke, on his own behalf.

Before Martinez, Chair; Dowdin Calvillo and Huguenin, Members.

DECISION

MARTINEZ, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Werner Witke (Witke) of the Office of the General Counsel's dismissal (attached) of his unfair practice charge. The charge, as amended, alleged that UPTE-CWA Local 9119 (UPTE) violated the Higher Education Employer-Employee Relations Act (HEERA),[1] citing Witke's failure to receive adequate pre-hearing notice from the American Arbitration Association (AAA) arbitrator of the agency fee challenge hearing for the 2010/2011 challenge period. The charge alleged that this conduct specifically violated PERB Regulation 32994, subdivision (b)(7)[2] requiring that agency fee challenge hearings be "fair, informal proceedings conducted in conformance with basic precepts of due process." The Board agent dismissed the charge for failure to state a prima facie case. The Board agent found the charge deficient on jurisdictional grounds, and because it failed to allege facts

[1] The HEERA is codified at Government Code section 3560 et seq.

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

demonstrating that PERB should not defer to the decision of the AAA arbitrator regarding the adequacy of the pre-hearing notice.

The Board has reviewed the entire record in this matter and given full consideration to the issues raised on appeal and the arguments of the parties. Based on this review, the Board finds the Board agent's warning and dismissal letters to be well-reasoned, adequately supported by the record and in accordance with the applicable law. Accordingly, the Board hereby adopts the warning and dismissal letters as the decision of the Board itself, as supplemented by a discussion of the issues raised by Witke on appeal.

DISCUSSION

The issues raised on appeal concern the processing and investigation of the charge. Witke asserts that the Board agent and UPTE engaged in ex parte communications. Witke also asserts that the Board agent granted multiple extensions in violation of PERB Regulation 32132, subdivision (b), and, as a consequence, UPTE's position statement should have been excluded from consideration. Based on these assertions, Witke argues that dismissal of his charge should be reversed, and a complaint should issue.

The Initial Processing of an Unfair Practice Charge

After an unfair practice charge has been filed, it is assigned to a Board agent for processing. (PERB Reg. 32620, subd. (a).) The powers and duties of the Board agent are, in pertinent part:

> (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) 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; . . .
>
> (6) Place the charge in abeyance . . . .
>
> (7) Issue a complaint pursuant to Section 32640.

(PERB Reg. 32620, subd. (b).) If the Board agent concludes that the charge or the evidence is insufficient to establish a prima facie case, the Board agent "shall refuse to issue a complaint, in whole or in part. The refusal shall constitute a dismissal of the charge." (PERB Reg. 32630.)

Here, the two Board agents involved in this matter performed their duties well within the regulatory framework set forth above. In processing a charge, a Board agent may freely communicate with the parties to facilitate the gathering of information necessary to the investigation of the charge.

Regarding Witke's argument that the Board agents involved in processing the instant charge engaged in improper "ex parte" communications with UPTE, there is no prohibition on ex parte communications in the initial charge processing stage of an unfair practice proceeding. This policy of unrestricted and open communication with the parties at the charge processing stage stands in stark contrast to the rules governing formal hearings before the Board on an unfair practice complaint, which specifically prohibit both oral and written ex parte communications between parties and the presiding Board agent. (PERB Reg. 32185.)

Ex parte communications at the charge processing stage of unfair practice proceedings are a routine and necessary part of the performance of a Board agent's regulatory duties. Ex parte communications enable Board agents to "[a]ssist the charging party" in formulating a

charge, "[a]nswer procedural questions of each party" regarding the case, "[f]acilitate communication" between the parties, and "[m]ake inquiries." (See PERB Reg. 32620, subd. (b).) Indeed, ex parte communications are explicitly sanctioned by PERB Regulation 32620, subdivision (d), which provides: "Facts obtained from oral responses that reveal potential deficiencies in the allegations must be communicated to the charging party before dismissal of a charge under Section 32630." Although this provision conditions the use of ex parte communications, it in no manner restricts the Board agent from engaging in such communications in the course of the investigation. This provision ensures that information gathered by a Board agent through an ex pate communication, which reveals a potential deficiency in the charge, be provided to the charging party in order for that information to be considered as a basis for dismissal of the charge. This provision demonstrates that ex parte communications are not just authorized but fully contemplated by the regulatory scheme. (See *Monterey County Office of Education* (1991) PERB Decision No. 913 [rejecting respondent's argument that issuance of complaint was improper because it was based on facts taken from a telephone conversation between Board agent and charging party, the Board itself held that "the Board agent has the authority to conduct an investigation to determine whether the unfair practice charge allegations state a prima facie case."][3]

Extensions of Time

Witke further argues that the Board agent granted multiple extensions in violation of PERB Regulation 32132, subdivision (b). This regulation provides as follows:

[3] It bears mention that Witke objects only to ex parte communications between the Board agents and UPTE, and not to ex parte communications between the Board agent and himself. On October 5, 2011, for example, the Board agent left a voicemail message for Witke "conveying that charge processing would proceed without considering a second position statement from Respondent." (Board agent's Dismissal, p. 1.) In his appeal, Witke neither refers to this communication nor asserts that it was improper.

> A request for an extension of time within which to file any document with a Board agent shall be in writing and shall be filed with the Board agent at least three days before the expiration of the time required for filing. The request shall indicate the reason for the request 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. Extensions of time may be granted by the Board agent for good cause only.

Witke attaches copies of two letters to his appeal, which he believes demonstrate a violation of the above regulation. By letter dated June 15, 2011, to the Board agent and copied by mail to Witke, UPTE's attorney referred to a "brief telephone conversation" between himself and the Board agent that morning confirming that the Board agent had agreed to a one-week extension by which UPTE would be allowed to submit a position statement in response to the charge. Witke did not submit a response.

By letter dated September 9, 2011, to the Board agent and copied by mail to Witke, UPTE's attorney referred to the Board agent's agreement to extend by approximately two weeks the date by which UPTE would be allowed to submit a position statement in response to the amended charge. By letter dated September 22, 2011, Witke objected to UPTE's request for an extension of time by which to file a second position statement. The Board agent was subsequently informed that "nothing further would be submitted on behalf of Respondent." (Board agent's Dismissal, p. 1.)

Witke is correct that the UPTE failed to comply with PERB Regulation 32132, subdivision (b) in failing to put the two requests for extension in writing. There is no basis to conclude from UPTE's shortcomings, however, that the Board agent did not find good cause to grant either the extension that occurred after the filing of the charge or the extension that occurred after the filing of the amended charge. Witke was informed of each extension and objected in writing to the second. Subsequent to his objection, the UPTE refrained from filing the second position statement. Based on the lack of full compliance with PERB

Regulation 32132, subdivision (b), Witke argues that UPTE's first and only position statement filed in response to the initial charge, to which Witke did not object in writing, be excluded from PERB's consideration. Witke's argument is misplaced for three main reasons.

Witke's remedy for the regulatory compliance issue would be to exclude consideration of pertinent and undisputed facts learned in the course of the investigation, namely the existence of an AAA arbitrator ruling concerning the very issue raised by Witke in his unfair practice charge. The PERB regulation at issue here, PERB Regulation 32132, subdivision (b), is a means by which Board agents, through their consideration of requests for extension, can exercise control over the timeline for processing a charge. While violations of PERB regulations will not be condoned, neither will they be used to undermine the authority of a Board agent in the performance of his or her duties. The Board agent is responsible for determining whether the facts as alleged in the charge state a prima facie case and whether the charging party is capable of providing admissible evidence in support of the allegations. (*Eastside Union School District* (1984) PERB Decision No. 466.) As the Board agent noted, absent a factual dispute, a Board agent may rely on information that does not appear in the charge, including information provided by the respondent. (*Service Employees International Union #790* (*Adza*) (2004) PERB Decision No. 1632-M.) To exclude that information from PERB's consideration would hinder the investigative fact-gathering process.

Also, there has been no showing of prejudice. The filing of a position statement by a respondent in an unfair practice proceeding is explicitly authorized under PERB Regulation 32620, subdivision (c), which provides that the "respondent shall be apprised of the allegations, and may state its position on the charge during the course of the inquiries." The charge was filed on June 8, 2011. Respondent was given until June 22, 2011, by which to file a position statement. Respondent requested and received a one-week extension of time. UPTE

filed one day early on June 28, 2011. Almost two months later, on August 24, 2011, Witke filed an amended charge. UPTE's receipt of a one-week extension of time by which to file a position statement prejudiced Witke in no discernible way. Witke had more than ample opportunity to dispute the factual assertions set forth in UPTE's position statement as untrue or irrelevant. (See, e.g., *Monterey County Office of Education, supra,* PERB Decision No. 913 [where respondent was provided the opportunity to respond to charging party's allegations, which were taken from a telephone conversation between the Board agent and the charging party, the respondent suffered no prejudice].)

As important, the focus of the appeal obscures the real issue, which is whether the charge, as amended, states a prima facie violation of the law. At the charge processing stage, the burden to provide specific allegations of fact, which demonstrate a prima facie case that an unfair practice has been committed, is on the charging party. (*Sacramento Municipal Utility District* (2006) PERB Decision No. 1838-M.) Based on consideration of the amended charge alone, this burden has not been met. As the Board agent explained, PERB lacks jurisdiction over alleged failures of AAA in providing Witke with adequate pre-hearing notice of the agency fee challenge hearing. (*American Arbitration Association (O'Malley)* (2003) PERB Decision No. 1573-H [the selection of and payment to AAA by the union pursuant to regulation does not qualify AAA as an agent of the union]; *California School Employees Association, Chapter 258 (Gerber)* (2001) PERB Decision No. 1460, Board agent's Dismissal, p. 5 ["[a]s [union] was not required to provide notice to Charging Party, it cannot be found to have violated PERB Regulations when [AAA] allegedly fails to notify Charging Party in a timely manner"].)

Based on the foregoing, the Board concludes that the appeal is without merit and dismissal of the charge is proper.

ORDER

The unfair practice charge in Case No. LA-CO-516-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Dowdin Calvillo and Huguenin joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8387
Fax: (916) 327-6377

October 7, 2011

Werner Witke
10556 Caminito Flores
San Diego, CA 92126

Re: *Werner Witke v. UPTE-CWA Local 9119*
Unfair Practice Charge No. LA-CO-516-H
DISMISSAL LETTER

Dear Mr. Witke:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 8, 2011. Werner Witke (Witke or Charging Party) alleges that UPTE-CWA Local 9119 (Union or Respondent) violated the Higher Education Employer-Employee Relations Act (HEERA or Act)[1] and PERB Regulation 32994(b)(7)[2] by failing to provide Charging Party with proper notice of an agency fee arbitration hearing.

Charging Party was informed in the attached Warning Letter dated August 10, 2011, that the above-referenced charge did not state a prima facie case. Charging Party was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, Charging Party should amend the charge. Charging Party was further advised that, unless he amended the charge to state a prima facie case or withdrew it, the charge would be dismissed.

On August 24, 2011, Charging Party filed a First Amended Charge (amended charge). On September 26, 2011, Charging Party submitted a letter objecting to Respondent's request for an extension of time to file a position statement. Subsequently, the undersigned was informed that nothing further would be submitted on behalf of Respondent. On October 5, 2011, the undersigned left a voicemail message for Charging Party, conveying that charge processing would proceed without considering a second position statement from Respondent.

Investigation of the amended charge revealed the following relevant information.

Charging Party states, for the first time:

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

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

> My sworn declaration [attached as Exhibit 1 to the amended charge] pertains to the conduct of UPTE that specifies what UPTE failed to do in accordance with due process. The proof is provided in Exhibit 2, a notice sent to Ms. Sylvia Rayner and her letter to me, both that were sent after the hearing was held.
>
> UPTE has failed to provide me due process, to wit, it did not send or cause to be sent a notice as required under the California Code of Civil Procedure Section 1282.2(a)(1).[3]

Charging Party states in his attached declaration that he "did not receive a letter from UPTE, UPTE's representatives or anyone employed or hired by UPTE notifying [him] of the time, date and place of the arbitration hearing[.]" Charging Party states that the letter he did receive was sent via first class mail, while notice of arbitration hearings are required "to be personally served or [by] registered or certified mail on the parties to the arbitration[.]" Additionally, Charging Party states that he did not personally appear at the hearing, and therefore did not waive his right to notice.

Charging Party's original charge, as filed on June 8, 2011, provides:

> I am a University Professional and Technical Employees (UPTE) Union agency fee challenger for the 2010/2011 challenge period. I did not receive notice of the time, date and location of the agency fee challenge hearing for the 2010/2011 challenge period.
>
> I emailed my fellow challengers in February, 2011, after the hearing was held, asking if any of them had heard of when the hearing would take place. Ms. Sylvia Rayner sent me a letter shortly after that time, sending me a copy of the hearing notice along with a handwritten note. [Attached as an exhibit to the charge.[4]] The text of the letter states that a hearing concerning

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[3] California Code of Civil Procedure section 1282.2(a)(1), provides:

> The neutral arbitrator shall appoint a time and place for the hearing and cause notice thereof to be served personally or by registered or certified mail on the parties to the arbitration and on the other arbitrators not less than seven days before the hearing. Appearance at the hearing waives the right to notice.

(Emphasis added.)

[4] Charging Party provides a letter dated December 28, 2010, from the American Arbitration Association (AAA) that states in pertinent part:

the dispute pertaining to the California Faculty Association, a union different from UPTE, is scheduled for January 20, 2011. However, there is a reference to UPTE in another part of the letter.

Mr. Michael Wen, a fellow agency fee challenger, did not receive notice of the hearing. His sworn declaration is included. [Attached as an exhibit to the charge.]

The American Arbitration Association (AAA) told me that my name and address is on their mailing list. The AAA provides no proof that it actually mailed the notice and more importantly provides no proof that I received such. Neither the AAA or UPTE counsel provide proof of service, certified mailing receipt or any other document to show that the notice was sent and/or received that meets the requirements of California statutes. There is a law that requires this, I remember it, can't find it, but you ought to know this.

DISCUSSION

Charging Party has failed to correct the following deficiencies in his charge as discussed in the August 10, 2011 Warning Letter. To reach the merits of Charging Party's charge, AAA must

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Re: 74 673 00627 10
UPTE, CWA Local 9119
Fair Share Fees July 1, 2010 – June 30, 2011
VS
Agency Fee Objectors

The California Faculty Assocation has initiated arbitration proceedings under the [AAA's] Rules for Impartial Determination. . . .

[AAA] has appointed Sandra Smith Gangle as impartial Arbitrator for the above referenced matter. . . .

In accordance with Rule 6 of [AAA's] Rules ... a hearing is scheduled as follows:

Date: January 20, 2011 Place: Oakland Airport Hilton

Time: 10:00 A.M. 1 Hegenberger Road

Before: Sandra Smith Gangle Oakland, CA 94621

be a covered entity under HEERA; otherwise, the Board lacks jurisdiction to adjudicate the charge. AAA is neither an employer nor an employee organization under HEERA sections 3562(f)(1) and (2) and 3562(g).[5] Instead, AAA is one of two entities authorized by PERB Regulation 32994(b)(4) to select an impartial decisionmaker to hear agency fee appeals.[6] Under that provision, the selection among those entities shall be made by the exclusive representative, in this case, Respondent. The selection and payment of AAA by Respondent alone does not qualify AAA as an agent of Respondent. (*American Arbitration Association (O'Malley)* (2003) PERB Decision No. 1573-H.) AAA was not hired to represent employees with higher education employers regarding terms and conditions of employment. Charging

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[5] HEERA section 3562:

> (f)(1) "Employee organization" means any organization of any kind in which higher education employees participate and that exists for the purpose, in whole or in part, of dealing with higher education employers concerning grievances, labor disputes, wages, hours, and other terms and conditions of employment of employees. An organization that represents one or more employees whose principal worksite is located outside the State of California is an employee organization only if it has filed with the board and with the employer a statement agreeing, in consideration of obtaining the benefits of status as an employee organization pursuant to this chapter, to submit to the jurisdiction of the board. The board shall promulgate the form of the statement.
>
> (2) "Employee organization" shall also include any person that an employee organization authorizes to act on its behalf. An academic senate, or other similar academic bodies, or divisions thereof, shall not be considered employee organizations for the purposes of this chapter.
>
> (g) "Employer" or "higher education employer" means the regents in the case of the University of California, the directors in the case of the Hastings College of the Law, and the trustees in the case of the California State University, including any person acting as an agent of an employer.

[6] PERB Regulation 32994(b)(4) provides:

> The impartial decisionmaker shall be selected by the American Arbitration Association or the California State Mediation Service. The selection between these entities shall be made by the exclusive representative.

Party provided no other facts to show that the AAA is a covered entity under HEERA. Additionally, the Board has held in a similar case that formal notice of the [agency fee] arbitration is the responsibility of the AAA. (*California School Employees Association, Chapter 258* (Gerber) (2001) PERB Decision No. 1460.) Under these circumstances, where the charge relates to alleged misconduct of AAA in providing notice, the Board lacks jurisdiction to address the merits of Charging Party's charge and the charge must be dismissed.

In the alternative, PERB will defer to an arbitrator's decision in an agency fee case and dismiss an unfair practice charge where: (1) the arbitration proceedings were fair and regular, and (2) the arbitrator's decision is not clearly repugnant to the purposes of HEERA. (*ABC Federation of Teachers, AFT Local 2317 (Murray, et al.)* (1998) PERB Decision No. 1295.) From the uncontested facts provided by the parties, it appears that this precise matter concerning notice of the agency fee challenge hearing was addressed by the Arbitrator. Charging Party does not include any facts demonstrating that the Arbitrator's decision was anything but fair and regular or that it was repugnant to the Act. Charging Party has failed to provide facts alleging or demonstrating that PERB should not defer to the Arbitrator's decision in this matter.

Therefore, the charge is hereby dismissed based on the facts and reasons set forth above and in the August 10, 2011 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,

M. SUZANNE MURPHY
General Counsel

By _____
Jonathan Levy
Regional Attorney

Attachment

cc: Robert S. Remar

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8387
Fax: (916) 327-6377

August 10, 2011

Werner Witke
10556 Caminito Flores
San Diego, CA 92126

Re: *Werner Witke v. UPTE-CWA Local 9119*
Unfair Practice Charge No. LA-CO-516-H
WARNING LETTER

Dear Mr. Witke:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 8, 2011. Werner Witke (Witke or Charging Party) alleges that UPTE-CWA Local 9119 (Union or Respondent) violated the Higher Education Employer-Employee Relations Act (HEERA or Act)[1] and PERB Regulation 32994(b)(7)[2] by failing to provide Charging Party with proper notice of an agency fee arbitration hearing.

Investigation of the charge revealed the following relevant information.

FACTUAL BACKGROUND

Charging Party states the following, verbatim:

> I am a University Professional and Technical Employees (UPTE) Union agency fee challenger for the 2010/2011 challenge period. I did not receive notice of the time, date and location of the agency fee challenge hearing for the 2010/2011 challenge period.
>
> I emailed my fellow challengers in February, 2011, after the hearing was held, asking if any of them had heard of when the hearing would take place. Ms. Sylvia Rayner sent me a letter shortly after that time, sending me a copy of the hearing notice along with a handwritten note. [Attached as an exhibit to the

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

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

charge.[3]] The text of the letter states that a hearing concerning the dispute pertaining to the California Faculty Association, a union different from UPTE, is scheduled for January 20, 2011. However, there is a reference to UPTE in another part of the letter.

Mr. Michael Wen, a fellow agency fee challenger, did not receive notice of the hearing. His sworn declaration is included. [Attached as an exhibit to the charge.]

The American Arbitration Association (AAA) told me that my name and address is on their mailing list. The AAA provides no proof that it actually mailed the notice and more importantly provides no proof that I received such. Neither the AAA or UPTE counsel provide proof of service, certified mailing receipt or any other document to show that the notice was sent and/or received that meets the requirements of California statutes. There is a law that requires this, I remember it, can't find it, but you ought to know this.

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[3] Charging Party provides a letter dated December 28, 2010, from the American Arbitration Association (AAA) that states in pertinent part:

> Re: 74 673 00627 10
> UPTE, CWA Local 9119
> Fair Share Fees July 1, 2010 – June 30, 2011
> VS
> Agency Fee Objectors
>
> The California Faculty Assocation has initiated arbitration proceedings under the [AAA's] Rules for Impartial Determination. . . .
>
> [AAA] has appointed Sandra Smith Gangle as impartial Arbitrator for the above referenced matter. . . .
>
> In accordance with Rule 6 of [AAA's] Rules ... a hearing is scheduled as follows:
>
> Date: January 20, 2011 Place: Oakland Airport Hilton
>
> Time: 10:00 A.M. 1 Hegenberger Road
>
> Before: Sandra Smith Gangle Oakland, CA 94621

As a remedy, I ask for the following:

1. A determination that the decision of the arbitrator is not valid due to failure to provide due process.

2. That the Board order a new hearing for all challengers for the 2010/2011 challenge period.

3. That the Board order further hearing notices be mailed via certified mail or other method that requires a signature receipt.

4. That future hearing notices be sent a minimum of sixty days prior to the hearing.

Respondent's Position[4]

This charge should be dismissed for either of two independent reasons. First, PERB lacks jurisdiction over this allegation because the charge complains of alleged misconduct of the AAA, which is neither a covered entity under the Act or an agent of the Union. Second, PERB should defer to the Arbitrator's decision and resolution of Charging Party's objections concerning the adequacy of AAA's pre-hearing notice.

Upon receipt of agency fee challenges for the 2010-2011 agency fee period, the Union requested that AAA appoint a neutral arbitrator. The Union provided AAA with a mailing list of all agency fee challengers. AAA then scheduled a hearing to be held in front of Sandra Gangle on January 20, 2011. On or about December 28, 2010, AAA mailed a notice for the upcoming hearing to all agency fee challengers on the mailing list. AAA confirmed both orally and in written response to "counsel's email inquiry, that it provided copies of the notice to each and every individual included on the mailing list, including" Charging Party. The hearing was conducted on January 20, 2011; no agency fee challengers attended.

Charging Party mailed AAA a letter dated March 28, 2011, in which he raised these same procedural challenges to the agency fee arbitration proceeding as he is raising in this unfair practice charge. Specifically, Charging Party alleges that he had not received AAA's December 28, 2010 notice of hearing. Also, Charging Party challenges the notice due to a typographical error referencing the wrong union, despite recognizing that the notice included the correct AAA matter number and case name, correctly listed the requesting Union, and correctly provided the date, time and location of the hearing.

[4] Absent a factual dispute, a Board Agent may rely on information that does not appear in the charge, including information provided by the Respondent. (*Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M.)

AAA informed Respondent of Charging Party's objections to the hearing (Charging Party did not provide Respondent with a copy of these objections). On April 11, 2011, Respondent filed a document in opposition to Charging Party's objections, to which Charging Party filed a reply on April 17, 2011. On April 25, 2011, after reviewing these submissions, the Arbitrator issued a written Interim Award denying Charging Party's procedural challenges and ruling that the notice of the agency fee arbitration proceeding was procedurally proper under the applicable laws and procedures. Thereafter, the Arbitrator ruled that the Union had properly calculated and assessed agency fees for the 2010-2011 agency fee period.

DISCUSSION

A. Charging Party's Burden

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.)

B. Deficiencies in the Charge

To reach the merits of Charging Party's charge, AAA must be a covered entity under HEERA; otherwise, the Board lacks jurisdiction to adjudicate the charge. AAA is neither an employer nor an employee organization under HEERA sections 3562(f)(1) and (2) and 3562(g).[5]

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[5] HEERA section 3562:

> (f)(1) "Employee organization" means any organization of any kind in which higher education employees participate and that exists for the purpose, in whole or in part, of dealing with higher education employers concerning grievances, labor disputes, wages, hours, and other terms and conditions of employment of employees. An organization that represents one or more employees whose principal worksite is located outside the State of California is an employee organization only if it has filed with the board and with the employer a statement agreeing, in consideration of obtaining the benefits of status as an employee organization pursuant to this chapter, to submit to the jurisdiction of the board. The board shall promulgate the form of the statement.
>
> (2) "Employee organization" shall also include any person that an employee organization authorizes to act on its behalf. An

Instead, AAA is one of two entities authorized by PERB Regulation 32994(b)(4) to select an impartial decisionmaker to hear agency fee appeals.[6] Under that provision, the selection among those entities shall be made by the exclusive representative, in this case, Respondent. The selection and payment of AAA by Respondent alone does not qualify AAA as an agent of Respondent. (*American Arbitration Association (O'Malley)* (2003) PERB Decision No. 1573-H.) AAA was not hired to represent employees with higher education employers regarding terms and conditions of employment. Charging Party provided no other facts to show that the AAA is a covered entity under HEERA. Additionally, the Board has held in a similar case that formal notice of the [agency fee] arbitration is the responsibility of the AAA. (*California School Employees Association, Chapter 258* (Gerber) (2001) PERB Decision No. 1460.) Under these circumstances, where the charge relates to alleged misconduct of AAA in providing notice, the Board lacks jurisdiction to address the merits of Charging Party's charge and the charge must be dismissed.

In the alternative, PERB will defer to an arbitrator's decision in an agency fee case and dismiss an unfair practice charge where: (1) the arbitration proceedings were fair and regular, and (2) the arbitrator's decision is not clearly repugnant to the purposes of HEERA. (*ABC Federation of Teachers, AFT Local 2317 (Murray, et al.)* (1998) PERB Decision No. 1295.) From the uncontested facts provided by Respondent, it appears that this precise matter concerning notice of the agency fee challenge hearing was addressed by the Arbitrator. Charging Party does not include any facts demonstrating that the Arbitrator's decision was anything but fair and regular or that it was repugnant to the Act. Charging Party has failed to provide facts alleging or demonstrating that PERB should not defer to the Arbitrator's decision in this matter.

> academic senate, or other similar academic bodies, or divisions thereof, shall not be considered employee organizations for the purposes of this chapter.
>
> (g) "Employer" or "higher education employer" means the regents in the case of the University of California, the directors in the case of the Hastings College of the Law, and the trustees in the case of the California State University, including any person acting as an agent of an employer.

[6] PERB Regulation 32994(b)(4) provides:

> The impartial decisionmaker shall be selected by the American Arbitration Association or the California State Mediation Service. The selection between these entities shall be made by the exclusive representative.

C. Conclusion

For these reasons the charge, as presently written, does not state a prima facie case.[7] 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 August 25, 2011,[8] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Jonathan Levy
Regional Attorney

JL

[7] 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.*)

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