STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JEFFEREY L. NORMAN, Charging Party, v. NATIONAL EDUCATION ASSOCIATION-JURUPA, Respondent.	Case No. LA-CO-1564-E PERB Decision No. 2371 April 18, 2014

Appearances: Law Offices of Richard Ackerman by Richard D. Ackerman, Attorney, for Jefferey L. Norman; California Teachers Association by Robert E. Lindquist, Staff Attorney, for National Education Association-Jurupa.

Before Huguenin, Winslow and Banks, Members.

DECISION

WINSLOW, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by Jefferey L. Norman (Norman) of a Board agent's dismissal of an unfair practice charge alleging that the National Education Association – Jurupa (NEA-J) violated the Educational Employment Relations Act (EERA)[1] by refusing to provide an attorney to represent Norman in an administrative hearing concerning his dismissal as a permanent teacher. Norman alleged that this conduct violated the duty of fair representation and was undertaken in retaliation against him, allegedly violating EERA sections 3543.6(a), (b), and (c) and 3544.9.

The Board has reviewed the warning and dismissal letters, and the record in light of charging parties' appeal, the NEA-J's response thereto, and the relevant law. Based on this review, we affirm the dismissal for the reasons discussed below.

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

SUMMARY OF ALLEGATIONS

Norman's Initial Unfair Practice Charge

Norman filed his initial unfair practice charge on February 4, 2013, alleging that NEA-J, his exclusive representative, and the California Teachers Association (CTA)[2] promised that Norman would be provided with an attorney throughout the period he was placed on administrative leave, starting November 2, 2011. The unfair practice charge was accompanied by hundreds of e-mail messages describing events from 2008 to February 2013, including the fact that NEA-J represented Norman in 2008 in an arbitration concerning involuntary transfer and administrative leave.

Norman's timely allegations describe that he was promised by CTA and NEA-J that he would be provided an attorney "throughout my being placed on administrative leave (November 2, 2011) . . . I received no representation by a union attorney in my dismissal hearing or anytime after September 5, 2012." The charge also alleges that CTA's website promises that CTA will provide legal representation in teacher for-cause dismissal hearings up to a maximum of $20,000, but that Norman received nothing.

The Office of the General Counsel reviewed the voluminous e-mails and summarized the relevant background information contained in them. On September 3, 2012, Director of Citrus-belt Uniserve,[3] Michael Kress (Kress)[4] sent Norman a letter stating, in relevant part: "You were assigned an attorney for one purpose and one purpose only [*sic*] to represent you at your dismissal hearing." CTA initially provided Norman with an attorney, Marianne Reinhold

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[2] CTA is not a named respondent.

[3] Citrus-belt Uniserve is not a named respondent. Norman does not describe the relationship between Citrus-belt Uniserve and NEA-J.

[4] The e-mail attachments to Norman's charge indicate that Kress was an employee of CTA during the relevant time period.

(Reinhold), to represent him in the initial stages of Norman's disciplinary proceedings in mid-December 2011. Once the Jurupa Unified School District (District) served a notice of intended disciplinary action against Norman, he refused to contact Reinhold because she was allegedly "very angry and upset" with him. (Warning Ltr., p. 6.) By April 9, 2012, the "Union" had procured another Attorney, Matt Singer (Singer), to represent Norman in the for-cause dismissal hearing. Singer represented Norman from April 2012 until September 5, 2012, when an administrative law judge from the Office of Administrative Hearings granted Singer's request to be relieved as counsel. On August 29, 2012, Norman called Kress and asked for a new group legal services (GLS)[5] attorney to be appointed and/or that CTA pay for a private attorney. On the same day, Singer wrote to Norman informing him that Singer believed a conflict had arisen between the two that prevented Singer from "competently and zealously" representing Norman. (Warning Ltr., p. 10.)

Kress refused to provide a third GLS attorney or to compensate a private non-GLS attorney. He also stated that Norman retained the right to have CTA represent him at his dismissal hearing.

Norman alleges he received no representation by a union attorney in his January 2013 dismissal hearing or any time after September 5, 2012. Norman was left to self-represent (pro per) at his *Skelly* hearing.[6] Norman also alleges that he was never given the opportunity to

[5] GLS is not a named respondent.

[6] The California Supreme Court's decision in *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 215 (*Skelly*) requires that prior to punitive action being taken against a permanent employee, the public employer must provide the employee with certain due process, including a notice of the proposed action, the reasons therefore, a copy of the charges upon which the action is based, and the right to respond to the authority initially imposing the discipline.

participate in his *Skelly* hearing or pre-hearing conference. Norman was left to file all discovery requests against the District.

It appears the California Office of Administrative Hearings conducted a dismissal hearing in January 2013, and Norman was without representation at the hearing. It appears that Norman was dismissed from employment with the District on or about January 18, 2013.

Office of the General Counsel's Warning Letter

The Office of the General Counsel issued a warning letter on June 5, 2013. It noted that PERB would not issue a complaint based on conduct occurring more than six months before the charge was filed.

The Office of the General Counsel determined that many of the allegations contained in the charge concern conduct occurring more than six months before the charge was filed. For example, the allegations that NEA-J failed to fulfill its promise to provide Norman with an attorney "throughout [Norman's] administrative leave (November 2, 2011)," failed to represent Norman at his *Skelly* hearing on or about March 29, 2012, and failed in its representation of Norman on his grievance that asserted Norman had a contractual right to call witnesses in response to the District's summary of allegations against him, were considered untimely, and PERB lacks jurisdiction to issue a complaint with respect to any of these untimely allegations. Moreover, according to the Office of the General Counsel, even if allegations concerning extra-contractual proceedings like the *Skelly* hearing were timely, such proceedings were beyond the extent of the duty of fair representation.

The Office of the General Counsel determined that the charge did not include information demonstrating that NEA-J's representation at a for-cause dismissal/suspension hearing arises out of an obligation found in the collective bargaining agreement. Such representation, according to the Office of the General Counsel, appeared to be beyond the

extent of the duty of fair representation. Similarly, according to the Office of the General Counsel, the provision of a GLS attorney and union assistance in propounding discovery requests appeared to be extra-contractual.

The Office of the General Counsel determined that the charge did not allege facts that demonstrate NEA-J's conduct regarding contractual remedies under NEA-J's exclusive control was arbitrary, discriminatory, in bad faith, lacked a rational basis, or was devoid of honest judgment. According to the Office of the General Counsel, there were also no allegations demonstrating that NEA-J failed to perform a ministerial act which completely extinguished Norman's right to pursue his claim.

The Office of the General Counsel determined that the charge did not provide information demonstrating NEA-J took an adverse action against Norman, because the information does not demonstrate that a reasonable person under the same circumstances would consider NEA-J's decision to cease providing representation to have an adverse impact on Norman's employment. Therefore, according to the Office of the General Counsel, Norman was warned that his initial unfair practice charge did not state a prima facie case.

The Office of the General Counsel did not address Norman's allegation that NEA-J had breached EERA section 3543.6(a) (causing or attempting to cause the District to violate EERA section 3543.5) and EERA section 3543.6(c) (refusal or failure to meet and negotiate in good faith with a public school employer).

Norman's First Amended Charge

Norman filed a first amended charge on or about June 20, 2013. Norman alleges that the NEA-J violated EERA sections 3543.6 (without specifying subsections (a), (b), or (c), as he did in his initial charge) and 3544.9. He referred to proceedings governed by the California Education Code, his "property interest" in his job and reputation, the need to equalize power

between employer and employee, and the difficulty in finding an affordable attorney to represent his interests. Norman states that he is "asking for fair practices relative to what has actually been promised in writing by CTA/NEAJ which is a collaborative effort." Norman alleges that membership in NEA-J gives him membership in CTA, which offers legal services that he needed and that are the subject of the present unfair practice charge. Norman's hearing involved a "permanent dismissal" case "with all appurtenant discovery and related rights pursuant to the California Administrative Procedures Act."

Norman states that:

> "any expectations that would be developed by either the union or the employee are governed by the representations made in the context of the [collective bargaining agreement] CBA-relationship between the unit member, union, and employer, which, of course, is negotiated for and by the parties to the CBA and any appendices/[memorandum of understanding] MOUs. The duty of fair representation arises directly out of the CBA relationship and the promises made therein and through related membership benefits that can only be had by virtue of participation as a unit member in the dues-required union."

(Emphasis in original.)

Norman cites to the California court of appeal case *Lane v. I.U.O.E. Stationary Engineers, Local 39* (1989) 212 Cal.App.3d 164 (*Lane*) in support of his allegation that "a duty to take on representation, per the CBA relationship of the parties was undertaken voluntarily by NEA-J and they had a duty to complete the course of representation."

Norman alleges that Singer did not allow enough notice for Norman to respond to his motion to withdraw from representation. Norman alleges that he was left to self-represent (pro per) for his *Skelly* hearing (that he was never given an opportunity to participate in), his pre-hearing conference, and filing all discovery (e.g., interrogatories, admissions, and requests for production) against the District.

Norman alleges he had his dismissal hearing without his union attorney and was dismissed from District employment as of January 18, 2013.

NEA-J's Position Statement

NEA-J asserts several defenses to the first amended charge, including that many factual allegations were untimely and that there were insufficient facts alleged to state a prima facie case that NEA-J breached any provision of EERA or to draw an inference that NEA-J: (1) caused any public school employer to violate Norman's EERA rights; (2) threatened, interfered with or retaliated against Norman; (3) violated its duty to bargain in good faith with Norman's employer; or (4) failed to provide Norman with fair representation. NEA-J also alleges that Norman failed to exhaust the GLS program's procedure for appealing the program's representation decisions and failed to comply with the participation requirements of the GLS program, and that failure to exhaust a union's internal appeal procedures is a complete bar to recovery.

However, NEA-J's position statement was not filed in conformance with PERB Regulation 32620(c),[7] which requires that any response to an unfair practice charge be "signed under penalty of perjury by the party or its agent with the declaration that the response is true and complete to the best of respondent's knowledge and belief." Consequently, we will not consider NEA-J's response to the unfair practice charge, including facts asserted therein, in determining this case. (*United Educators of San Francisco (Banos)* (2005) PERB Decision No. 1764.)

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

Office of the General Counsel's Dismissal Letter

The Office of the General Counsel dismissed the first amended charge for many of the reasons discussed in the warning letter. In the dismissal letter, the Office of the General Counsel declined Norman's invitation to expand the scope of the duty of fair representation to statutory proceedings and concluded that:

> Allegations that the Union failed to fulfill promises or provide services such as representation at Charging Party's for-cause dismissal/suspension hearings concern conduct that is beyond the contractual remedies under the Union's exclusive control and may not form the basis of a PERB complaint. Again, the duty of fair representation, as administered by PERB, does not extend to extra-contractual conduct, despite Charging Party's desire to extend the duty of fair representation to promises the Union makes regarding group legal services and Charging Party's assertion that CTA's extra-contractual conduct "should be corrected as a matter of Collective Bargaining Agreement [CBA] and CTA Membership rights as well as public policy."

(Dismissal Ltr., p. 4, citations omitted.)

The Office of the General Counsel dismissed both the duty of fair representation and retaliation charges, concluding that Norman had failed to demonstrate that NEA-J's alleged decision to cease representation in the dismissal proceedings had an adverse impact on his employment.

Norman's Appeal

Norman's appeal of the dismissal reiterates his claim that *Lane, supra,* 212 Cal.App.3d 164 imposes on NEA-J a duty of fair representation in the for-cause dismissal proceeding because NEA-J voluntarily undertook the representation. Norman also argues that NEA-J was required to provide him with an attorney in the dismissal case because CTA promised that it would do so.

NEA-J's Response to Appeal

NEA-J's response to Norman's appeal argues that the PERB Regional Attorney properly dismissed the case because:

(1) Norman's charge failed to state a prima facie case of a violation;

(2) The charge concerned matters beyond the scope of NEA-J's duty of fair representation, since the duty arises only under contractual disputes where the union exclusively controls the means by which an employee can seek redress for alleged employer misconduct; and

(3) Norman failed to exhaust the internal union remedies provided for by CTA's GLS program.[8]

NEA-J also argues in its response that Norman failed to perfect an appeal from the Regional Attorney's refusal to issue a complaint because:

(1) The appeal failed to specify the Regional Attorney errors of fact;

(2) The appeal failed to specify the Regional Attorney's erroneous conclusions of law.

DISCUSSION

Untimely Claims

Because PERB may not "[i]ssue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge," (EERA, § 3541.5(a)(1)), we affirm the Office of the General Counsel's finding that many of

[8] This is a fact that we do not consider because it was initially asserted in NEA-J's unverified position statement.

the allegations contained in the charge concern conduct occurring more than six months before the charge was filed and are therefore untimely.[9]

EERA section 3541.5(a)(1) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.) At the charge investigation stage, a charging party bears the burden of demonstrating that the charge is timely filed. (*Los Angeles Unified School District* (2014) PERB Decision No. 2359-E, p. 22; *Tehachapi Unified School District* (1993) PERB Decision No. 1024; *State of California (Department of Insurance)* (1997) PERB Decision No. 1197-S.)

Norman's allegations that NEA-J failed to fulfill its promise to provide Norman with an attorney "throughout [Norman's] administrative leave (November 2, 2011)," failed to represent Norman at his *Skelly* hearing on or about March 29, 2012, and failed in its representation of Norman on his grievance that asserted Norman had a contractual right to call witnesses in response to the summary of allegations, are untimely, and PERB lacks jurisdiction to issue a complaint with respect to any of those untimely allegations.

Duty of Fair Representation Charge

PERB has long held that the duty of fair representation extends only to contractually-based remedies under the exclusive control of the exclusive representative. (*Bay Area Air Quality Management District Employees Association (Mauriello)* (2006) PERB Decision

[9] Although PERB will not issue a complaint based on conduct occurring more than six months before the unfair practice charge was filed, older allegations may be considered to provide background or characterize conduct that does fall within the statute of limitations. (*Jurupa Unified School District* (2012) PERB Decision No. 2283, fn. 18, and cases cited therein.)

No. 1808-M; *Professional Engineers in California Government (Lopez)* (1989) PERB Decision No. 760-S; *California State Employees Association (Parisi)* (1989) PERB Decision No. 733-S [duty of fair representation extends only where union is acting in its capacity as the exclusive representative].) An exclusive representative owes no duty of fair representation to a unit member unless the exclusive representative possesses the exclusive means by which such member can vindicate an individual right, and the right in question derives from a collective bargaining agreement. (*International Union of Operating Engineers, Local 501, AFL-CIO (Huff)* (2000) PERB Decision No. 1382-S; *California State Employees' Association (Darzins)* (1985) PERB Decision No. 546-S [union's refusal to provide representation in an extra-contractual proceeding does not bar individual from seeking redress on his own]; *Los Rios College Federation of Teachers, Local 2279, CFT/AFT, AFL-CIO (Deglow)* (1993) PERB Decision No. 992.)

In this case, Norman alleged that NEA-J violated its duty of fair representation by failing to appoint a third attorney at the union's expense to represent him in his for-cause permanent teacher dismissal hearing. As the Office of the General Counsel noted, Norman alleged no facts showing that any of the procedural steps for which he allegedly sought representation arose out of a collectively bargained agreement between NEA-J and the District. Permanent teacher dismissal proceedings are governed exclusively by the Education Code,[10] and are beyond the scope of negotiations under EERA. (EERA section 3543.2(a) and (b); *Board of Education v. Round Valley Teachers Assn.* (1996) 13 Cal.4th 269.) Therefore, it was legally impossible for permanent teacher dismissal proceedings to be a term and condition contained in a CBA between the District and NEA-J. NEA-J, the exclusive bargaining representative, owed no duty of fair representation for the statutory teacher dismissal

[10] Education Code section 44932 et seq.

procedure. We affirm the conclusion by Office of the General Counsel that Norman failed to state a prima facie case that NEA-J violated the duty of fair representation by failing to provide Norman with an attorney to represent him in this statutory proceeding.

Norman also alleged that CTA made promises to provide him with a GLS attorney in his dismissal case, and that it broke those promises in violation of the duty of fair representation. However, CTA was not named as a respondent to Norman's unfair practice charges. Even if it had been, the charge would still have to be dismissed because PERB has held that CTA is not the exclusive representative for certificated bargaining units, and therefore owes no duty of fair representation. (*California Teachers Association and Oakland Education Association (Welch)* (2006) PERB Decision No. 1850 (*Welch*), pp. 1-2, Proposed Dec., p. 2.) Norman's allegations against CTA, GLS, Citrus-Belt Uniserve, or any entity other than NEA-J, do not satisfy the principal element of the prima facie violation of the duty of fair representation, namely, that the charged entity is the exclusive representative of a bargaining unit in which Norman is a member.

To the extent that Norman's unfair practice charge can be read to allege that CTA breached a contract made to its members to provide legal representation in teacher dismissal cases, this claim must also be dismissed. As noted above, CTA was not named as a party to Norman's unfair practice charge, and is not a party to the CBA. Any alleged contract to provide legal services to members is not part of a collective bargaining agreement negotiated between the District and NEA-J, but instead an alleged promise made only to CTA members. PERB does not have jurisdiction to enforce such contracts. PERB's jurisdiction over employee organizations is confined to remedying alleged violations of EERA, including EERA sections 3543.6 and 3544.9. Nothing in EERA requires employee organizations to offer members economic benefits such as legal services, and nothing in EERA envisions PERB

enforcing such alleged individual contracts between an employee organization and its members, especially where the employee organization is not the exclusive representative. (See, e.g., *Valley of the Moon Teachers Association, CTA/NEA (McClure)* (1996) PERB Decision No. 1165, Warning Ltr., p. 5 [CTA group legal services manual requiring that a unit member either chose an attorney affiliated with that program or waive his or her right to an attorney from CTA does not violate the duty of fair representation].)

In order to state a prima facie violation of the duty of fair representation, Norman must show that NEA-J's conduct was arbitrary, discriminatory, or in bad faith. (*United Teachers of Los Angeles (Collins)* (1982) PERB Decision No. 258 (*Collins*).) As stated by the Board in *Collins*:

> 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.

(*Id.*, Dismissal Ltr., p. 5; citation omitted.)

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, emphasis in original; quoting *Rocklin Teachers Professional Association (Romero)* (1980) PERB Decision No. 124.)

Norman has alleged no facts that demonstrate that any action, or lack of action NEA-J took was without rational basis or devoid of honest judgment.

Norman alleges no facts that NEA-J, the only named respondent, denied representation to Norman at any stage of his dismissal-related procedure. Norman only alleges facts indicating that CTA, Citrus-belt Uniserve, and their respective employees or agents made and broke various promises to provide Norman with representation with regard to his dismissal. However, Norman does not allege any specific facts indicating that NEA-J or NEA-J President John Vigrass (Vigrass) made or broke such promises, only unsupported conclusions to this effect.

Norman alleges that Vigrass directed Norman to CTA and GLS to seek representation for his dismissal-related proceedings. However, Norman has not alleged that any of the above-referenced entities were alter egos or agents of each other.[11] Vigrass' action would indicate that he was specifically refraining from making any promises of representation on NEA-J's behalf by directing him to inquire about representation from entities other than NEA-J. Norman has therefore failed to allege a prima facie violation of NEA-J's duty of fair representation.

On appeal Norman reiterates his claim that *Lane, supra,* 212 Cal.App.3d 164 establishes that NEA-J has a duty of fair representation in Norman's for-cause dismissal case because it voluntarily undertook to represent him in that proceeding. PERB, however, has never adopted this theory as the basis for an unfair practice charge. (*Service Employees International Union, Local 1021 (Horan)* (2011) PERB Decision No. 2204-M; *Welch, supra,* PERB Decision No. 1850; see also, *California Union of Safety Employees (John)* (1994) PERB

[11] The warning and dismissal letters make reference to "Union Citrus-belt Uniserve." However, the facts alleged in the charge do not indicate what relationship exists between NEA-J and Citrus-belt Uniserve.

Decision No. 1064-S, p. 11, fn. 5 [reversing in part proposed decision finding breach of duty based on *Lane, supra,* 212 Cal.App.3d 164 theory, the Board found it unnecessary "to determine whether a *Lane* duty of fair representation attaches to union representation in extra-contractual services"].) Rather, PERB has viewed the court's decision in *Lane* as implicating a cause of action in state court outside PERB's jurisdiction. (*Oakland Education Association (McKeel)* (2000) PERB Decision No. 1383; *California State Employees Association (Cohen)* (1993) PERB Decision No. 980-S.)

We need not decide here whether to adopt the *Lane, supra,* 212 Cal.App.3d 164 theory in this case, because Norman has failed to demonstrate that his exclusive representative, as opposed to CTA, undertook the representation, or made the decision not to appoint a third attorney to represent Norman.

Union Activity To Influence District Charge

The Office of the General Counsel did not address Norman's allegation from his original charge that NEA-J had violated EERA section 3543.6(a), possibly because Norman's first amended charge dropped any reference to specific subsections of EERA section 3543.6. Even if Norman had still intended to invoke subsection (a) of EERA section 3543.6, we find the Office of the General Counsel's omission to be harmless error. Norman has failed to allege any facts that NEA-J violated EERA section 3543.6(a) by causing or attempting to cause the District to violate EERA section 3543.5. Additionally, Norman's appeal of dismissal fails to object to the Office of the General Counsel's lack of consideration of this charge. We therefore dismiss this allegation.

Retaliation Charge

The Office of the General Counsel dismissed this claim because the charge did not provide information demonstrating that a reasonable person under the same circumstances

would consider NEA-J's decision to cease providing representation to have an adverse impact on Norman's employment. We affirm the dismissal of this claim, but for different reasons than those relied on by the Office of the General Counsel.

To establish a prima facie case of discrimination or retaliation in violation of EERA section 3543.5(a), the charging party must show that: (1) the employee exercised rights guaranteed by EERA; (2) the employer had knowledge of the employee's exercise of those rights; (3) the employer took action against or adverse to the interest of the employee; and (4) the employer acted because of the employee's exercise of the guaranteed rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).)

In *AFT Part-Time Faculty United, Local 6286 (Peavy)* (2011) PERB Decision No. 2194 (*Peavy*), the Board applied the *Novato, supra,* PERB Decision No. 210 test to an allegation that an employee organization retaliated or discriminated against an employee:

> In analyzing allegations of discrimination that also violate the duty of fair representation, the Board follows the principles applicable for violations of EERA section 3543.5(a), a parallel provision prohibiting employer interference and reprisals. (*Los Rios College Federation of Teachers/CFT/AFT/Local 2279* (*Deglow*) (1999) PERB Decision No. 1350 (*Los Rios College Federation of Teachers*); *Service Employees International Union, Local 99* (*Kimmett*) (1979) PERB Decision No. 106, at p. 13.) In order to prevail on a discrimination theory, the charging party must establish: (1) the employee exercised rights guaranteed by EERA; (2) the employee organization had knowledge of the employee's exercise of those rights; (3) the employee organization took adverse action against the employee; and (4) the employee organization took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 at pp. 5-6 (*Novato*).)
>
> In determining whether evidence of adverse action is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*Palo Verde Unified School District* (1988) PERB Decision No. 689.) The test is not whether the employee found the employee organization's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse

> impact on the employee's employment. (*Newark Unified School District* (1991) PERB Decision No. 864.)

(*Id.* at pp. 12-13, emphasis in original.)

Prior to the *Peavy, supra,* PERB Decision No. 2194 decision, the Board held in *California Union of Safety Employees (John)* (1994) PERB Decision No. 1064-S that an employee organization's refusal to represent an employee before the State Personnel Board because of his support for an allegedly rival union satisfies the adverse action element of a discrimination prima facie case. (*Id.* at pp. 12-13.)

We assume, arguendo, that withdrawing legal representation from an employee on the eve of his dismissal hearing is an adverse action.

However, under the facts alleged here, Norman has still failed to plead two of the prima facie elements of a retaliation/discrimination charge. He did not indicate that he engaged in any protected conduct for which NEA-J allegedly retaliated against him. Nor do the allegations show facts tending to show a retaliatory motive on the part of NEA-J. On these grounds, we dismiss Norman's allegation that NEA-J violated EERA section 3543.6(b).

Failure to Bargain In Good Faith Charge

Although the Office of the General Counsel did not specifically address charging party's allegation that NEA-J violated EERA section 3543.6(c), this is harmless error, since Norman lacked standing to file a charge under this section. (See, e.g., *Alameda County Medical Center* (2004) PERB Decision No. 1620-M, p. 3). We therefore dismiss this claim.

ORDER

The unfair practice charge in Case No. LA-CO-1564-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Huguenin and Banks joined in this Decision.