STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JANICE ZHANG, Charging Party, v. CALIFORNIA MEDIA WORKERS GUILD/CWA/LOCAL 39521, Respondent.	Case No. LA-CO-4-I PERB Decision No. 2245-I April 6, 2012

Appearance: Janice Zhang, on her own behalf.

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

DECISION

MARTINEZ, Chair: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by Janice Zhang (Zhang) of the Office of the General Counsel's dismissal (attached) of her unfair practice charge. The charge alleged that the California Media Workers Guild/CWA/Local 39521 (Local 39521) violated the Trial Court Interpreter Employment and Labor Relations Act (Court Interpreter Act)[1] by rejecting Zhang's request for representation regarding her dispute with her employer, the Superior Court of California, County of Los Angeles (Court). The charge alleged that this conduct breached Local 39521's duty of fair representation. The Board agent dismissed the charge, concluding that it was untimely filed and that it failed to state a prima facie case.

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 thereon, the Board finds the Board agent's warning and dismissal letters to be well-reasoned, adequately supported by the

[1] The Court Interpreter Act is codified at Government Code section 71800 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

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 issue raised by Zhang on appeal.

DISCUSSION

The Board agent's dismissal of the charge was based on two grounds: the charge was untimely filed; and, the charge failed to state a prima facie case of breach of the duty of fair representation. Regarding the latter, Zhang's appeal raises no issues warranting the Board's review. Regarding the former, Zhang argues that her charge was timely filed because it was filed within six months of March 7, 2011, the date of a letter from the Court notifying Zhang that she had been discharged from service as an employee with the Court. As the letter explains, Zhang had failed to comply with language registration/certification requirements established by the Judicial Council of California (Judicial Council), Administrative Office of the Courts. As a result, on March 4, 2011, Zhang's name was removed from the Master List of Certified Court Interpreters and Registered Interpreters of non-Designated Languages (Master List).

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 & Vector Control Dist. v. Public Employment Relations Bd.* (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.) A charging party bears the burden of demonstrating that the charge is timely filed. (*Long Beach Community College District* (2009) PERB Decision No. 2002.)

In cases involving the duty of fair representation, the six-month 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. (*Los Rios College Federation of Teachers, CFT/AFT (Violett, et al.)* (1991) PERB Decision No. 889; *International Union of Operating Engineers, Local 501 (Reich)* (1986) PERB Decision No. 591-H; *SEIU, United Healthcare Workers West (Rivera)* (2009) PERB Decision No. 2025-M.) Once the statute begins to run, the charging party cannot cause it to begin anew by making the same request over and over again. (*California State Employees Association, Local 1000, SEIU, AFL-CIO (Sutton)* (2003) PERB Decision No. 1553-S.) Repeated refusals by a union to provide assistance also do not start the statute of limitations period anew. (*SEIU Local 1021 (DeLarge)* (2009) PERB Decision No. 2068.) Nor does a charging party's complaint to higher-level union officials extend the limitations period. (*California School Employees Association (Spiegelman)* (1984) PERB Decision No. 400.)

The amended charge alleges that Zhang contacted Local 39521 for assistance between September 2007, and January 2010, and that Local 39521 had consistently declined to represent her. Attached as an exhibit to Zhang's amended charge is a letter dated May 1, 2008, from Zhang to the Newspaper Guild-CWA (CWA) attempting to "appeal Local 39521's January 10, 2008 decision from Sheila Sexton of Beeson, Tayer, Bodine rejecting my request for legal representation in a matter regarding changing the 'terms and conditions' of my employment by the Judicial Council of California and Los Angeles Superior Court." By letter of May 19, 2008, CWA informed Zhang that "contracts are held directly by the locals" and that she had the right to challenge the decision at a local membership meeting. The charge fails to allege whether Zhang pursued this avenue of appeal or what contact, if any, Local 39521 or CWA had with Zhang after CWA's letter of May 19, 2008.

Zhang's appeal mentions a prior PERB charge. Zhang states:

> My efforts to obtain Union representation date back to 2008 when I anticipated that my employment would be suspended. I file [sic] my first charge with PERB in June of 2008 but it was dismissed. I did not file an appeal at that time.

The Board may take notice of its own records and files. (*San Ysidro School District* (1997) PERB Decision No. 1198.) The Board takes notice of the case file in Unfair Practice Charge No. LA-CO-3-I. Review of that file reveals the following:

Zhang's prior charge alleged that Local 39521 breached its duty of fair representation by declining to represent her regarding the same issue involved in the present case, i.e., Zhang's failure to comply with the Judicial Council requirements for maintaining her status as an employee with the Court. The prior charge was filed during a grace period before Zhang's services were terminated/suspended by the Court in February 2009. The prior charge was filed a month after CWA's letter of May 19, 2008.

The file from the prior charge contains a copy of Sexton's letter of January 10, 2008. The letter, addressed to Doug Cuthbertson of Local 39521, arrives at the following conclusions: (1) it is questionable whether Local 39521 has standing to pursue a legal challenge to the Judicial Council's certification requirements; (2) the facts do not sufficiently support a challenge on the merits; and (3) in the event the Court terminates Zhang if she is unable to pass the examination prior to February 1, 2008, when the grace period expires, there would be no valid grounds for filing a grievance on Zhang's behalf. The file from the prior charge also contains a copy of a memorandum from the Judicial Council dated January 22, 2008. It is addressed to "Registered Interpreters in Eastern Armenian, Western Armenian, Mandarin, and Russian." The memorandum states that: (1) the Judicial Council had approved a 12-month extension

of the grace period for registered interpreters of these languages to pass certification examinations; (2) the extended grace period would end on February 1, 2009; and (3) during the additional 12-month grace period, registered interpreters would maintain their registered status and their employment status with the courts.[2] Zhang provided neither of these documents to the Board agent assigned to process the present charge. Nor does it appear that the Board agent was informed of Zhang's prior charge.

As we know from our review of the file from the prior charge, the date mentioned by Zhang in her May 1, 2008, letter to CWA as the date of Local 39521's decision not to represent her refers to the January 10, 2008, letter from Sexton to Local 39521 in which she rendered a legal opinion about the merits of Zhang's case. That letter concluded that there would be no valid basis for bringing a grievance against the Court in the event Zhang were terminated for failing to satisfy the Judicial Council's certification requirements. Assuming Zhang's allegations to be true that Local 39521 continued to decline representation through January 2010, in response to Zhang's continued requests, the statute of limitations began to run with Local 39521's initial decision not to represent her on or about January 10, 2008, or at least on or about May 19, 2008, when CWA informed Zhang that contracts are held directly with the locals and that her right to challenge Local 39521's decision was at a local membership meeting. At that time, Zhang knew or should have known that Local 39521's assistance was unlikely. Zhang's continued requests and Local 39521's continued refusals do not extend the statute of

[2] Zhang's prior charge against Local 39521 was dismissed for failure to state a prima facie case. The Board agent concluded that Local 39521 reviewed Zhang's case and declined representation after determining that the chances for success were minimal and that Local 39521's decision not to represent Zhang was not without a rational basis or devoid of honest judgment.

limitations period. As the Board agent noted, even Zhang's most recent request for representation in January 2010, is well outside the limitations period.[3]

That Zhang's final discharge by the Court occurred on or about March 7, 2011, does not change this analysis. Removal of Zhang's name from the Master List was simply the final administrative action taken by the Court in response to Zhang's continued failure to comply with the Judicial Council's certification requirements. Despite the discharge language in the Court's March 7, 2011, letter, Zhang's employment status with the Court appears to have ended with the expiration of the extended grace period on February 1, 2009. Even if that is not the case, Local 39521's decision not to represent Zhang did not turn on the timing of the Court's final action to discharge her and remove her name form the Master List. It turned on the merits of the underlying certification dispute. Zhang knew or should have known that Local 39521 was unlikely to assist her regarding her certification dispute at the time Local 39521 first declined to represent her, not when the Court took its final action to discharge her and remove her from the Master List on or about March 7, 2011.

Based on the foregoing discussion, the Board agent correctly determined that Zhang's charge was untimely.

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[3] In her appeal, Zhang presents a new factual allegation not previously presented. Zhang states, "I gave up trying to get their representation when I received Court's pre-warning letter in February of 2011 regarding anticipated final discharge in March of 2011, I [sic] only recourse was to file a new Charge with PERB immediately." This statement implies that Zhang's most recent attempt to obtain representation occurred in February 2011, not on January 2010, as alleged in the amended charge. "Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." (PERB Reg. 32635, subd. (b) [PERB regs. are codified at Cal. Code Regs., tit. 8, sec. 31001 et seq.].) The event alleged for the first time on appeal occurred prior to the dismissal of the charge, and the appeal provides no reason why it could not have been alleged in the original or amended charge. Therefore, we find no good cause to consider this new allegation. More importantly, even were we to consider this new allegation, our analysis would not change. Assuming Zhang requested assistance as recently as February 2011, her renewed request would not start the limitations period anew. (*California State Employees Association, Local 1000, SEIU, AFL-CIO (Sutton), supra,* PERB Decision No. 1553-S.)

ORDER

The unfair practice charge in Case No. LA-CO-4-I is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Dowdin Calvillo and Huguenin joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
Telephone: (818) 551-2804
Fax: (818) 551-2820

May 13, 2011

Janice Zhang

Re: *Janice Zhang v. California Media Workers Guild/CWA/Local 39521*
Unfair Practice Charge No. LA-CO-4-I
DISMISSAL LETTER

Dear Ms. Zhang:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 16, 2011. Janice Zhang (Zhang or Charging Party) alleges that the California Media Workers Guild/CWA/Local 39521 (Union or Respondent) violated section 71822 of the Trial Court Interpreter Employment and Labor Relations Act (Court Interpreter Act or Act)[1] by breaching the duty of fair representation.

Charging Party was informed in the attached Warning Letter dated April 29, 2011, that the above-referenced charge did not state a prima facie case. She was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, she should amend the charge. She was further advised that, unless she amended the charge to state a prima facie case or withdrew it prior to May 9, 2011, the charge would be dismissed. On May 9, 2011, Charging Party filed an amended charge.

According to the amended charge, Zhang was employed by the Superior Court of Los Angeles (Court) as a Court Interpreter until March 7, 2011.[2] Zhang alleges that she sought assistance from her Union from September 2007 until January 2010. Although not entirely clear, it appears from correspondence attached to the amended charge that Zhang requested the Union's assistance because the Judicial Council of California began requiring a certification exam as a component of maintaining her license as a Court Interpreter.

I. Timeliness of the Charge

As explained in the April 29, 2011 Warning Letter, Zhang has the burden of demonstrating that her charge is timely filed. (*Los Angeles Unified School District* (2007) PERB Decision No. 1929; *City of Santa Barbara* (2004) PERB Decision No. 1628-M.) PERB is prohibited from

[1] The Court Interpreter Act is codified at Government Code section 71800 et seq. The text of the Court Interpreter Act and PERB Regulations may be found at www.perb.ca.gov.

[2] In the original charge Zhang alleged that her "employment was terminated by her employer, Superior Court of California, Los Angeles in February 2009."

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.) In cases involving 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 Local 1021 (DeLarge)* (2009) PERB Decision No. 2068.) Repeated refusals by a union to provide assistance does not start the statute of limitations period anew. (*Ibid.*)

According to the amended charge, Zhang's most recent request for Union representation occurred in January 2010, almost a year prior to February 16, 2011, the date Zhang filed the instant unfair practice charge. In addition, Zhang alleges that the Union consistently declined to assist her since September 2007. Under these circumstances it appears as though Zhang knew or should have known that further assistance from the Union was not forthcoming at a time outside the statute of limitations period. Accordingly, Zhang does not establish that the instant charge is timely.

II. The Duty of Fair Representation

Even if Zhang's charge was timely, she does not establish that the Union breached the duty of fair representation. A union's duty of fair representation only applies to circumstances where the exclusive representative possesses the exclusive means by which an employee may obtain a particular remedy. (*California Statewide Law Enforcement Association (Edelen & Lewis)* (2009) PERB Decision No. 2088-S, citing *San Francisco Classroom Teachers Association, CTA/NEA (Chestangúe)* (1985) PERB Decision No. 544.) Accordingly, the duty of fair representation typically does not apply to extra-contractual forums such as the civil litigation process. (*SEIU Local 790 (Hein)* (2004) PERB Decision No. 1677.) In this case, Zhang alleges that she sought the Union's assistance with a certification requirement of the Judicial Council of California, the entity that issues Court Interpreter licenses in the State. Although not specifically pled in the unfair practice charge, correspondence attached to the charge also suggests that she requested that the Union assist her in pursuing claims concerning age-based discrimination and violation of her due process rights. However, Zhang does not establish whether these issues are subject to the collective bargaining relationship between the Union and the Court. Accordingly, there is insufficient information to conclude that the Union had a duty to represent Zhang regarding these issues.

Moreover, as explained in the April 29, 2011 Warning Letter, "unions owe a duty of fair representation to their members, and this requires them to refrain from representing their members arbitrarily, discriminatorily, or in bad faith." (*Hussey v. Operating Engineers* (1995) 35 Cal.App.4th 1213 *(Hussey).)* 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 (Wyler)* (1993) PERB Decision No. 970.)

Zhang was informed in the Warning Letter that, because she did not provide sufficient details about the Union's conduct, PERB was unable to conclude whether the Union's treatment of her requests for representation was arbitrary, discriminatory, or taken in bad faith. *(Hussey, supra,* 35 Cal.App.4th 1213.) For that reason, Zhang was informed that she did not meet her burden of stating a prima facie case. (PERB Regulation 32615(a)(5).)[3]

In the amended charge, Zhang again does not provide sufficient information regarding the Union's handling of Zhang's complaints. Zhang's conclusory remarks that the Union's conduct was arbitrary and discriminatory are not sufficient to demonstrate a violation. (See *State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S.)

Moreover, Zhang has not demonstrated that the Union breached the duty of fair representation. Accordingly, her unfair practice charge is dismissed

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

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

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 _____
Eric J. Cu
Regional Attorney

Attachment

cc: Doug Cuthbertson; Andrew H. Baker

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
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Telephone: (818) 551-2804
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April 29, 2011

Janice Zhang

Re: *Janice Zhang v. California Media Workers Guild/CWA/Local 39521*
Unfair Practice Charge No. LA-CO-4-I
WARNING LETTER

Dear Ms. Zhang:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 16, 2011. Janice Zhang (Zhang or Charging Party) alleges that the California Media Workers Guild/CWA/Local 39521 (Union or Respondent) violated section 71822 of the Trial Court Interpreter Employment and Labor Relations Act (Court Interpreter Act or Act)[1] by breaching the duty of fair representation.

Prior to February 2009, Zhang was employed by the Superior Court of Los Angeles (Court) as a Court Interpreter and was the member of a bargaining unit represented by the Union. In February 2009, the Court terminated Zhang's employment.

In May 2010, Zhang filed a civil lawsuit against the Union for breach of the duty of representation. On November 24, 2010 the lawsuit was dismissed without prejudice due to the court's lack of primary jurisdiction over the issue raised in Zhang's complaint.

At unspecified times, Zhang requested that the Union assist her with reinstatement to her former position with the Court. The Union denied Zhang's requests.

Zhang then alleges that the Union "never made any diligent inquiry or submit any form of complaints or grievances on Zhang's behalf to her employer in an attempt to get her job back."

Discussion:

I. Standing to File Charge

Court Interpreter Act section 71822 states:

[1] The Court Interpreter Act is codified at Government Code section 71800 et seq. The text of the Court Interpreter Act and PERB Regulations may be found at www.perb.ca.gov.

> The trial courts, the regional court interpreter employment relations committee, and employee organizations may not interfere with, intimidate, restrain, coerce, harass, or discriminate against applicants for interpreter employment or interpreter employees because of their membership in an interpreter association or employee organization, because of their participation in any grievance, complaint, or meet and confer activities, or for the exercise of any other rights granted to interpreter employees under this chapter.

Court Interpreter Act section 71802(a) defines a "court interpreter" as either "an employee of the trial court or an employee of another trial court on cross-assignment." (Court Interpreter Act, § 71802(a).) In this case, Zhang alleges that the Union violated the Court Interpreter Act by not assisting her with getting her position back after her employment with the Court was terminated in February 2009. All of Zhang's allegations of wrongdoing by the Union concern events that took place after her employment with the Court ended. Accordingly, Zhang does not allege that she was a "court interpreter" within the meaning of the Court Interpreter Act at the time she sought the Union's assistance. As such, Zhang does not establish that she has standing to allege that the Union violated rights protected by the Court Interpreter Act.

II. Charging Party's Burden

In addition, PERB Regulation 32615(a)(5)[2] 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.)

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

A. Timeliness of the Charge

Even if Zhang had standing to file the instant charge, she does not demonstrate that the charge is timely. Zhang filed this unfair practice charge on February 16, 2011. This means that the statute of limitations extends back until August 16, 2010. Any allegations of wrongdoing by the Union occurring prior to August 16, 2010 are therefore untimely unless an exception to the statute of limitations applies. In this case, Zhang does not provide the dates for any conduct by the Union. Thus, PERB is unable to conclude that Zhang's unfair practice charge is timely. (*City of Santa Barbara, supra*, PERB Decision No. 1628-M.)

B. Burden to State a Prima Facie Case[3]

Even if the charge was timely, there is insufficient information to conclude that the Union breached the duty of fair representation. While the Court Interpreter Act does not expressly impose a statutory duty of fair representation upon employee organizations, the courts have held that "unions owe a duty of fair representation to their members, and this requires them to refrain from representing their members arbitrarily, discriminatorily, or in bad faith." (*Hussey v. Operating Engineers* (1995) 35 Cal.App.4th 1213.) In *Hussey*, the court further held that the duty of fair representation is not breached by mere negligence and that a union is to be "accorded wide latitude in the representation of its members . . . absent a showing of arbitrary exercise of the union's power."

In *International Association of Machinists (Attard)* (2002) PERB Decision No. 1474-M, the Board determined that it is appropriate in duty of fair representation cases to apply precedent developed under the other acts administered by the Board. The Board noted that its decisions in such cases, including *Reed District Teachers Association, CTA/NEA (Reyes)* (1983) PERB Decision No. 332 and *American Federation of State, County and Municipal Employees, Local 2620 (Moore)* (1988) PERB Decision No. 683-S, are consistent with the approach of both *Hussey* and federal precedent (*Vaca v. Sipes* (1967) 386 U.S. 171.

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.)

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[3] 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.*)

Thus, in order to state a prima facie violation of the duty of fair representation under the Court Interpreter Act, a charging party must at a minimum include an assertion of facts from which it becomes apparent in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment. (*International Association of Machinists (Attard)*, *supra*, PERB Decision No. 1474-M.) 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 (Wyler)* (1993) PERB Decision No. 970.)

Here, Zhang does not provide a "clear and concise statement of facts" regarding the Union's conduct. (PERB Regulation 32615(a)(5).) Zhang does not provide any specific details about any action or failure to act by the Union. Without this information, PERB cannot determine whether the Union has violated the Court Interpreter Act. Zhang's conclusory remarks that the Union's conduct was arbitrary and discriminatory are not sufficient to demonstrate a violation. (See *State of California (Department of Food and Agriculture)*, *supra*, PERB Decision No. 1071-S.) Therefore, Zhang does not establish that a violation occurred.

To the extent that Zhang alleges that the Union breached the duty of fair representation after her employment was terminated by the Court, there is again insufficient information to establish a violation. The duty of fair representation requires the exclusive representative or recognized employee organization of a bargaining unit to represent all members of that bargaining unit fairly and equally. (*SEIU Local 1000, CSEA (Burnett)* (2007) PERB Decision No. 1914-S.) In this case however, after Zhang's employment with the Court ended in February 2009, Zhang does not provide facts demonstrating that she was still in the bargaining unit represented by the Union. Thus, there is insufficient information to conclude that the Union had a duty to represent her after her February 2009.

Zhang also includes as attachments documents regarding her continuing education requirements and associated fees. It is unclear what relationship these documents have to the Union's duty to represent Zhang in her employment. Thus, these documents do not support Zhang's allegations that the Union violated the Court Interpreter Act.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before May 9, 2011,[4] PERB will dismiss your charge.

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

If you have any questions, please call me at the above telephone number.

Sincerely,

Eric J. Cu
Regional Attorney

EC