STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JANET KING, Charging Party v. FREMONT UNIFIED DISTRICT TEACHERS ASSOCIATION, CTA/NEA, Respondent	Case No. SF-CO-42 PERB Decision No. 125 April 21, 1980

Appearances; Stewart Weinberg, Attorney (Van Bourg, Allen, Weinberg & Roger) for Charging Party; Joseph R. Colton, for Fremont Unified District Teachers Association, CTA/NEA.

Before Gluck, Chairperson; Gonzales and Moore, Members.

DECISION

This case is before the Public Employment Relations Board (hereafter Board) on exceptions taken by Janet King to the attached hearing officer's proposed decision dismissing her charge against the Fremont Unified District Teachers Association (hereafter FUDTA) alleging violations of Government Code sections 3543, 3543.6(a) and (b), 3544.9.1 Ms. King

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1 Government Code section 3543 provides:

> Public school employees shall have the right to form, join, and participate in the activities of employee organizations of

excepts to the hearing officer's conclusion that she failed to show that the FUDTA violated the EERA by filing a grievance bearing her name without obtaining her permission, by failing to provide her with a copy of the grievance in a timely

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> their own choosing for the purpose of representation on all matters of employer-employee relations. Public school employees shall also have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public school employer, except that once the employees in an appropriate unit have selected an exclusive representative and it has been recognized pursuant to Section 3544.1 or certified pursuant to Section 3544.7, no employee in that unit may meet and negotiate with the public school employer.
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> Any employee may at any time present grievances to his employer, and have such grievances adjusted, without the intervention of the exclusive representative, as long as the adjustment is reached prior to arbitration pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8 and the adjustment is not inconsistent with the terms of a written agreement then in effect; provided that the public school employer shall not agree to a resolution of the grievance until the exclusive representative has received a copy of the grievance and the proposed resolution and has been given the opportunity to file a response.

Government Code section 3543.6 (a) and (b) provides:

> It shall be unlawful for an employee organization to:

fashion, by allegedly denying her the right to represent herself or to provide input on the grievance, and by allegedly attempting to cause the District to discriminate against her.

The hearing officer found that the Respondent's actions did not breach the duty imposed by section 3544.9 to fairly represent all members of the unit, as there was no showing that FUDTA acted discriminatorily, negligently, arbitrarily, or in bad faith. Likewise, he found that there was no evidence to show that FUDTA caused or attempted to cause the employer to violate section 3543.52 by handling its grievance in the manner it did. For this reason, he dismissed the section 3543.6(a) charge. The hearing officer also found that

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> (a) Cause or attempt to cause a public school employer to violate Section 3543.5.
>
> (b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
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> . . . . . .

Section 3544.9 provides:

> The employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit.

^Section 3543.5 defines employer unfair practices,

Ms. King's claim that FUDTA's actions denied her right under section 3543 3 to represent herself was without merit. The facts indicate that FUDTA filed the grievance on its own behalf to enforce contract terms affecting all unit members. The hearing officer concluded that the association was under no obligation to permit the Charging Party to intercede in the exclusive representative's decision affecting the enforcement of the Association's contractual rights.

After careful consideration of the entire record, including the proposed decision and the exceptions filed, the Board affirms the hearing officer's findings of fact, including credibility determinations, and conclusions of law, to the extent modified herein.

DISCUSSION

In discussing the legal basis for a duty of fair representation complaint, the hearing officer found that a charge alleging a breach of the duty of fair representation

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•3 Section 3543 provides in relevant part:

> Public school employees shall also have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public school employer . . .

could be brought either under section 3544.9, supra, or under the unfair practice section 3543.6(b), supra.

This conclusion requires clarification. Section 3544.9 imposes a duty on the exclusive representative to represent all members of the unit fairly. Impliedly, EERA grants employees the right to receive fair representation from their exclusive representative. In Romero v. Rocklin Teachers Professional Association, PERB Decision No. 124, this Board discussed the parameters of the duty of fair representation and concluded that that duty is violated when an employee organization acts arbitrarily, discriminatorily, or in bad faith. Thus, the duty of fair representation established in section 3544.9 encompasses a concomitant right of employees to be free from arbitrary, discriminatory, or bad faith conduct from their exclusive representative.

The provisions which make interference with guaranteed rights unlawful are found only in section 3543.5 and 3543.6, each of which provides that: "It shall be unlawful for a public school employer [employee organization] to . . ." (emphasis added). Thus, the obligation created by section 3544.9 is actionable through section 3543.6 which defines the violation and is the source of protection of statutory rights. As we stated in Kimmett v. SEIU, Local 99 (10/19/79) PERB Decision No. 106, at p. 13:

> By imposing a duty of fair representation in section 3544.9, the Legislature clearly gave employees a right to be represented fairly by their exclusive representative. Conduct breaching that duty therefore harms an employee right, making violations of section 3544.9 unfair practices under section 3543.6(b).

In the instant case, under the facts presented, section 3543.6(b) is the appropriate section for filing an unfair practice charge alleging a breach of the exclusive representative's obligation under 3544.9. The hearing officer considered the elements of the breach of the duty of fair representation which the charging party alleged and we affirm his decision that the Association did not violate that duty.

In addition to her claim that FUDTA's filing and processing its grievance breached the Association's duty of fair representation, the Charging Party further alleges that FUDTA's actions with respect to the grievance violated 3543.6(b) by interfering with her right to represent herself and with her right to refrain from participating in the activities of the organization. Both of these rights are guaranteed by 3543, supra. As to the right of self-representation, we affirm the ' hearing officer without further discussion. However, he did not specifically address the right to refrain from participation.

Allowing, arguendo, that FUDTA's actions prevented Ms. King from refraining from participating in the activities of the

employee organization, we would be compelled to conclude that there was still no violation of EERA. By filing the grievance in this case, the Association was enforcing an agreement negotiated for the benefit of all members of the unit who went out on strike. Certainly, all members of the unit have a vital stake in the enforcement of agreements negotiated by their exclusive representative. In the face of such compelling interests of the majority of the employees the competing right of an individual employee must be subordinated.[4] As the Supreme Court stated in NLRB v. Allis-Chalmers Mfg. Co., (1967) 388 U.S. 175 [65 LRRM 2449], at p. 180:

> National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees.

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[4]See J. I. Case v. NLRB, (1944) 321 U.S. 332, [14 LRRM 501] ; NLRB v. Western Addition Community Organization (Emporium-Capwell) (1975) 420 U.S. 50 [88 LRRM 2660].

ORDER

In accordance with the hearing officer's decision and with the modification discussed herein, the Board hereby ORDERS the charge filed against the Fremont Unified Teacher's Association be dismissed.

By: /Harry /G2kick, CMwu'r pe r son Barbara D. Moore, Member

Raymond J. Goj*zales, Member

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

JANET KING, Charging Party, vs. FREMONT UNIFIED DISTRICT TEACHERS ASSOCIATION, CTA/NEA, Respondent.	)	Unfair Practice Case No. SF-CO-42 PROPOSED DECISION (8-4-78)

Appearances; Stewart Weinberg, Attorney (Van Bourg, Allen, Weinberg and Roger) for Charging Party; Joseph R. Colton for Fremont Unified District Teachers Association, CTA/NEA.

Before Jeffrey Sloan, Hearing Officer.

STATEMENT OF THE CASE

On January 9, 1978, Janet King filed an unfair practice charge against the Fremont Unified District Teachers Association (hereafter FUDTA or the Association).[1] As amended at the formal hearing in this case, the charge alleged violations of sections 3543, 3543.6(a), 3543.6(b), and 3544.9

1-The representation file entitled Fremont Unified School District, SF-R-53A, located in the San Francisco regional office of the Public Employment Relations Board, shows that the Association is the exclusive representative of certificated employees within the Fremont Unified School District, and is an "employee organization" under the meaning of Government Code section 3540.l(d). The Association is an affiliate of the California Teachers Association/NEA.

of the Educational Employment Relations Act.[2] The charge alleged that on November 28, 1977, the Association, without the

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[2]The Educational Employment Relations Act (hereafter the Act or the EERA) is codified at Government Code section 3540 et seq. All statutory references are to the Government Code unless otherwise indicated.

Section 3543 states:

> Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public school employees shall also have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public school employer, except that once the employees in an appropriate unit have selected an exclusive representative and it has been recognized pursuant to Section 3544.1 or certified pursuant to Section 3544.7, no employee in that unit may meet and negotiate with the public school employer.
>
> Any employee may at any time present grievances to his employer, and have such grievances adjusted, without the intervention of the exclusive representative, as long as the adjustment is reached prior to arbitration pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8 and the adjustment is not inconsistent with the terms of a written agreement then in effect; provided that the public school employer shall not agree to a resolution of the grievance until the exclusive representative has received a copy of the grievance and the proposed resolution and has been given the opportunity to file a response.

permission of Ms. King, filed a grievance on her behalf against the Fremont Unified School District (hereafter District)[3] for violation of a "no reprisals" provision in the collective bargaining agreement executed between FUDTA and the District. The charge also alleged that the Association announced the filing of the grievance at a public meeting, that the Association declined to provide a copy of the grievance to Ms. King or the six other individuals also affected by the

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(cont. of footnote 2)

Section 3543.6(a) states:

> It shall be unlawful for an employee organization to:
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> (a) Cause or attempt to cause a public school employer to violate Section 3543.5.

Section 3543.6(b) states:

> It shall be unlawful for an employee organization to:
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> . . . . . .
>
> (b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

Section 3544.9 states:

> The employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit.

3 Fremont Unified School District is located in Alameda County. It has 45 school sites and an average daily attendance of 29,621. California State Department of Education, California Public School Directory (1978) pp. 55-57.

disputed actions, and that FUDTA "[refused] to permit the charging party and the six other persons to represent themselves or in any way make decisions about the grievance which [affected] their future." The charge alleged further that the District offered to go to binding arbitration concerning the grievance. The charge concluded that the action of the Association was a "violation of the teachers[1] rights not to participate in the activities of the FUDTA, ...a violation of their right to fair representation, ...an effort to cause the District to discriminate against the individuals, and ...an interference with the rights of teachers of the Fremont Unified School District."

The Association answered the charge on January 25, 1978, admitting that the disputed grievance was filed and also admitting that the grievance was "appealed to arbitration." The Association denied that it "declined" to supply a copy of the grievance to the charging party, and also denied that its filing of the grievance in question constituted an unfair practice.

No settlement was reached during an informal conference held between the parties and a hearing officer from the Public Employment Relations Board (hereafter PERB), and a formal hearing was held on March 3, 1978, at District offices in Fremont.

FINDINGS OF FACT

Between October 13 and November 6, 1977, certificated employees in the Fremont Unified School District were engaged

in a strike and other forms of concerted activities directed against the District. Among those activities was a seven-person sit-in on District property on November 3. In the midst of that sit-in, District Superintendent Wayne Ferguson performed a citizen's arrest on the seven protesters (hereafter the Seven or the defendants). One of those arrested was charging party Janet King, who is a teacher in the District and is the president of the Fremont Federation of Teachers.[4]

On November 8, 1977, the Association and the District signed a collective bargaining agreement. The agreement contained a "no reprisals" clause that stated in relevant part:

> The District covenants not to sue in any court of law, before EERB, or before any judicial body, any District employee, student, the Association, Association employee or Association officer(s) for any conduct arising from concerted actions which preceded agreement on this contract. The District further covenants not to take any punitive action or reprisal against any District employee, student, the Association, Association employee or Association officer(s) for any conduct arising from the concerted action which preceded agreement on this contract. ... (Article IV, section 1.)

On that same date, Barbara Mahon, the president of the Association, had a conversation with the superintendent. She asked him whether he intended to pursue the criminal charges against the Seven. He replied that the Seven had "asked to be

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[4]The other individuals arrested during the sit-in were Steve Brosamer, Jerry Caveglia, Jean Gerrans, Mary Jane Holmes, John Kriege, and Sharon Maldonado. Five of these individuals were members of the American Federation of Teachers. One of them, Ms. Gerrans, was not. Ms. Gerrans was a member of the Association. The record does not indicate whether any of the AFT members also were members of the Association.

arrested," that he would not drop the charges, and that he "could not" because the prosecutor would continue them without regard to Mr. Ferguson's personal wishes.

On November 15, Mr. Ferguson signed a formal police complaint against the protesters. The complaint charged, among other allegations, that on November 3, 1977, the seven protesters named above illegally disturbed the public peace, committed an unlawful act, and failed to disperse upon the command of a public officer.

On November 16, the protesters were arraigned on the above charges in the Municipal Court of Alameda County, Fremont-Newark-Union City Judicial District. They were represented by William Sokol of the law firm of Van Bourg, Allen, Weinberg and Roger.

Ms. Mahon attended the court session where the protesters were arraigned. After the arraignment, Ms. Mahon attempted to talk to Mr. Sokol concerning the charges lodged against them. Mr. Sokol told her that he was not free to talk to anyone concerning the case, and that she "should get her information elsewhere." Ms. Mahon also approached Ms. King twice on that day in an attempt to engage in a discussion concerning the ramifications of the arrests, but Ms. King was occupied with other matters and told Ms. Mahon that they "would have to talk later." Ms. King made no subsequent attempt to call Ms. Mahon after these approaches. Ms. Mahon also approached defendant Jerry Caveglia, and asked him whether the seven defendants intended to file grievances against the

District. Mr. Caveglia responded that he did not know, and that he would talk to his lawyer about it.

That same day, Jerry Caveglia asked Mr. Sokol during lunch whether they were going to file a grievance. According to Mr. Caveglia, Mr. Sokol responded that they should do nothing at that time because they were in the midst of a legal proceeding.

Ms. Mahon had lunch at the same restaurant as did the defendants. She again approached Mr. Caveglia and asked him whether the Seven were considering filing a grievance against the District. Mr. Caveglia told her that the defendants did not want anything done at that time "until the legal matter was settled."[5] Ms. Mahon said that the parties should try to talk more about that issue, and Mr. Caveglia said that he would "try to get [Ms. King] to call her."

Soon after the date of the arraignment, Ms. Mahon reported to the Association's grievance committee that there was a lack of interest on the part of the seven defendants, and that the defendants had not seemed to want to discuss it.

5MS. King testified that Mr. Caveglia had a conversation with her immediately after he spoke with Ms. Mahon. She further testified that he repeated to her what he purportedly had told Ms. Mahon—that the defendants "didn't want to do any, take any kind of action like that, including a grievance, and that if and when that became maybe a feasible action, that [they] would probably want to do it on [their] own." The double-hearsay character of this testimony makes it particularly untrustworthy. In addition, Mr. Caveglia did not testify to have made the entirety of this statement to Ms. Mahon. Ms. King's testimony is not credited to the extent that it asserted that Mr. Caveglia said that the seven defendants probably would want to file the grievance on their own behalf.

Members of the grievance committee later elicited the opinion of CTA's general counsel as to whether they had a meritorious grievance. The general counsel stated that they did. The grievance committee recommended to the FUDTA executive committee that the Association file a grievance against the District.

Before the grievance committee filed the grievance, George Curry, the grievance chairperson of the Association, attempted to call some of the seven defendants to determine whether they intended to file their own grievance.[6] He reached Mr. Caveglia. Mr. Curry asked him whether the Seven intended to file a grievance. He did not state that the grievance committee had plans to file a grievance on its own. Mr. Caveglia told Mr. Curry that he did not know what the plans of the Seven were, and that they would discuss the matter on the following Monday.

The Association filed a grievance on Monday, November 28, 1977.[7] While there is some evidence that the

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[6]Mr. Curry testified that he attempted to contact all of the seven defendants. He stated that he reached two individuals, and that he could only recall the identity of one of these individuals, Mr. Caveglia. It is undisputed that Mr. Curry called Mr. Caveglia. The hearing officer finds it unnecessary to determine whether Mr. Curry in fact made the other calls he testified to have made.

[7]The contract clause stating the time limit within which a grievance could be filed stated:

> To be recognized at any procedural level a grievance shall have been presented at the appropriate level within 30 working days of the act or omission giving rise to the grievance. (Article XXI, section 4.)

grievance was filed on behalf of the Seven and not as a grievance of the Association, the weight of the evidence shows that the grievance was filed on the basis of article XXI of the collective bargaining agreement.[8] Article XXI states in pertinent part:

> 2. A grievance shall be a written complaint by a member of the unit involving a violation, misapplication or misinterpretation of the Agreement.
>
> 3. "Grievant" means individual members of the unit <u>or the Association when processing a grievance pursuant to section 4 of this Article</u>.
>
> 4. <u>The Association may initiate a grievance which affects a substantial number of members of the unit</u>. (Emphasis added.)[9]

(cont. of footnote 7)

Under this provision the last date for filing a grievance based on the superintendent's actions was either December 20, 1977, or January 12, 1978, depending upon whether the grievable act was the superintendent's act of performing a citizen's arrest or his signing of a formal complaint.

8 It is noted that Ms. King testified that the grievance had been filed as an Association grievance and had not been filed on her behalf.

8 It is arguable that the grievance did not affect a "substantial number of members of the unit." However, the District did not reject the grievance on the ground that the grievance properly could not be filed under this section. Since the hearing officer has concluded that the Association filed the grievance in its own behalf, it is irrelevant whether the grievance in fact affected a "substantial number of members of the unit."

The grievance was written on the letterhead of FUDTA. It stated in pertinent part:

November 28, 1977

MEMORANDUM OF GRIEVANCE

I.

We hereby make application for remedy of Level II of the Fremont Unified School District Grievance Procedure. This grievance is being filed with Dr. Wayne S. Ferguson, Superintendent, Fremont Unified School District, as respondent consistent with the contract between the FUSD Board of Education and FUDTA/CTA/NEA.

II.

Specifics Giving Cause For This Complaint;

On November 3, 1977, Jerry L. Caveglia, Steve J. Brosamer, Retta J. Gerrans, Sharon E. Maldonado, Janet K. King, Mary Jane Holmes and John F. Kriege, the injured parties, were arrested by City of Fremont Police Officers at the request of Dr. Wayne S. Ferguson, Superintendent FUSD, for alleged participation in concerted actions which took place at FUSD offices on the above date.

On November 15, said superintendent signed a formal police complaint against the injured parties for the alleged actions.

III.

Specific Violations Being Grieved:

The District, through the actions of Superintendent Dr. Wayne S. Ferguson, has violated, misapplied, and/or misinterpreted the contract between the parties which guarantees [that no reprisals will be taken against any District employee for conduct arising from concerted actions which preceded agreement on this contract].

IV.

Remedy Being Sought;

> That [Superintendent Ferguson] shall permanently withdraw and in all other ways cease and desist pursuit of all criminal charges which have been personally brought by said Superintendent, and or under his authority indication [sic] to pursue, against those injured parties named in this grievance.
>
> /s/ Barbara Mahon,
> FUDTA President

On November 28, a teacher in the District told Ms. King that the Association had announced on that day that it had filed a grievance on behalf of the seven defendants.

On the following day, Ms. King spoke to Ms. Mahon and Mr. Marcello, who is the Executive Director of FUDTA. She told Mr. Marcello that the seven defendants were "upset" by the filing of the grievance and by the fact that it had been done without their knowledge or consent, that they had requested that nothing be done of that nature, and that she wanted to see what could be done to "amend the situation." Mr. Marcello responded, in effect, that it was the Association's right to file a grievance, that the grievance did not affect them, and that the Association had made several unsuccessful attempts to contact the defendants before filing the grievance.

During her later conversation with Ms. Mahon, Ms. King attempted to explain to Ms. Mahon that the pendency of the grievance could interfere with the defendants' court case. She did not request the Association to drop the grievance. Ms. Mahon said, in essence, that Ms. King should put her concerns

in writing to the grievance committee, that communications from any of the defendants to the grievance committee would be considered by it, and that the committee and the executive board would determine on the basis of those writings whether to proceed with the grievance.[10]

Ms. King never sent a statement to the grievance committee outlining the reasons as to why the pendency of the grievance was detrimental to her. Ms. King testified that she did not attempt to "prod" the Association into dropping the grievance because it had failed to send her a copy of the grievance upon her initial request. There is no evidence that

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[10]Ms. King testified that Ms. Mahon had told her that the defendants "would not be allowed to have any influence on the decision-making process of the organization as to how to proceed or whether to proceed on the grievance." She clarified this testimony by stating that Ms. Mahon effectively said that the Association was going to proceed with the grievance without regard to any request that Ms. King might make. Based on the demeanors of Ms. King and Ms. Mahon, and in view of the record as a whole, the hearing officer does not credit the testimony that Ms. Mahon said that the Association would not allow the defendants any influence as to "whether to proceed" with the grievance. Ms. Mahon testified credibly that the grievance committee and the executive board would give consideration to the written concerns of the defendants. In addition, to the extent that this testimony asserts that Ms. Mahon said that the defendants would not be allowed to influence the decisions as to <u>how</u> to pursue the grievance, the hearing officer does not credit such testimony. First, this testimony is hearsay to the extent that it seeks to assert that the Association in fact would not permit the defendants to aid in determining "how" to proceed with the grievance. This testimony has not been corroborated sufficiently to deem it to be either reliable or admissible. The hearing officer concludes from the record, including Ms. King's demeanor, that she was confused by the information that Ms. Mahon was attempting to give her. It is concluded that Ms. Mahon in fact did not make this particular statement.

any of the other six defendants requested that the Association withdraw the grievance. The defendants[1] attorney never conveyed his concerns to the Association.

On December 1, 1977, Ms. King wrote a letter to FUDTA that stated:

> Ms. Mahon:
>
> Please send me a copy of the grievance filed by FUDTA on November 28, 1977, against FUSD superintendent Wayne Ferguson for violation of the certificated employee contract no-reprisal clause. ...

This letter was received by FUDTA during the first week of December. Mr. Marcello asked Mr. Curry to send a copy of the grievance to Ms. King. Unbeknownst to the officers of the Association, Mr. Curry neglected to do so at that time.[11]

After the grievance was filed, there was some movement from within the Fremont community toward pressuring Superintendent Ferguson to drop the criminal charges. On December 7, 1977, a local pastor made a plea at a meeting of the school board, calling on the trustees to ask the superintendent to "drop the case against the seven teachers." Witnesses for the charging party testified that it was possible that the superintendent refused to drop the criminal charges

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[11] Mr. Curry testified that he sent a copy of the grievance to Ms. King during the first or second week of December. Mr. Curry's testimony showed that he underwent periods of confusion with respect to administering other details of the Association's business. The hearing officer therefore does not credit this particular testimony. It is found that Mr. Curry did not send a copy of the grievance until January, 1978.

because the pendency of the grievance rendered it impossible to obtain a full "civil release." At the school board meeting the superintendent made a statement to the effect that the trustees did not intend to discuss the criminal case until the grievance was settled. This statement has minimal probative value insofar as it is intended by the charging party to show that the District did not drop the criminal charge due to the pendency of the grievance. No one knew what effect the grievance would have on the defendants[1] ability to negotiate a settlement, including the deputy district attorney who negotiated with the defendants' lawyer. Some evidence indicates that the charges were not dropped due to the political climate in Fremont. For example, the superintendent stated before the grievance was filed that he would not drop the charges because the Seven had "asked to be arrested."

There is no evidence indicating that the superintendent or the trustees would have dropped the charges if the grievance had been dropped. The hearing officer concludes that the charging party has not shown that the superintendent's failure to drop the charges was due to the pendency of the grievance.[12]

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[12]At no time did the charging party request FUDTA to withdraw the grievance, nor did the charge filed in the instant case ever so request.

The Association published an edition of its newsletter, "The Signal," on December 12. The newsletter contained an article that stated:

> FUDTA has filed two grievances on the basis of the amnesty clause in our contract. One is in behalf of the seven teachers arrested at the District Office. We believe that Ferguson's citizens arrest complaint should be withdrawn as part of the no reprisal section of the amnesty clause. (Emphasis added.)

Ms. Mahon credibly testified that the statement that the grievance was submitted "in behalf of" the Seven was an error on the part of the writer of the article.

Shortly after the grievance was filed, the District requested the Association to waive the steps of the grievance procedure and to go directly to arbitration. The Association suspended processing of the grievance for a period of time, then continued with it. On January 18, 1977, after it received service of the unfair practice charge, the Association requested the District to hold the grievance in abeyance. The Association made this request because it was unclear as to "where [it] stood" with respect to the grievance given that an unfair practice charge had been filed because of it. In late February, the matter was set for arbitration.

The Association has filed other grievances related to the no-reprisals clause. As of the date of the hearing in the instant case, none of those grievances had progressed as far as arbitration. According to the credible testimony of an Association witness, the specific issues addressed by those

grievances are distinct and "less clear" than those of the grievance involved in this case.

The unfair practice charge was filed on January 9, 1978. The Association learned upon receipt of the charge that Ms. King claimed she had not received a copy of the grievance. FUDTA then sent a copy of the charge to her.

Six of the seven defendants went to trial on February 1, 1978. After the prosecution's case-in-chief, the judge entered a judgment of acquittal. The seventh defendant, Mr. Kriege, pled "no contest" to a lesser and included offense.

ISSUES

1. Did the Association's filing and processing of the grievance breach its duty of fair representation toward Ms. King, thereby violating section 3544.9?

2. Did the Association's filing of the grievance violate Ms. King's right to represent herself or her right not to participate in the activities of the Association, thereby violating section 3543?

3. Did the Association's filing and processing the grievance cause or attempt to cause the District to violate section 3543.5, thereby violating section 3543.6 (a)?

4. Did the Association's filing and processing the grievance interfere with Ms. King's exercise of rights guaranteed by the EERA, thereby violating section 3543.6(b)?

DISCUSSION AND CONCLUSIONS OF LAW

1. Duty of Fair Representation

The exclusive representative for the purposes of meeting and negotiating is required to represent fairly "each and every employee in the appropriate unit." (Section 3544.9.) PERB has not yet set forth the parameters of the duty of fair representation, nor has it determined whether an unfair practice charge is the sole appropriate vehicle for processing an alleged violation of the duty of fair representation. The latter issue must be noted before proceeding to the merits of the charge in this case.

At least two theories are equally arguable concerning whether the unfair practice vehicle is the appropriate method for PERB to evaluate a charged violation of the duty of fair representation. First, violation of the duty of fair representation may be considered to be an unlawful practice under the meaning of section 3543.6(b). In taking this approach, it will be necessary for the charging party to prove violations both of section 3543.6(b) and section 3544.9.

Section 3543.6(b) states:

> It shall be unlawful for an employee organization to:... [i]mpose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees <u>because of their exercise of rights guaranteed by this chapter</u>. (Emphasis added.)

In order to find a violation of section 3543.6(b), it is necessary to find that an organization's interference with employees occurred "because of" their exercise of rights

guaranteed by the EERA. This may create a serious problem in proving a violation of the duty of fair representation, because an exclusive representative's arbitrary, discriminatory or bad faith actions toward employees in some instances may be unrelated to employees' exercise of EERA rights. The following hypothetical should be considered:

> An individual employee has filed a clearly meritorious grievance relating to her working conditions. The grievance has not been resolved satisfactorily short of arbitration. Only the exclusive representative may take a grievance to arbitration. The exclusive representative refuses to take the grievance to arbitration. The organization's refusal is based purely on personal animosity toward the grievant that is completely unrelated to any exercise of EERA rights.

In order to prove a violation of the duty of fair representation by way of section 3543.6(b), it is necessary to prove that the exclusive representative acted "because of" the employees' exercise of EERA rights. In the hypothetical above, it would appear impossible to make this proof unless the phrase "exercise of rights" is defined more broadly than it seems to read at first glance.

Section 3543 grants to employees the right to "form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations." It further guarantees to employees the right to represent themselves individually in their employment relations with their employer, "except that once the employees in an

appropriate unit have selected an exclusive representative and it has been recognized ... or certified ..., no employee in that unit may meet and negotiate with the public school employer." Section 3543.3 states that a public school employer or its designate

> shall meet and negotiate with and only with representatives of employee organizations selected as exclusive representatives of appropriate units upon request. ...

Sections 3544, 3544.1 and 3544.7[13] provide the procedure by

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[13]**Section** 3544 states:

> (a) An employee organization may become the exclusive representative for the employees of an appropriate unit for purposes of meeting and negotiating by filing a request with a public school employer alleging that a majority of the employees in an appropriate unit wish to be represented by such organization and asking the public school employer to recognize it as the exclusive representative. The request shall describe the grouping of jobs or positions which constitute the unit claimed to be appropriate and shall be based upon majority support on the basis of current dues deduction authorizations or other evidence such as notarized membership lists, or membership cards, or petitions designating the organization as the exclusive representative of the employees. Notice of any such request shall immediately be posted conspicuously on all employee bulletin boards in each facility of the public school employer in which members of the unit claimed to be appropriate are employed.
>
> (b) The employee organization shall submit proof of majority support to the board. The information submitted to the board shall remain confidential and not be disclosed by the board. The board shall obtain from the employer the information necessary for it to carry out its responsibilities pursuant to this section and shall report to the employee organization and the public school employer as to whether the proof of majority support is adequate.

which employees may select an employee organization as their exclusive representative for the purposes of meeting and negotiating.

(cont. of footnote 13)

Section 3544.1 states:

> The public school employer shall grant a request for recognition filed pursuant to Section 3544 unless:
>
> (a) The public school employer desires that a representation election be conducted or doubts the appropriateness of a unit. If the public school employer desires a representation election, the question of representation shall be deemed to exist and the public school employer shall notify the board, which shall conduct a representation election pursuant to Section 3544.7, unless subdivision (c) or (d) apply; or
>
> (b) Another employee organization either files with the public school employer a challenge to the appropriateness of the unit or submits a competing claim of representation within 15 workdays of the posting of notice of the written request. The claim shall be evidenced by current dues deductions authorizations or other evidence such as notarized membership lists, or membership cards, or petitions signed by employees in the unit indicating their desire to be represented by the organization. Such evidence shall be submitted to the board, and shall remain confidential and not be disclosed by the board. The board shall obtain from the employer the information necessary for it to carry out its responsibilities pursuant to this section and shall report to the employee organizations seeking recognition and to the public school employer as to the adequacy of the evidence. If the claim is evidenced by the support of at least 30 percent of the members of an appropriate unit, a question of representation shall be deemed to exist and the board shall conduct a representation election pursuant to Section 3544.7, unless subdivisions (c) or (d) of this section apply; or

One of the most fundamental and far-reaching rights guaranteed by the EERA, therefore, is the right of employees to

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(cont. of footnote 13)

(c) There is currently in effect a lawful written agreement negotiated by the public school employer and another employee organization covering any employees included in the unit described in the request for recognition, unless the request for recognition is filed less than 120 days, but more than 90 days, prior to the expiration date of the agreement; or

(d) The public school employer has, within the previous 12 months, lawfully recognized another employee organization as the exclusive representative of any employees included in the unit described in the request for recognition.

Section 3544.7 states:

(a) Upon receipt of a petition filed pursuant to Section 3544.3 or 3544.5, the board shall conduct such inquiries and investigations or hold such hearings as it shall deem necessary in order to decide the questions raised by the petition. The determination of that board may be based upon the evidence adduced in the inquiries, investigations, or hearing; provided that, if the board finds on the basis of the evidence that a question of representation exists or a question of representation is deemed to exist pursuant to subdivision (a) or (b) of Section 3544.1, it shall order that an election shall be conducted by secret ballot and it shall certify the results of the election on the basis of which ballot choice received a majority of the valid votes cast. There shall be printed on each ballot the statement: "no representation." No voter shall record more than one choice on his ballot. Any ballot upon which there is recorded more than one choice shall be void and shall not be counted for any purpose. If at any election no choice on the ballot receives a majority of the votes cast, a runoff election shall be conducted. The ballot for the runoff election shall provide for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

select an exclusive representative for the purpose of meeting and negotiating. Through the exercise of this right, public school employees acquire the right of collective representation and yield that of self-representation. In giving up the right of self-representation, however, it does not follow that employees have no right to complain of discriminatory or coercive treatment, or other forms of invidious or ineffectual representation at the hands of their representative. Rather, because of employees' exercise of their right to select an exclusive representative, they are protected by the unfair practice provision of section 3543.6(b) against discriminatory treatment, reprisals, inteferences, restraints and coercions. It may be argued that it is through use of this medium that alleged violations of the duty of fair representation are to be evaluated.

(cont. of footnote 13)

> (b) No election shall be held and the petition shall be dismissed whenever:
>
> (1) There is currently in effect a lawful written agreement negotiated by the public school employer and another employee organization covering any employees included in the unit described in the request for recognition, or unless the request for recognition is filed less than 120 days, but more than 90 days, prior to the expiration date of the agreement; or
>
> (2) The public school employer has, within the previous 12 months, lawfully recognized an employee organization other than the petitioner as the exclusive representative of any employees included in the unit described in the petition.

This essentially is the manner in which the duty of fair representation was found to exist under the National Labor Relations Act (hereafter NLRA), which has no specific statutory guarantee of such a duty. See discussion infra at pages 20 and 21. The duty of fair representation under the NLRA is enforceable through section 8(b)(l)(A)[14] of the National Labor Relations Act (hereafter NLRA), under the theory that section 7 of the NLRA grants to employees "the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment." Miranda Fuel Co., Inc. (1962) 140 NLRB 181 [51 LRRM 1584] enforcement denied [2d Cir. 1973] 326 F.2d 172 [54 LRRM 2715].

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[14] NLRA section 8(b)(l)(A) states:
It shall be an unfair labor practice for a labor organization or its agents-
(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or

See footnote 15 for the text of section 7 of the NLRA.

A second method of analysis, however, is equally persuasive:

It may be argued that section 3544.9 prescribes a duty of fair representation that is enforceable without regard to the "unlawful practices" sections of the Act of which section 3543.6(b), supra, is a part. The term "duty of fair representation" in section 3544.9 is identical to the term used by the National Labor Relations Board (hereafter NLRB) to describe the duty owed by the exclusive representative to members of the negotiating unit being represented. However, the EERA, unlike the NLRA, has a specific statutory provision establishing a duty of fair representation. Given this fundamental distinction, the first analysis above—used by the NLRB in devising a duty of fair representation under the NLRA—is not persuasive precedent to which PERB should adhere. See Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608 [87 LRRM 2453] .

Given its explicit prescription of a duty of fair representation, the legislature must have intended section 3544.9 to be actionable on its own terms. It could not have intended section 3544.9 to create an effective exception to the rule that a direct nexus must be shown between an organization's interference and an employee's exercise of rights in order to make out a violation of section 3543.6(b). Rather, the legislature sought to grant to PERB that which the Congress did not grant the NLRB—a self-contained provision

establishing a duty of fair representation owing to employees by their exclusive representative.

In construing section 3544.9 as establishing a specific statutory duty of fair representation that is enforceable independently of the unfair practice process, employees do not need to demonstrate, whether by fact or legal fiction, that an organization "... interfered ... with them because of their exercise of right guaranteed by [the EERA]." (Section 3543.6 (b).) Instead, the sole question would become whether the exclusive representative has violated its statutory duty of fair representation.

The hearing officer finds that both of the above approaches are reasonable ones. In view of the hearing officer's resolution of the alleged violation of the duty of fair representation, however, it is found to be unnecessary to determine which of the above theories should apply to this case.

PERB has held that the NLRB and federal court precedents are persuasive guidance in analogous areas of law. See Fire Fighters Union v. City of Vallejo, supra; Sweetwater Union High School District (11/23/76) EERB Decision No. 4. The National Labor Relations Act does not prescribe specifically a duty of fair representation. However, it has long been recognized that the NLRA imposes on the exclusive representative a duty to represent fairly the employees of the negotiating unit it represents. Reference therefore is made to decisions of the NLRB and the federal courts that have addressed this issue.

The United States Supreme Court has held that the duty of the exclusive representative is to "exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them." Steele v. Louisville & Nashville Railway (1944) 323 U.S. 192 [15 LRRM 708]. In Miranda Fuel Co., Inc., supra, 140 NLRB 181 [51 LRRM 1584], the NLRB adopted the standard that had been judicially established in Steele. The Board found in section 7 of the NLRA[15] a grant to employees of "the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment." 140 NLRB at p. 185.

The United States Supreme Court enunciated its still-current standard governing the duty of fair representation in Vaca v. Sipes (1967) 386 U.S. 171 [64 LRRM 2369]. The Court held that a breach of the duty of fair

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[15] NLRA section 7 states:

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

representation occurs when a union's conduct toward a member of the bargaining unit is "arbitrary, discriminatory, or in bad faith."

The duty of fair representation has been held to prohibit discrimination based on union membership or activities. Thompson v. Sleeping Car Porters (4th Cir. 1963) 316 F.2d 191 [52 LRRM 2880]. See also Wallace Corp. v. NLRB (1944) 323 U.S. 248 [15 LRRM 697].[16]

The NLRB and the courts have granted wide latitude to the exclusive representative in the negotiation of collective bargaining agreements. See Steele, supra. On the other hand, the degree of discretion given the exclusive representative in the enforcement of collective bargaining agreements is somewhat more restricted. The Supreme Court in Vaca proclaimed that a violation of the duty would be found in arbitrary, capricious or bad faith actions. But it also made reference to

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[16]Discr discrimination by an employee organization based on organizational activities under the National Labor Relations Act is explicitly forbidden by NLRA section 8(b)(2), which states:

> It shall be an unfair labor practice for a labor organization or its agents-
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> . . . . . .
>
> (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

"perfunctory" grievance processing in such a way as to create the inference that "perfunctoriness" in handling grievances would be held tantamount to arbitrariness, capriciousness or bad faith. One commentator has stated that the Court's phrasing of the standard "invite[s] the finding of a violation when injury is caused by union carelessness without more." Gorman, Labor Law (1976) p. 720. Another commentator has urged that the appropriate duty of fair representation should be based on "reasonableness," defined as "fairness" as that term has been used in the context of constitutional due process cases. See Duty of Fair Representation and Exclusive Representation in Grievance Administration (1976) Syracuse L.Rev. 1199, 1230. A recent federal case has held extreme negligence in grievance processing to be a breach of the duty of fair representation. Ruzicka v. General Motors Corp. (6th Cir. 1975) 523 F.2d 306 [90 LRRM 2497]. Cf. Local 18, Int'l Union of Operating Engineers (Ohio Pipeline Construction Co.) (1963) 144 NLRB 1365 [54 LRRM 1235].

A typical case involving an alleged breach of the duty of fair representation bases its claim either on a union's refusal to process the grievance of a member of the bargaining unit, or on a union's perfunctory handling of a grievance that it chooses to accept. See, e.g., Vaca, supra; Holodnak v. Avco Corp., Avco-Lycoming Div. (D.Conn. 1974) 387 F.Supp. 191 [87 LRRM 2337], modified (2d Cir. 1975) 514 F.2d 285 [88 LRRM 2950]; Figueroa de Arroyo v. Sindicato de Trabajadores Packinghouse (1st Cir. 1970) 425 F.2d 281 [74 LRRM 2028], cert.

denied (1970) 400 U.S. 877 [75 LRRM 2455]. It is settled that the union's duty of fair representation may be violated as much by a union's acts of commission as by its failure to act. See, e.g., Steele, supra, where the U.S. Supreme Court found a violation of the duty of fair representation in a union's negotiation of contractual provisions designed to give priority in hiring and promotions to white employees over black employees.

The hearing officer finds that the Association acted within the scope of the duties prescribed by the duty of fair representation, and that the Association did not intentionally or negligently disregard the potential that the pendency of the grievance would make settlement of the criminal case impossible. The Association had the authority under article XXI, section 4 of the contract to file the grievance on its own behalf. Its reason for pursuing the grievance was to enforce the no-reprisals clause in the contract. It would appear that the Association was under an obligation toward the negotiating unit as a whole to assure that a grievance against the District for breach of the no-reprisals clause would be filed, and the record shows that the superintendent's arrest of the Seven was the most clear violation of the no-reprisals clause. The Association made adequate good faith efforts to reach the Seven before determining to file the grievance. The Association was not put on clear notice that the pendency of the grievance barred settlement of the criminal charges. Further, the Association did not intend harm to come to the charging party

or the other defendants through its processing of the grievance. In view of these facts, it is held that the Association did not violate its duty to represent Ms. King fairly, and that it therefore did not violate section 3544.9.

As a corollary to the conclusion that the Association's action in pursuing the grievance was done in good faith and for legitimate reasons, it is found that the charging party has failed to establish that the Association's maintenance of the grievance was either extremely negligent, arbitrary, capricious or bad faith. As a foundational matter, there is no persuasive evidence that the pendency of the grievance was the factor that caused the superintendent to refuse to drop the charges. The superintendent said before the grievance was filed in this case that he would not drop the charges because the Seven had "asked to be arrested." The newspaper article quoted above states that the trustees would not seek to compromise the criminal charges until the grievance was resolved; however, there is an equivalent quantum of evidence indicating that the superintendent's motivation in refusing to drop the grievance was political, notwithstanding his statement that the charges "could not" be dropped. For example, the same news article stated that "Ferguson said he has personally been receiving community support for not bowing the [sic] pressure to drop the case." Further, the brief of the charging party indicates that the superintendent used the impending grievance only as an "excuse" not to drop the criminal complaint. While what the District would have done

but for the Association's filing of the grievance is open to some speculation, it has not been demonstrated persuasively that the charges would have been dropped.[17] The fact that an insufficient casual relation has been shown to exist between the acts of the Association and the District's refusal to settle is an initial serious failing of Ms. King's case.

Even assuming, arguendo, that it was proven that the grievance precluded settlement of the criminal charges,[18] the Association was not aware at the time the grievance was filed that it may have had that effect, and thus it must be concluded that the duty of fair representation was not violated as of that time. Mr. Caveglia told Ms. Mahon that the Seven did not want to file a grievance until after the criminal case was disposed of, but neither the Seven nor their attorney attempted to explain before the filing of the grievance that it might jeopardize settlement of the criminal charges. In addition, the day before the grievance was filed Mr. Caveglia told Mr. Curry that he did not know what the plans of the Seven were. Under these circumstances, it cannot be concluded that the mere filing of the grievance constituted a breach of the duty of fair representation.

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[17] It is noted that no California statute requires that a full "civil release" be given to a complaining witness as a prerequisite for dismissal of a criminal action. See Penal Code section 1385.

[18] The remainder of the Discussion and Conclusions of Law is written under the assumption, arguendo, that this foundational showing had been made.

Three additional facts presented themselves after the filing of the grievance: as of November 29, Ms. King had expressed her unhappiness to Ms. Mahon concerning the grievance; as of December 10, the Association knew of the District's rationalization that it would not drop the criminal complaint because of the pendency of the grievance; and the Association failed to send Ms. King a copy of the grievance upon her initial request. It is held, however, that these three additional facts do not establish a violation of the duty of fair representation. Ms. Mahon asked Ms. King to put in writing her concerns as to the potential adverse effect that maintenance of the grievance would have, and she stated that the grievance committee and the executive committee of the Association would consider those concerns. Ms. King failed to make any request to either committee. While Ms. King may argue that it would have been "futile" to put her concerns in writing, the hearing officer does not find an adequate evidentiary basis on which to justify that conclusion.[19] Ms. King and Mr. Caveglia were sounded out on numerous occasions as to their inclinations toward pursuing the grievance, yet once the grievance was filed none of the Seven asked the Association to drop the grievance, nor did the attorney for the Seven ever contact the Association to express

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[19]It is noted that Ms. King's testimony that Ms. Mahon said that the grievance would proceed without regard to Ms. King's reasons has not been credited by the hearing officer. See footnote 10, supra.

his concerns. It is noted that the charge, filed six weeks after the grievance was filed and three weeks before the criminal trial, did not allege that the charging party was jeopardized because of the pendency of the grievance, nor does it allege that the charging party requested the Association to withdraw the charge.[20] For all of these reasons the hearing officer concludes that the Association did not violate section 3544.9 by failing to withdraw the grievance.

The hearing officer has concluded that Mr. Curry neglected to send the grievance to Ms. King, and that the Association, upon later learning that Ms. King had not received a copy, sent her one immediately. However, even assuming that negligence in handling a grievance is an adequate basis for sustaining a charged violation of the duty of fair representation, Ruzicka v. General Motors Corp., supra, it is found that the Association's failure to send Ms. King a copy of her grievance, without more, is insufficient to sustain the charge. Mr. Curry was merely negligent in failing to send a copy of the grievance to Ms. King; there is no evidence that his failure to send the grievance was part of a design of the Association; the Association cured the situation immediately

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[20]The gravamen of the charge is that the Association allegedly filed the grievance "without permission of the seven employees," that the Association "declined" to provide a copy of the grievance to the defendants, that the Association refused to permit the Seven to represent themselves "or in any way make decisions about the grievance... ." These allegations are inconsistent with the contention that Ms. King requested that the grievance be withdrawn.

once Ms. King informed it that she had not received the grievance; and at any rate Ms. King was informed by another teacher on the date that the grievance was filed that it in fact had been filed. Given these facts, the Association's initial failure to send a copy of the grievance was de minimis. Whether viewed in isolation or together with the other facts of this case, this factor does not allow a finding that the Association breached its duty of fair representation toward Ms. King.

While the duty of fair representation may be violated by discrimination against nonmembers of an employee organization, Thompson v. Sleeping Car Porters, supra, there is no persuasive evidence showing that the Association's maintenance of the grievance was grounded in such a motive. The charging party did not establish that the officers of the Association who were involved with the grievance had an anti-Federation animus, nor can a reasonable inference of animus be drawn from the facts presented. One of the seven defendants was a member of the Association and was not a member of the AFT, and thus any alleged discrimination was not congruent with AFT membership. In addition, even assuming, arguendo, the existence of animus, no nexus has been established between such animus and the Association's maintenance of the grievance.

Charging party appears to argue that the Association could have been awarded a favorable arbitration decision before the defendants went to trial if the Association had not delayed

in processing the case. Thus, she seems to argue, but for the Association's intentional or reckless actions, the defendants would not have had to stand trial. This contention is groundless. The Association held the grievance in abeyance because it was unclear as to "where [it] stood" with respect to the grievance given that an unfair practice charge had been filed concerning it. The fact that a new legal issue had been raised because of the Association's pursuit of the grievance was a reasonable basis for suspending processing of it until the ramifications of proceeding had been evaluated. The hearing officer declines to infer from the Association's suspension of the case that the Association was motivated by a desire to harm the defendants thereby. As indicated above, the record shows that the Association's motive for maintaining the grievance was to seek enforcement of the no-reprisals clause in the contract for the benefit of all members of the negotiating unit.

In summary, the record shows that the Association acted in good faith and with an adequate regard for the defendants in filing and processing its grievance, and that its actions therefore were neither extremely negligent, arbitrary, capricious, discriminatory nor in bad faith. These facts mandate the conclusion that the Association's maintenance of the grievance did not violate section 3544.9 of the EERA.

2. Alleged Violation of Section 3543

The Charging Party appears to contend that her right to represent herself was violated in two respects. She first contends that the Association, contrary to her wishes, filed a grievance "on her behalf." Second, she contends that the right of self-representation was violated in that she was not permitted "in any way to make decisions about the grievance which affects [her] future." These contentions will be addressed in order.

A. The filing of the grievance. The grievance in question was filed by the Association on its own behalf. As noted above, the applicable contract clause states:

> 3. "Grievant" means individual members of the unit or the Association when processing a grievance pursuant to section 4 of this Article.
>
> 4. The Association may initiate a grievance which affects a substantial number of members of the unit. (Emphasis added.)

While the grievance itself stated that the defendants were the "injured parties," it was signed by Ms. Mahon as president of FUDTA and indicated on its face that it was "filed consistent with the contract between the FUSD Board of Education and FUDTA... ." And although the Association's newsletter, "The Signal," stated that the grievance was filed "in behalf of" the seven teachers, testimony of Ms. Mahon indicated that the statement was an error of the writer of the article. Ms. King acknowledged in testimony that the grievance had been filed as

an Association grievance and had not been filed on her behalf.[21] Her letter to the Association of November 29 corroborates this fact, as it requested dispatch of a copy of the grievance "filed by FUDTA for violation of the certificated employee contract no-reprisal clause. ..." Moreover, according to the credible testimony of Ms. King, Mr. Marcello informed Ms. King in late November that the Association had filed the grievance on its own behalf after having attempted to elicit the defendants' inclinations toward filing the grievance. In view of these facts, the hearing officer concludes that the grievance was filed by the Association on its own behalf.

It is arguable the Association's filing of the grievance violated Ms. King's right to represent herself in that its filing of the grievance precluded her from presenting a grievance on her own behalf. The charging party does not argue that this theory applies to this case. Assuming, arguendo, that this omission is not a bar to consideration of this argument, it nonetheless is found to be unpersuasive. Before filing its grievance, the Association gave the

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21 counsel for the charging party apparently sought to minimize this testimony by stating that Ms. King understood "as of February" that the grievance was filed on her behalf. This qualification of her testimony is not clearly relevant, nor is it admissible. Statements of counsel are not admissible as testimony unless they are made under oath from the witness stand, and Ms. King's counsel did not elicit testimony on redirect examination to alter Ms. King's testimony.

defendants ample time to determine whether they intended to file a grievance on their own behalf. While the grievance was filed by the Association in advance of the last permissible date of filing, this is not persuasive evidence that the Association intended to "close out" the Seven from pursuing their own grievance. The exclusive representative must be given considerable discretion in determining the most appropriate time upon which to file its grievances against the employer. There is no persuasive evidence that the Association's motives were ulterior in filing the grievance when it did, and there is no credible evidence that the defendants requested the Association not to file a grievance in order that they could file one on their own.[22] Charging party therefore has not shown that the Association's filing of the grievance violated her rights under section 3543 in this respect.

B. Denial of the ability to make decisions concerning the grievance. The only evidence addressing this issue is testimony that the Association would not permit the defendants

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[22]As noted at footnote 5, Ms. King testified that Mr. Caveglia had a conversation with her immediately after he spoke with Ms. Mahon. She further testified that he repeated to her what he allegedly had told Ms. Mahon—that the defendants "didn't want to do any, take any kind of action like that, including a grievance, and that if and when that became maybe a feasible action, that [they] would probably want to do it on [their] own." As noted above at footnote 5, the hearing officer does not credit Ms. King's statement that Mr. Caveglia told Ms. Mahon that the defendants might want to file a grievance "on their own."

to take part in the decision whether to carry forward with the grievance. There is no obligation imposed by law on an employee organization in these circumstances to grant nonmembers the opportunity to decide whether the organization should proceed on its own behalf. Charging party may contend that she was entitled under the grievance procedure to take part in the Association's decisions whether to file, and to proceed, with the grievance. However, Ms. Mahon told Ms. King that if she put her concerns in writing to the Association, that the Association would consider them in determining whether to continue with the grievance. This alternative was both reasonable and fair. To permit any individual in a negotiating unit free rein to intercede in the exclusive representative's enforcement of its contractual rights would do fundamental mischief to the principle of exclusive representation. The hearing officer concludes that under these facts the Association was under no obligation to permit the charging party to take further part in its decision-making process.

It also may be argued that under section 3543 the charging party was entitled to take part in determining the Association's grievance strategy, and was denied that right by the Association. It has been concluded, however, that the Association's grievance was filed on its own behalf, and that Ms. King had been given a reasonable opportunity to present her own grievance. There is insufficient evidence on which to base a finding that Ms. King requested to take part in the processing of the grievance, and there is even less indicating

that the Association denied such a request. The charging party therefore has not shown a violation of section 3543 based on this theory.[23]

Moreover, the Association, after filing its grievance, waived the initial steps of the grievance process and consented to taking the case directly to arbitration. Section 3543 grants to employees the right to adjust grievances only prior to arbitration. There is no evidence that the Association intended to interfere with Ms. King's right to represent herself by going directly to arbitration, and Ms. King had not expressed an interest in pursuing the grievance on her own behalf. For these reasons, Ms. King's right to represent herself was finally extinguished when the Association submitted the grievance to arbitration. See Mount Diablo Unified School District, Santa Ana Unified School District, Capistrano Unified School District (12/30/77) EERB Decision No. 44. This is an additional factor establishing that no violation of section 3543 has been established.

3. Alleged Violation of Section 3543.6(a)[24]

The charge alleged that the Association violated section 3543.6(a) in that it made an "...effort to cause the

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23 In view of this conclusion, it is unnecessary to reach the issue whether the Association's right under the contract to file a grievance affecting a substantial number of members of the unit would deny Ms. King of the ability to press this grievance without the intervention of the Association.

24 Section 3543.6(a) is set forth at footnote 2, supra.

District to discriminate against the [defendants]." The hearing officer has concluded above that the Association acted in good faith and without discriminatory motives in filing and maintaining the grievance. Even assuming, arguendo, that the District's pursuit of criminal charges may have been grounded in discriminatory motives, the record shows that the Association's pursuit of the grievance in question was made in order to remedy a perceived violation of the contract. There is no evidence that the Association attempted to cause the District to discriminate against the defendants. The alleged violation of section 3543.6(a) therefore is dismissed.

4. Alleged Violation of Section 3543.6(b)

As noted above, the hearing officer has concluded that it is possible that a violation of the duty of fair representation may be proven independently of section 3543.6(b) of the EERA. This portion of the Discussion and Conclusions of Law proceeds under the assumption that a violation of the duty of fair representation requires proof of a violation of section 3543.6(b).

Section 3543.6(b) prohibits discriminations and reprisals, and threats thereof, in addition to its prohibition of interference in the employee's exercise of rights guaranteed by the EERA. The charging party only has alleged an interference in her exercise of rights, and therefore the alleged violation of section 3543.6(b) is treated only as a charge of interference and not as a charge of discrimination or imposition of reprisals.

Ms. King alleged that the grievance interfered with the settlement of her criminal case. This contention is dismissed in the preceding discussion of section 3544.9.

Any allegation that the Association denied Ms. King's right not to participate in the activities of FUDTA and her right to represent herself is disposed of in the preceding discussion of section 3543.

Any allegation that the Association interfered with Ms. King in her exercise of EERA rights in that it encouraged the District to discriminate against Ms. King is disposed of in the preceding discussion of section 3543.6 (a).

Since no other persuasive evidence of interference is present in the record or has been argued, the hearing officer concludes that the charging party has failed to show by a preponderance of the evidence that the Association interfered with her because of her exercise of rights guaranteed by the EERA. The alleged violation of section 3543.6(b) therefore is dismissed.[25]

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[25]Board rule 35027 states:

> The charging party shall prove the charge by a preponderance of the evidence in order to prevail.

The Board rules were amended effective July 6, 1978. Former Board rule 35027 now is found at Board rule 32178.

PROPOSED ORDER

Based on the findings of fact, conclusions of law and the entire record in this case, it is the proposed order that the unfair practice charge filed by Janet King against the Fremont Unified District Teachers Association alleging violations of sections 3543, 3543.6(a) and (b), and 3544.9 is DISMISSED.

The parties have twenty (20) calendar days after service of this Proposed Decision in which to file exceptions in accordance with California Administrative Code, title 8, part III, section 32300. If no party files timely exceptions, this Proposed Decision will become final on August 28, 1978 and a Notice of Decision will issue from the Board.

Dated: August 4, 1978

By _____
Jeffrey Sloan
Hearing Officer