



STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD

LOIS McELWAIN and MARIE LYEN,	)	
Charging Parties,	)	
v.	)	Case No. SF-CE-112
CASTRO VALLEY UNIFIED SCHOOL	)	
DISTRICT,	)	
Respondent.	)	PERB Decision No. 149
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LOIS McELWAIN and MARIE LYEN,	)	December 17, 1980
Charging Parties,	)	
v.	)	
CASTRO VALLEY TEACHERS	)	Case No. SF-CO-23
ASSOCIATION,	)	
Respondent.	)	

Appearances: Stewart Weinberg, Attorney (Van Bourg, Allen, Weinberg and Roger) for Lois McElwain and Marie Lyen; James D. Pinnell, Attorney (Breon, Galgani and Godino) for Castro Valley Unified School District; Francis R. Giambroni, Attorney (White, Giambroni & Walters) for Castro Valley Teachers Association.

Before Gluck, Chairperson; Moore, Member.

This case is before the Public Employment Relations Board (hereafter Board) on exceptions filed by Lois McElwain and Marie Lyen (hereafter Charging Parties) to the attached hearing officer's proposed decision. Charging Parties filed unfair

practice charges against both the Castro Valley Teachers Association (hereafter Association) and the Castro Valley Unified School District (hereafter District). Charging Parties allege in Case No. SF-CO-23 that the Association violated section 3543.6(a) and (b)<sup>1</sup> by denying them their right to fair representation guaranteed by Government Code section 3544.9<sup>2</sup> by negotiating a transfer policy with the District

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<sup>1</sup>The Educational Employment Relations Act (hereafter EERA) is codified at Government Code section 3540 et seq. Unless otherwise noted, all subsequent statutory references are to the Government Code.

Section 3543.6(a) and (b) provides:

It shall be unlawful for an employee organization to:

(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.

<sup>2</sup>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.

In Fremont Unified School District (4/21/80) PERB Decision No. 125, the Board held that the duty of fair representation created by section 3544.9 is actionable through section 3543.6. See also Los Angeles Community College District (10/19/79) PERB Decision No. 106 and Mt. Diablo Unified School District (8/21/78) PERB Decision No. 68 at pp. 11-13.

under which they were not reassigned from junior to senior high school teaching positions when the District reorganized its secondary schools and by refusing to take their grievance regarding their teaching assignments to arbitration. Charging Parties further allege that the Association violated section 3543.6(c)<sup>3</sup> and that the District violated section 3543.5(a) and (c)<sup>4</sup> (Case No. SF-CE-112) by negotiating a contract modification derogating the Charging Parties' contract rights. Although they did not specifically list section 3543.6(d) in their charge, Charging Parties alleged that the District

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<sup>3</sup>Section 3543.6(c) provides:

It shall be unlawful for an employee organization to:

(c) Refuse or fail to meet and negotiate in good faith with a public school employer of any of the employees of which it is the exclusive representative.

<sup>4</sup>Section 3543.5(a) and (c) provides:

It shall be unlawful for a public school employer to:

(a) 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.

. . . . .

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

controlled and dominated the Association which is the basis for charging a violation of that section.<sup>5</sup>

The hearing officer dismissed the section 3543.5(c) and (d) charges against the District and the section 3543.6(c) charge against the Association at the hearing for lack of evidence following the Charging Parties' presentation of their case in chief. He further dismissed the 3543.5(a) charge against the District and the 3543.6(a) charge against the Association. The hearing officer found, however, that the Association violated section 3543.6(b) in that it breached its duty to fairly represent the Charging Parties by failing to consider the merits of their grievance in determining whether to take the matter to arbitration.

Charging Parties except to all the hearing officer's dismissals and argue that the hearing officer's remedy on the 3543.6(b) violation was inadequate.

The Board has considered the charges and the hearing officer's proposed decision in light of Charging Parties'

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<sup>5</sup>Section 3543.6(d) provides:

It shall be unlawful for an employee organization to:

. . . . .

(d) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).

exceptions and the entire record in this case. We summarily affirm the hearing officer's dismissal of all charges against the District and those charges against the Association which allege that the Association negotiated with the District in bad faith and in violation of its duty of fair representation to the Charging Parties. We reverse, for the reasons which follow, so much of the proposed decision wherein the hearing officer found that the Association breached its duty of fair representation by not considering the merits of the Charging Parties' grievance and by refusing to take their grievance to arbitration.

#### DISCUSSION

#### The Association's Refusal to Take Charging Parties' Grievance to Arbitration.

In Rocklin School District (3/26/80) PERB Decision No. 124, the Board analyzed an exclusive representative's duty of fair representation. The Board was guided by cases involving the duty of fair representation as interpreted under the National Labor Relations Act (hereafter NLRA), by the National Labor Relations Board and the federal courts. In Rocklin, we held that a breach of the duty of fair representation occurs when a union's conduct toward a member of the bargaining unit is arbitrary, discriminatory, or in bad faith.

Federal courts have held that, "Without any hostile motive of discrimination and in complete good faith, a union may nevertheless pursue a course of action or inaction that is so unreasonable and arbitrary as to constitute a violation of the duty of fair representation. A union may refuse to process a grievance or handle the grievance in a particular manner for a multitude of reasons, but it may not do so without reason, merely at the whim of someone exercising union authority." (See Griffin v. United Auto Workers (4th Cir. 1976) 469 F.2d 181 [81 LRRM 2485].)

However, an employee does not have an absolute right to have a grievance taken to arbitration regardless of the provisions of the applicable collective negotiations agreement. NLRB v. GTDWA Local 315, IBT (9th Cir. 1976) 545 F.2d 1173, [93 LRRM 2747]. An exclusive representative's reasonable refusal to proceed with arbitration is essential to the operation of a grievance and arbitration system. Fountain v. Safeway Stores, Inc. (9th Cir. 1977) 555 F.2d 753 [95 LRRM 3106].

An exclusive representative's duty of fair representation does not contemplate

. . . [t]he complete satisfaction of all who are represented . . . . A wide range of reasonableness must be allowed to a statutory bargaining representative in serving the unit it represents subject always to complete good faith and honesty of purpose in the exercise of its discretion.

Ford Motor Co. v. Huffman (1953) 345 U.S. 330 [31 LRRM 2548 at 2551].

Like the Board in Rocklin, the hearing officer looked at private sector law. He concluded that consideration of the likelihood of success on the merits is one of the most important factors in deciding whether to take a grievance to arbitration.<sup>6</sup> He found that the Association failed to consider the merits of Charging Parties' grievance, that this amounted to arbitrary conduct and, thus, the Association violated its duty of fair representation.

The hearing officer has misconstrued the facts relevant to this issue. Charging Parties were given the opportunity to present their grievance and their positions to the Association's executive board which then determined that, even if Charging Parties prevailed on the merits, that result, although beneficial to the Charging Parties, would not be beneficial to the majority of the members of the unit. The result would cause maximum dislocation of the teachers' assignments. It was for this reason that the Association did not proceed to arbitration. In short, the Association's decision had a rational, non-arbitrary basis, and there is no evidence that it was motivated by hostility or bad faith towards the Charging Parties.

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<sup>6</sup>Vaca v. Sipes (1967) 386 U.S. 171 [64 LRRM 2369].

For all of the reasons set forth above, the Board finds that the Association did not breach its duty of fair representation when it refused to take the Charging Parties' grievance to arbitration. We hereby REVERSE that portion of the hearing officer's proposed decision and DISMISS Charging Parties' related complaint against the Association.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ORDERED that so much of the proposed decision of the hearing officer as dismisses the charges against the District and the negotiating charge against the Association is affirmed and that so much of the decision as finds that the Association breached its duty of fair representation is reversed.

By: Barbara D. Moore, Member

Harry Gluck, Chairman

STATE OF CALIFORNIA  
PUBLIC EMPLOYMENT RELATIONS BOARD



LOIS McELWAIN and MARIE LYEN,	)	
	)	
Charging Parties,	)	UNFAIR PRACTICE
	)	
v.	)	Case No. SF-CE-112-77/78
	)	
CASTRO VALLEY UNIFIED SCHOOL	)	
DISTRICT,	)	
	)	
Respondent.	)	
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LOIS McELWAIN and MARIE LYEN,	)	
	)	
Charging Parties,	)	
	)	
v.	)	Case No. SF-C0-23-77/78
	)	
CASTRO VALLEY TEACHERS	)	PROPOSED DECISION
ASSOCIATION,	)	(10/25/78)
	)	
Respondent.	)	

Appearances: Stewart Weinberg, Attorney (Van Bourg, Allen, Weinberg and Roger) for Lois McElwain and Marie Lyen; James D. Pinnell, Attorney (Breon, Galgani and Godino) for Castro Valley Unified School District; Francis R. Giambroni, Attorney (White, Giambroni & Walters) for Castro Valley Teachers Association.

Before Gerald A. Becker, Hearing Officer.

PROCEDURAL HISTORY

On June 29, 1977, Lois McElwain and Marie Lyen (hereafter Charging Parties) filed unfair practice charges against both the Castro Valley Teachers Association (hereafter Association) and the Castro Valley Unified School District (hereafter District)

alleging they were denied their right to fair representation under Government Code section 3544.9<sup>1</sup> as they were not reassigned from junior to senior high school teaching positions in a secondary school reorganization within the District. The District was charged with violating section 3543.5(a), (c) and (d). The Association was charged with violating section 3543.6(a), (b) and (c).<sup>2</sup>

The Association and the District each filed answers denying the charges. The two charges were consolidated for a

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<sup>1</sup>All statutory references are to the Government Code unless otherwise specified.

<sup>2</sup>Gov. Code, sec. 3543.5(a), (c) and (d) provides:

It shall be unlawful for a public school employer to:

(a) 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.

.....  
(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

Gov. Code, sec. 3543.6(a), (b) and (c) provides:

It shall be unlawful for an employee organization to:

(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.

(c) Refuse or fail to meet and negotiate in good faith with a public school employer of any of the employees of which it is the exclusive representative.

hearing which was held on November 28 and 29, 1977.

Upon respondents' motions, at the close of the charging parties' case-in-chief the alleged violations of section 3543.5(c) and (d) by the District were dismissed as was the alleged violation of section 3543.6(c) by the Association, leaving the alleged violations of section 3543.5(a) by the District and section 3543.6(a) and (b) by the Association pending for decision.

#### FINDINGS OF FACT

Primarily due to declining enrollments, effective September 1977 the secondary schools in the District underwent a reorganization. There had been two junior high schools (A. B. Morris and Earl Warren) composed of grades 7 and 8, and two senior high schools (Castro Valley and Canyon) including grades 9 through 12. After the reorganization, there was only one senior high school made up of grades 10 through 12 and one junior high school incorporating grades 7 through 9.

The new senior high school is called Castro Valley and is at the same location as the former senior high school of the same name. The new junior high school is called Canyon and is at the same location as the former Canyon senior high school. Before the reorganization there were 87 senior high and 43 junior high school teaching positions. After the reorganization, as a result of the ninth grade being switched from the senior high to the junior high, there were 65 senior high and 59-1/2 junior high teaching positions.

In their collective negotiations agreement entered into in November 1976, the District and the Association purposefully did not include a provision specifically dealing with the forthcoming reorganization of schools. Rather, as testified by Harry Feucht, then the Association president, and Dale Lambert, then the District certificated personnel director, the District's existing transfer procedures were incorporated with minor changes into the agreement and the application of these procedures to the reorganization was left undecided. No evidence was offered by any party as to the reasons for this omission from the agreement.

Under the "Involuntary Transfer" provision of the agreement, if there is a "combining of schools" the affected teachers:

. . . shall have priority for vacancies at the new location or in the schools to which their students have been transferred . . . .

Under the "Voluntary Transfer" provision, teachers:

. . . have the professional right to request transfer to any site or opening in the district . . . . If there are several applicants, the applicant . . . with most seniority in the district shall get the position . . . .

There is no mention of "new" schools in the voluntary transfer provision.

On many occasions and in a variety of publications, the District characterized the reorganization as creating two "new" schools. Initially the District unilaterally determined to assign teaching positions at the two new schools in accordance with district-wide seniority, the primary criterion under the voluntary transfer provision in the negotiations agreement.

Mr. Lambert testified and it is found that the District's motivation in representing the reorganization as the creation of "new" schools, rather than the merger of one school into another, was the need to integrate two high school faculties which had operated under dramatically different educational viewpoints, and also the need to resolve problems stemming from the close identification by certain community factions with the previous schools.

Both Charging Parties, junior high school teachers, applied for high school teaching positions in their respective subjects. On the basis of strict seniority, Ms. McElwain would have been entitled to a position in the high school English department. Prior to the hearing in this matter, all parties believed that Ms. Lyen, a Spanish teacher, was senior to one high school Spanish teacher, Daryl Anderson, who was assigned one high school Spanish class (a one-fifth assignment) in the 1977-1978 school year. But at the hearing, unrebutted evidence showed that Mr. Anderson actually had 14 years of service in the District as opposed to Ms. Lyen's 13-1/2. By mistake, a year's service by Mr. Anderson in the 1960-1961 school year originally had not been counted.

In a December 10, 1976 memo to Association Representative Council members, Mr. Feucht, apparently on his own initiative, stated that the Association's position on the reorganization was that it was a combination of schools and the principle of teachers following their students should be applied. Mr. Feucht also testified that he previously had stated the same position at

Association executive board meetings of May 26, June 2 and August 26, 1976, and at a general meeting held on October 13, 1976.

Mr. Feucht testified that the reason underlying his and the Association's position on reorganization transfers was that the principle of teachers following their students previously had been applied in two elementary school closures, one of which was under the District transfer policy similar to the one in the present negotiations agreement.

The representative council is the policy-making body of the Association consisting of members from each school in the District. At a January 5, 1977 representative council meeting, after a discussion in which the minutes reflect it was decided that it would be unfair to determine new teaching assignments based only on seniority, Mr. Feucht was instructed to contact the District to discuss application of the negotiated transfer provisions to the reorganization. Such meetings took place on January 10 and 14, 1977. There is no evidence that any member of the representative council or of the negotiations unit protested the Association's position on post-reorganization teaching assignments until after these two meetings.

The evidence indicates that decision-making by informal consensus is an established practice, not only by the Association itself but also by predecessor organizations in the District prior to the Educational Employment Relations Act (hereafter EERA).<sup>3</sup> It is still the Association's practice not to require

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<sup>3</sup>Government Code section 3540 et seq.

a formal resolution to adopt a policy position.

Mr. Feucht chose three persons to accompany him to the meetings with the District. Michael Weston was chairman of the bargaining team, a nonvoting member of the executive board, and also a member of the committee which developed the District transfer policy. Eleanor Baird was secretary of the bargaining team and chairperson of the Certificated Employees Council when the original transfer policy had been developed. Thomas Moore was the treasurer of the Association and one officer whose teaching schedule permitted attendance at the meetings. All are high school teachers with the exception of Mr. Feucht, who is a junior high teacher.

At the time, Mr. Moore had 31 years seniority in the District. Mr. Feucht did not apply for a high school position but had applied for the position of "area chairman" at the new junior high school for which position he eventually was selected. Mr. Weston and Ms. Baird both had about 10 years seniority and conceivably could have been transferred to junior high school assignments on the basis of seniority.

At the first meeting on January 10, 1977, the two sides were unable to reach agreement as to the method for determining teaching assignments after the reorganization. However, at the second meeting on January 14 the District changed its original position and a consensus was reached that the principle of teachers following their students would be applied, i.e., insofar as possible high school teachers would continue to teach high school students and junior high teachers would continue to teach

junior high school students.

Teachers were notified of this decision by a memorandum dated January 17 from Mr. Lambert, the Director of Certificated Personnel, which accompanied the initial roster of assignments for the 1977-1978 school year. Ms. McElwain and Ms. Lyen were continued in junior high school teaching positions. The memorandum stated that the two new principals made the final assignments and continued in part as follows:

They [the principals] have consulted with and heard advice and opinions from others, but the decisions are theirs. Included among those consulted (on guidelines only, not specific names) were the President and representatives from [the Association]. The contract agreement with [the Association] provided and helped determine guidelines, but the re-structuring of four secondary schools is a unique process that requires thoughtful application of the principles incorporated in the contract.

At the same time, teachers were informed that under the contract, assignments could be appealed to the Transfer Appeals Committee, three of the six members of which were appointed by the Association. The Transfer Appeals Committee would then make a final recommendation to the superintendent. It also was mentioned that assignments were subject to grievance only if a contract violation were alleged.

By a letter to Mr. Feucht dated February 1, 1977, Murrell Engbrook and Lin Graham, two junior high representative council members, questioned the authority for the Association's position on the reorganization reassignments.

Charging Parties appealed the rejection of their applications for high school teaching positions to the Transfer

Appeals Committee. On May 4, 1977, the committee sustained Ms. McElwain's appeal and recommended to the superintendent that she be given a senior high assignment. The superintendent apparently approved the recommendation subject to availability of high school English classes. Ms. McElwain then was given a split assignment in the 1977-1978 school year - three senior high and two junior high classes.

With respect to Ms. Lyen's appeal, the Transfer Appeals Committee was unable to reach a consensus. However, with the superintendent's approval, the two school principals were instructed to remain alert for opportunities to move her into a high school teaching position, but because there already was a surplus of high school language teachers, no additional Spanish teachers would be displaced to create such a position for Ms. Lyen.

The Charging Parties also filed a grievance alleging that under the negotiations agreement seniority should be followed in making reassignments. At the third level, the superintendent issued a rather confusing decision. He agreed that it was the District's intent that "the secondary reorganization called for two new schools rather than combined schools" and thus in this respect there was "validity" to the grievance. But he also said there was merit to the administration's position that assignment on the basis of seniority "could possibly result in a major reassignment of personnel from their existing subjects and grade levels." As a solution, he recommended that Ms. McElwain have first choice for the next two high school English class openings

(she already had received three English classes via the transfer appeals process) and that Mr. Lyen have an option on available high school Spanish classes.

Dissatisfied with the superintendent's recommended solution, the Charging Parties requested the Association to take their grievance to binding arbitration as provided in the negotiated agreement. Previously, at the lower grievance levels, they had sought advice and assistance from Charles Hinton, a California Teachers Association (hereafter CTA) representative. He assisted them in filing and processing the grievance but did not otherwise represent them. For the level three grievance hearing, at Mr. Hinton's urging, the Charging Parties requested the presence of an Association representative, but did not specifically ask for representation at the hearing. Mr. Hinton and Doug Rogers, the school grievance officer for the Association, attended the level three grievance hearing. They were not asked by Charging Parties to act as spokespersons and they did not actively participate in the hearing.

On June 17, 1977, after considering their presentation, the Association's executive board rejected Charging Parties' request for arbitration. This was contrary to advice earlier received from James Williamson, a CTA staff person, who suggested that Charging Parties' grievance be allowed to proceed. The executive board made no judgment on the merits of the grievance but, supposedly on advice from CTA contained in a memorandum discussing Vaca v. Sipes (1967) 386 U.S. 171 [64 LRRM 2369] considered only the effect on the bargaining unit as a whole.

The executive board cited two reasons for refusing arbitration. First, it stated that it felt that the Association could best represent unit members by a cooperative approach with the District, "meeting and conferring" on such matters. The executive board felt that such cooperative efforts would be hampered if an arbitrator sustained Charging Parties' contention that the District violated the negotiated agreement by applying the transfer procedures which had been agreed upon with the Association at the January 14, 1977 meeting.

Secondly, the executive committee reasoned that if the arbitrator were to rule in Charging Parties' favor, it could have the effect of reopening all secondary positions which in turn could create confusion and divisiveness among unit members.

#### DISCUSSION AND CONCLUSIONS OF LAW

##### 1. Violation of the duty of fair representation as an unfair practice.

Although there is no explicit reference to the duty of fair representation in the Labor Management Relations Act, as amended (hereafter LMRA),<sup>4</sup> the courts long have held that employee organizations have a duty under the LMRA to act fairly regarding all represented employees. Ford Motor Co. v. Huffman (1953) 345 U.S. 330 [31 LRRM 2548].

Although the duty of fair representation is enforced primarily under section 301 of the LMRA (authorizing lawsuits against labor organizations for breach of collective bargaining

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<sup>4</sup>29 U.S.C. section 151 et seq.

agreements), it has also been enforced by the National Labor Relations Board (hereafter NLRB) as an unfair practice under sections 8(b)(1) and 8(b)(2). The corresponding violations by the employer are sections 8(a)(1) and 8(a)(3) respectively.<sup>5</sup> Miranda Fuel Co. Inc. (1962) 140 NLRB 181 [51 LRRM 1587] enf. denied NLRB v. Miranda Fuel Co. Inc. (2d Cir. 1963) 326 F.2d 172 [54 LRRM 2715]; Local 12, United Rubber Workers v. NLRB (5th Cir. 1966) 368 F.2d 12 [63 LRRM 2395]; cert den. 389 U.S. 837; Vaca v. Sipes (1967) supra, 386 U.S. 171 [64 LRRM 2369, 2371-2].

Section 3543.5(a) of the Educational Employment Relations Act (hereafter EERA) combines the language of sections 8(a)(1) and 8(a)(3) of the LMRA. San Dieguito Union High School District (9/2/77) EERB Decision No. 22, at 14. Likewise, with respect to

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<sup>5</sup>Sections 8(b)(1) and 8(b)(2) provide in pertinent part:

(b) It shall be an unfair labor practice for a labor organization or its agents-

(1) to restrain or coerce employees in the exercise of the [organizational] rights guaranteed in section 7;

. . .  
(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) . . . .

Sections 8(a)(1) and 8(a)(3) provide in pertinent part:

(a) It shall be an unfair labor practice for an employer-

(1) to interfere with, restrain or coerce employees in the exercise of rights guaranteed in section 7;

. . . . .  
(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; . . .

unfair practices by employee organizations, section 3543.6(b) contains the same language as section 3543.5(a) and section 3543.6(a) parallels section 8(b)(2) of the LMRA.

Section 3544.9 of the EERA requires that an exclusive representative "fairly represent each and every employee in the appropriate unit." It is obvious that section 3544.9 codifies in the EERA the duty of fair representation evolved under the LMRA. Therefore, the federal precedents provide persuasive authority in determining duty of fair representation questions under the EERA. Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 616-7 [116 Cal.Rptr. 507]. See also, Lerma v. D'Arrigo Bros. Co. (1978) 77 Cal.App.3d 836 [144 Cal.Rptr. 18], holding that federal duty of fair representation precedent is applicable under the Agricultural Labor Relations Act.<sup>6</sup>

There is no provision in the EERA analogous to section 301 of the LMRA. Accordingly, the remaining portions of the unfair practice charges alleging violation of section 3543.6(a) and (b) by the Association, and of section 3543.5(a) by the District, are the appropriate subdivisions under which to charge a violation of the duty of fair representation which is alleged as an unfair practice. See Mt. Diablo Unified School District, et al. (8/21/78) PERB Decision No. 68, at 11-13.

Under the federal precedent, a breach of duty of fair representation:

. . . occurs only when a union's conduct towards a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. (Emphasis added.) (Vaca v. Sipes, supra, 64 LRRM at 2376.)

<sup>6</sup>Labor Code sec. 1140 et seq.

Furthermore,

The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents . . . .  
(Ford Motor Co. v. Huffman, supra, 31 LRRM at 2551)

2. The "new" schools - "combined" schools controversy.

Central to the Charging Parties' charge is the contention that the reorganization created "new" schools rather than "combined" schools. To support this contention, they point to the various pronouncements by the District referring to "new" schools. Thus, Charging Parties argue that the "combining of schools" involuntary transfer procedure in the negotiations agreement which gives priority to teachers in the schools to be combined, is inapplicable. Rather, Charging Parties further contend that the "new" schools concept requires application of the voluntary transfer procedure which gives priority to seniority in the District. Since the combining of schools approach was followed, Charging Parties allege that the negotiated agreement was violated by both the Association and the District and they were denied their right to fair representation.

If Charging Parties were correct in their contention that the Association and the District violated unambiguous provisions of their negotiated agreement, even if such violation benefitted a majority of the unit, it would be strong evidence that a breach of the duty of fair representation occurred. See, Butler v. Teamsters Local 823 (8th Cir. 1975) 514 F.2d 442 [88 LRRM 3169, 3177]; cert. den. 423 U.S. 924. On the other hand, there is a

much greater amount of discretion in filling in "gaps" in the contract. Price v. Teamsters (3d Cir. 1972) 457 F.2d 605 [79 LRRM 2865, 2869].

There are, however, serious flaws in Charging Parties' logic. First, the Respondents' agreement is not unambiguous on this matter. The uncontroverted testimony of witnesses for both parties to the agreement, Mr. Feucht, the Association president, and Mr. Lambert, formerly the District certificated personnel director, was that the parties purposefully left out of the agreement a specific provision to deal with the forthcoming reorganization. Rather, the District's existing transfer procedures were incorporated into the agreement and the question of how application of these procedures would affect teacher transfers under the reorganization was left undecided.

Second, the concepts of "new" and "combined" schools are not necessarily mutually exclusive. Rather, the hearing officer agrees with the assessment by Mr. Lambert, who testified that he felt the reorganization had some of the characteristics of new schools and some characteristics of a combination of schools. On the one hand, the schools were "new" in the sense that they had new names, different locations, and different grouping of grades. On the other hand, there were mergers of the two junior and two senior high schools at the two previous senior high locations.

It is true that the District represented the reorganization as the creation of new schools. But Mr. Lambert testified that the reasons were the need to integrate two high

school faculties which had operated under dramatically different educational viewpoints, and also the need to resolve the problems stemming from close identification by certain community factions with the previous schools. There is no evidence in the record to suggest that interpretation of the negotiated agreement played any part in the District's use of the "new schools" terminology. Indeed, as discussed immediately below, there is no transfer provision in the contract dealing with the creation of "new" schools.

Lastly, as just mentioned, there is no transfer provision in the agreement specifically applicable to the creation of new schools. There is a specific provision for "combining of schools" under the "Involuntary Transfer" section. Thus, Charging Parties would have us draw the inference that since the reorganization was not a combining of schools but rather a creation of new schools, the "Voluntary Transfer" section of the agreement, with District seniority as the primary criterion, should have been applied. But, as noted, there is no mention of "new schools" under the voluntary transfer provision nor is there any evidence that it was intended in the agreement that any new schools in the District be staffed by voluntary transfers.

Therefore, it is found that the transfer provisions of the negotiated agreement were not unambiguous concerning their application to the reorganization. It follows that in agreeing to apply "combining" of schools criteria, contrary to Charging Parties' contention the District and Association did not violate unambiguous provisions of their agreement.

3. Respondents' agreement to apply combining of schools criteria.

The District originally intended to apply voluntary transfer procedures to the reorganization so that District seniority would govern and all teaching positions at the two schools would be "open." However, after the meetings with the Association on January 10 and 14, 1977, the District agreed to use the combining of schools approach in which teachers follow their students to their new site.

Both the District and the Association presented testimony that the reorganization had been discussed during negotiations and it was "agreed not to agree" on a specific transfer provision to apply to the reorganization.<sup>7</sup>

It has been held under the LMRA that the negotiating obligation includes meeting to interpret an agreement after it has been negotiated. NLRB v. Sands Mfg. Co. (1939) 306 U.S. 332 [4 LRRM 530, 534]. The effect of the January 10 and 14, 1977 meetings between the Association and the District was to fill in the "gaps" in their negotiated agreement.

In negotiations, an exclusive representative is accorded a "wide range of reasonableness . . . subject always to complete good faith and honesty of purpose in the exercise of its discretion." Ford Motor Co. v. Huffman, supra, 31 LRRM at p. 2551. In the present case, there is no evidence that either the Association or the District harbored any discriminatory motive or acted in bad faith towards Charging Parties.

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<sup>7</sup>There is no evidence as to the reason for this omission from Respondents' agreement; nor do Charging Parties contend that the omission is part of the Respondents' alleged wrongful conduct.

Nor can it be said that Respondents' decision to apply the combining of schools criteria under the agreement was arbitrary and without rational basis.

[A] certified bargaining agent offends the duty of fair representation if it enters a collective bargaining agreement which makes arbitrary distinctions between classes of employees . . . which are not based on relevant differences between the employees or operations.  
(Deboles v. TWA (3d Cir. 1977) 552 F.2d 1005 [94 LRRM 3237, 3244], cert. den. 96 LRRM 2514.)

Here, the Association's position favoring application of the combining of schools criteria, eventually adopted by the District, was based on relevant considerations. As previously discussed, the negotiated agreement certainly could be reasonably interpreted in this way. See Miami Copper Co. (1971) 190 NLRB 45 [77 LRRM 1033]. In fact, on two previous occasions when schools in the District had been closed, one under a transfer procedure similar to the one in the negotiations agreement, a combining of schools approach had been used. This was the reason, according to Mr. Feucht, that he originally proposed that the combining of schools approach be applied in this case.

Furthermore, the combining of schools approach would result in the least dislocation of teachers from existing teaching assignments. Since the ninth grade was to be moved from senior to junior high school, some high school teachers would have to be transferred to the junior high school whichever approach was used. Application of the principle that teachers follow their students would be expected to minimize such senior to junior high crossovers.

As the Supreme Court said in Humphrey v. Moore (1964)

375 U.S. 335 [55 LRRM 2031 at pp. 2037-8]:

[A union] must be free to take a position on the not so frivolous disputes. Nor should it be neutralized when the issue is chiefly between two sets of employees. Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes.

The district superintendent's comments in his grievance response, indicating his agreement with Charging Parties that the District intended "new" schools, does not affect this reasoning. First, Mr. Lambert's testimony explained the reasons behind the District's use of the term "new" schools, which reasoning had nothing to do with interpretation of the negotiated agreement. Secondly, even if it were an interpretation of the agreement, such a unilateral interpretation by the District or its agent necessarily must give way to the interpretation jointly arrived at by the two parties to the agreement.

Therefore, it is found that there was a rational basis for the Association's position on reorganization transfers and it was not arbitrary, discriminatory, or taken in bad faith. Accordingly, there was no breach of duty of fair representation by either the Association or the District. Rather, as stated by Justice Goldberg in a concurring opinion in Humphrey v. Moore, supra, 55 LRRM 2031, at p. 2040:

It necessarily follows from [Ford Motor Co. v. Huffman] that a settlement of a seniority dispute, deemed by the parties to be an interpretation of their agreement, not requiring an amendment, is plainly within their joint authority.

With respect to the Charging Parties' further contention that the Association committee which met with the District lacked authority, it is found that Charging Parties were not denied fair representation in this respect either. Absent evidence that the Association's position to apply combining of schools criteria was arbitrary, discriminatory or in bad faith, the fact that there was no formal resolution by its representative council to adopt this position (which was a common practice) is not a sufficient basis by itself to find a violation of the duty of fair representation. As was held in Waiters, Local 781 v. Hotel Association (D.C. Cir. 1974) 498 F.2d 998 [86 LRRM 2001, at p. 2002], with respect to the manner in which a negotiating position was adopted which favored one group within the union at the expense of another:

[T]here is no requirement of formal procedures. The fiduciary principle precludes arbitrary conduct, but it must not be stretched so as to 'judicialize' the conduct of the affairs of the Union, and to cut athwart a common sense and practical approach toward resolution of problems and disputes that is fair in its essence without being rigid in its procedures.

See also Bures v. Houston Symphony Society (5th Cir. 1974) 503 F.2d 842 [87 LRRM 3124] in which the above language was cited with approval in a case involving a union's determination of the merits of a member's grievance.

If there were other independent evidence tending to show that the Association acted arbitrarily, discriminatorily or in bad faith in adopting its position on the reorganization, then the lack of formal authorization might be an additional factor to be considered. But as discussed below, there is no evidence that

this was the case.

The testimony of Mr. Feucht, then the Association president, shows that the proposed position was communicated to the executive board, representative council, and general membership and discussed at various meetings of the above groups well before the January 1977 meetings with the District. At a January 5, 1977 representative council meeting, it was determined that Mr. Feucht should contact the District administration to discuss the guidelines for the reorganization assignments. By memorandum of January 17, 1977, the District informed teachers of their new assignments and the method by which they were determined.

There is no evidence that any member of the negotiating unit complained about the procedure adopted for reorganization transfers before February 1, 1977 when, after the fact, two junior high representative council members questioned the Association's position on the reorganization.

Thus, it is found that the manner in which the Association adopted its position on the reorganization transfer issue, although not a model of parliamentary procedure, was not arbitrary, discriminatory or in bad faith, the test by which to judge an alleged breach of the duty of fair representation.

Charging Parties further contend that the agreement between the Association and the District at the January meetings was intended to benefit the members of the Association committee which met with the District.

It is true that the three persons chosen by Mr. Feucht to accompany him to the meetings with the District were senior high school teachers. There were, however, legitimate reasons for choosing these individuals. Mr. Weston was chairman of the bargaining team and a nonvoting member of the executive board, and also a member of the committee that developed the District transfer policy. Ms. Baird was secretary of the bargaining team and chairperson of the certificated employees council when the original transfer policy was negotiated. Mr. Moore was the treasurer of the Association and an officer whose teaching schedule permitted attendance at the meeting.

There is no evidence, other than Charging Parties' bare assertion, that these three high school teachers pursued their own individual interests rather than those of the Association as a whole, or that Mr. Feucht selected them for this reason. The Association's proposed position, which was eventually adopted by the District, was made known by Mr. Feucht in his December 10, 1977 memo, while these three teachers apparently were not chosen by Mr. Feucht until after the January 5, 1978 representative council meeting. There is no evidence that they had any input into the Association's position. Also, Mr. Feucht originally articulated the Association's position and was the chief spokesperson at the meetings with the District. Mr. Feucht was a junior high school teacher both before and after the reorganization and had no interest in teaching at the senior high school. There is no evidence that his selection as junior high school area chairman was in any way connected with his position

on reorganization transfers.

Furthermore, at least one of the three persons chosen by Mr. Feucht, Mr. Moore, had over 31 years seniority with the District and would not have been affected whichever transfer criterion was selected.

Thus, it has not been shown that there was anything unfair in the selection of the Association committee which met with the District.

4. The Association's refusal to take Charging Parties' grievance to arbitration.

In refusing to take Charging Parties' grievance to arbitration, the Association's executive committee made it clear that it did not consider the merits of the grievance, but rather grounded its decision on the anticipated effects upon the negotiating unit as a whole.

Under the federal law, the executive committee clearly was wrong in not considering the merits of the grievance. The likelihood of success is one of the most important factors to be considered. As the Supreme Court said in Vaca v. Sipes, supra, 64 LRRM at p. 2378:

In administering the grievance and arbitration machinery as statutory agent of the employees, a union must, in good faith and in a non-arbitrary manner, make decisions as to the merits of particular grievances. See Humphrey v. Moore, 375 U.S. 335, 349-350, 55 LRRM 2031; Ford Motor Co. v. Huffman, 345 U.S. 330, 337-339, 31 LRRM 2548.

Although the factors upon which its decision was based certainly were worthy of consideration, the executive committee should have weighed their importance against the likelihood of success in the arbitration.

All other considerations being equal, and even though the merits of a grievance is only one factor to be considered, it is obvious that if a reasonable assessment of a particular grievance reveals that it has little merit, it has less chance of being taken to arbitration than if otherwise. If this is the case, then the converse should also be true--if a grievance has a good chance of success it should have a greater chance of being taken to arbitration.

The problem with the executive committee's failure to consider the merits of the grievance, and the reason why this failure is found to be arbitrary, is that the process utilized by the executive committee would not allow for a different result, acceptance of the arbitration request, regardless of the merits of a grievance. This is not to say that every meritorious grievance must be taken to arbitration. Vaca v. Sipes, supra, does not require this result. But the grievance itself, as well as whatever other factors may have bearing on the decision to arbitrate, is entitled to consideration.

Thus the Association's failure to give any consideration at all to the merits of Charging Parties' grievance, by itself, was arbitrary and violated the duty of fair representation under section 3544.9, and thus also violated section 3543.6(b).

5. The allegations dismissed at the hearing.

As previously stated in the Procedural History, the allegations that both parties negotiated in bad faith in violation of sections 3543.5(c) and 3543.6(c), and that the District dominated and interfered with the Association in

violation of section 3543.5(d), were dismissed at the hearing.

It follows from the conclusions already reached that there is insufficient evidence to support an allegation that the District and Association negotiated in bad faith. As to the allegation of domination and interference by the District, there similarly is no evidence to support the allegation. It was the Association which prevailed upon the District to alter the method of making teacher assignments after the reorganization.

#### REMEDY

The only unfair practice violation which has been found is that the Association violated its duty of fair representation by not considering the merits of Charging Parties' grievance. If it were clear that the Association wrongfully refused to arbitrate the grievance, an order compelling arbitration would be appropriate. Vaca v. Sipes, supra, 64 LRRM at 2377. In this case, however, where it is not clear that there was a wrongful refusal, it is appropriate to order the Association to reconsider Charging Parties' arbitration request taking into account the merits of the grievance and, if upon appropriate consideration it decides that arbitration is desirable, a further order directing arbitration of the grievance.

With respect to Ms. Lyen, since she really does not have sufficient seniority in the District, even if an arbitrator found that reassignments should have been based on seniority, she still would not be entitled to any high school Spanish classes. To order arbitration or other affirmative remedy in her case would be an idle act. See, Teamsters Local 705 (1974) 209 NLRB 292 [86

LRRM 1119], enf. (7th Cir. 1976) [92 LRRM 2137]; Buffalo Newspaper Guild (1975) 220 NLRB 79 [90 LRRM 1462]; Belanger v. Matteson (R.I. Sup. Ct. 1975) 91 LRRM 2003, at pp. 2008-9.

However, the Association will be ordered to cease and desist in the future from failing to consider the merits of grievances brought by Charging Parties or other unit members. The following applies only to Ms. McElwain.

When reconsidering the arbitration request, the Association must consider the individual merits of the grievance, i.e., the chances that an arbitration award would favor Ms. McElwain. It may also consider other relevant factors such as the political climate in the District and the effect of the arbitration award on the negotiating unit as a whole. Each factor considered should be weighed against the others in arriving at a final decision. The exact weight to be assigned each factor cannot be predetermined. As long as the Association's decision has a rational basis and is not arbitrary, discriminatory or in bad faith, there will be no breach of the duty of fair representation.

As a further remedy, the Association also will be required to post copies of the order.<sup>8</sup>

With respect to the District, if the Association decides to arbitrate the grievance, the District also will be ordered to

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<sup>8</sup>Posting effectuates the purposes of the EERA in that it serves to inform employees of the resolution of this controversy. See NLRB v. Empress Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415]; NLRB v. Pennsylvania Greyhound Lines, Inc. (1938) 303 U.S. 261 [2 LRRM 600].

arbitrate the grievance without regard to any time limits or other similar prerequisites in the negotiated agreement. If in fact the grievance is found by an arbitrator to be meritorious, the District should not be shielded from having to remedy any wrongs which it may have committed. Cf. Hines v. Anchor Motor Freight, Inc. (1976) 424 U.S. 554 [91 LRRM 2481, 2485-7], where despite a final arbitration award, the employer was required to re-arbitrate because of the union's failure to represent the employee fairly in the first arbitration.

PROPOSED ORDER: Case No. SF-CO-23-77/78

Upon the foregoing findings of fact, conclusions of law, and the entire record of Case No. SF-CO-23-77/78, and pursuant to section 3541.5(c) of the EERA, it is hereby ordered that the Castro Valley Teachers Association, its agents and other representatives shall:

A. CEASE AND DESIST FROM:

In the future, in determining whether to proceed to arbitration, failing or refusing to consider the merits of a grievance brought by Lois McElwain or Marie Lyen or other unit members.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

1. Reconsider Lois McElwain's request for arbitration of her grievance, and if upon appropriate consideration as set forth in this proposed decision it decides that arbitration is appropriate, proceed to arbitration with the grievance and fairly represent Ms. McElwain therein.

2. Prepare and post copies of this order for twenty (20) working days at its headquarters office and on bulletin boards in each school in the District where it customarily posts notices to certificated employees.

3. At the end of the posting period, notify the San Francisco Regional Director of the actions taken to comply with this order.

IT IS FURTHER ORDERED that the allegations in Case No. SF-CO-23-77/78 of unfair practices by the Association under section 3543.6(a) and (c), are hereby DISMISSED.

PROPOSED ORDER: Case No. SF-CE-112-77/78

Upon the foregoing findings of fact, conclusions of law, and the entire record of Case No. SF-CE-112-77/78, and pursuant to section 3541.5(c) of the EERA, it is hereby ordered that the Castro Valley Unified School District, its agents and other representatives shall:

A. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

1. If the Association requests arbitration of Ms. McElwain's grievance, proceed to arbitration without regard to any time limits or other similar prerequisites in the arbitration procedure in the negotiated agreement.

IT IS FURTHER ORDERED that the allegations in Case No. SF-CE-112-77/78 of unfair practices by the District under section 3543.5 (c) and (d), are hereby DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become

final on November 16, 1978 unless a party files a timely statement of exceptions and supporting brief within twenty (20) calendar days following the date of service of this decision. Such statement of exceptions and supporting brief must be actually received by the Executive Assistant to the Board at the headquarters office in Sacramento before the close of business (5:00 p.m.) on Tuesday, November 14, 1978 in order to be timely filed. (See California Administrative Code, title 8, part III, section 32135.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, part III, sections 32300 and 32305, as amended.

Dated: October 25, 1978.

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GERALD A. BECKER  
Hearing Officer