

primary issue presented to the Board is what limitations, if any, are imposed under the Educational Employment Relations Act¹ (hereafter EERA) on the use of service fees nonmembers may be obligated to pay to an exclusive representative pursuant to a negotiated organizational security provision.

Cumero's exceptions place in issue:

Whether the use of service fees to finance certain organizational activities violates his rights under the First Amendment to the United States Constitution and under EERA;

whether a nonmember must authorize in writing the deduction of service fees from his or her pay;

the standard of proof required of Respondent organization to justify its use of service fee funds;

whether a mere allegation of unlawful use of such funds is sufficient to state a prima facie violation of pertinent sections of the EERA and thus shift the burden of going forward to Respondent;

the adequacy of Respondent's internal rebate procedures; and

whether the absence of prehearing discovery deprived him of due process.

In addition, Cumero asks that the Board award him attorneys' fees.

With respect to those organizational activities Cumero alleges to be beyond the reach of service fee support, he

¹The Educational Employment Relations Act is codified at Government Code section 3540 et seq. All statutory references are to the Government Code unless otherwise specified.

specifically objects to lobbying, per capita payments by the exclusive representative to organizations with which it is affiliated, social and recreational activities, legal services, and publications and other communications to the extent that they do not directly relate to negotiations, contract administration, and grievance handling. In fact, it is Cumero's position that all permissible activities must be limited to these three functions.

Respondent, the exclusive representative of the King City Joint Union High School District's (hereafter District) certificated employees, disputes Mr. Cumero, who is a nonmember in the represented unit, on all points. In essence, it is Respondent's position that the only restriction on the use of service fee funds is the constitutional prohibition against their use for political or ideological purposes unrelated to collective bargaining. It therefore specifically excepts to the proposed ruling that would make the use of service fees impermissible to finance organizing and recruiting, social activities, charitable contributions and liability insurance made available only to members. Respondent also disagrees with the hearing officer's proposed finding that Cumero's prior authorization of the payroll deduction was required and contests his conclusion that a mere allegation of unlawful use of fees, unsupported by facts, is sufficient to establish a

prima facie unfair practice and shift the burden of going forward to the Respondent.

DISCUSSION

The initial matter this Board must address is the scope of PERB's authority to decide the issues raised on appeal. As an administrative agency, PERB is limited to deciding issues raised under the specific Acts entrusted to it. The EERA, under which this charge is brought, is one such Act. PERB must decide cases arising out of EERA on the assumption that the Act suffers no constitutional infirmity.²

Thus, the primary question to be addressed is whether the service fee requirement in evidence has violated any right vested in Mr. Cumero by the EERA. Cumero's charge alleges, in part, that the negotiated fee provision violates rights guaranteed him by section 3543 of the Act. This section provides, in pertinent part:

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

²California Constitution Article III, section 3.5.

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. . . . (Emphasis added.)

It is, of course, Cumero's right to refuse to participate in the activities of employee organizations, and that is the basis of the main charge. However, section 3546 of the Act provides:

Subject to the limitations set forth in this section, organizational security, as defined, shall be within the scope of representation.

(a) An organizational security arrangement, in order to be effective, must be agreed upon by both parties to the agreement. At the time the issue is being negotiated, the public school employer may require that the organizational security provision be severed from the remainder of the proposed agreement and cause the organizational security provision to be voted upon separately by all members in the appropriate negotiating unit, in accordance with rules and regulations promulgated by the board. Upon such a vote, the organizational security provision will become effective only if a majority of those members of the negotiating unit voting approve the agreement. Such vote shall not be deemed to either ratify or defeat the remaining provisions of the proposed agreement.

(b) An organizational security arrangement which is in effect may be rescinded by majority vote of the employees in the negotiating unit covered by such arrangement in accordance with rules and regulations promulgated by the board.

Section 3540.1(i)(2) defines organizational security:

(i) "Organizational security" means either:

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(2) An arrangement that requires an employee, as a condition of continued employment, either to join the recognized or certified employee organization, or to pay the organization a service fee in an amount not to exceed the standard initiation fee, periodic dues, and general assessments of such organization for the duration of the agreement, or a period of three years from the effective date of such agreement, whichever comes first.

If the mandatory payment of service fees constitutes "participation," then the apparent conflict between these sections must be reconciled. The Board finds no need for extensive analysis to reach the conclusion that the service fee requirement amounts to participation. Financial support of an organization's activity, though involuntary, is a factor both in making that activity possible and in pursuing it in a meaningful way. Neither of the parties to this action argues otherwise.

The validity of compulsory payments to labor organizations has long been established. In Railway Employees Department v. Hanson (1956) 351 U.S. 225 [38 LRRM 2099], the Supreme Court reversed the decision of the Nebraska Supreme Court which held that the provision of the Railway Labor Act (RLA) authorizing

union shop arrangements violated the First and Fifth Amendments of the United States Constitution. The Supreme Court found that Congress, under its interstate commerce powers, could enact the requirement of financial support of the collective bargaining agency by all who receive the benefits of its work; such legislation did not violate the two constitutional amendments. Id. 38 LRRM 2099 at p. 2104. The Court recognized the Congressional right to make the policy determination that the union shop was a stabilizing force in labor-management relations and served to promote industrial peace. The Court further rejected plaintiffs' argument that compulsory membership would impair their freedom of expression, finding that requiring financial support for the work of the union in collective bargaining did not, in and of itself, force ideological conformity. In International Machinists Association v. Street (1961) 367 U.S. 740 [48 LRRM 2345], the Court considered a claim that the RLA was violated when dissenting members' dues were used, in part, to finance certain political activities, a matter deferred by the Hanson Court. According to the court, the "fair share" obligation was designed to compel each represented employee to compensate the union for services performed but should not be applied to activities not contemplated by the Act.

Recently, in Abood v. Detroit Board of Education (1977) 431 U.S. 209 [95 LRRM 2411], the Supreme Court considered the

constitutional limitations on the use of agency fees in the public sector. Likening the Michigan statute's purposes to those of the RLA, the Court applied the Hanson and Street rationales, holding that public sector nonmembers could not be compelled to contribute to the support of all ideological causes they opposed, but could be required, as a condition of employment, to pay a fee to be applied toward matters related to the union's activities in collective bargaining, contract administration and grievance handling.

To compel employees financially to support their collective bargaining representative has an impact on their First Amendment interests. An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative. His moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan. One individual might disagree with the union policy of negotiating limits on the right to strike, believing that to be the road to serfdom for the working class, while another might have economic or political objections to unionism itself. An employee might object to the union's wage policy because it violates guidelines designed to limit inflation, or might object to the union's seeking a clause in the collective bargaining agreement proscribing racial discrimination. The examples could be multiplied. To be required to help finance the union as a collective bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit. But the judgment clearly made in Hanson and Street is that such interference as exists is constitutionally justified by

the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress. The furtherance of the common cause leaves some leeway for the leadership of the group. As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy. 431 U.S. 209, 222 [95 LRRM 2411 at 2416]. Emphasis added.

Like the Michigan statute considered in Abood, EERA is modeled after federal law. In interpreting this Act, PERB may find guidance in analogous federal legislation.³

We also note that it is an established principle of statutory construction that specific language controls or qualifies general language. Select Base Materials v. Board of Education (1959) 51 Cal.2d 640, 645; 335 P.2d 672. Provisions which are apparently in conflict or inconsistent can be harmonized by this rule.

In the construction of a statute the intention of the Legislature . . . is to be pursued, if possible; and when a general and a particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it. California Code of Civil Procedure section 1859.

³San Diego Teachers Assocation v. Superior Court (1979) 24 Cal.3d 1 [154 Cal.Rptr. 839; 593 P.2d 838] and Fire Fighters v. City of Vallejo (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507; 87 LRRM 2453].

Thus, the specific and unequivocal authority to negotiate a mandatory service fee found in section 3546 controls and qualifies the general right to refrain from participating in organizational activities expressed in section 3543. We therefore conclude that the "interference" with Cumero's right to refuse to participate in organizational activities resulting from his obligation to pay some service fee is justified by the California Legislature's assessment of the important contribution of organizational security arrangements to the system of employer-employee relations established in the EERA.

This is not to say that the amount of service fees that may be required is unlimited. Section 3540.1(i)(2), supra, limits the fee to not exceed dues paid by members. Further limitations, if any, would derive from Cumero's residual right not to participate surviving his obligation to contribute to the Association's costs which are "germane to collective bargaining."⁴ To balance Cumero's right against his obligation, he should not be required to support activities which are beyond the Association's representational obligations. For this reason, we reject the Association's argument that only constitutional (ideological) considerations apply. The fact that the Constitution does not prohibit certain uses of the service fee does not mean that EERA permits

⁴International Machinists Association v. Street, supra at p. 23.

them. PERB must look to the latter to define the permissible range of organizational activities for which Cumero may lawfully be required to pay his fair share through service fees.

We also think Cumero's "test" is too restrictive. The scope of representational obligations incurred by an exclusive representative extends beyond actual negotiations, contract administration and grievance adjustment. While EERA does not require the employer to negotiate on all matters of employer-employee relations, the representational rights and obligations of an exclusive representative reach beyond those matters subject to mandatory negotiations. Section 3543.2, after listing mandatory negotiable matters, continues:

In addition, the exclusive representative of certificated personnel has the right to consult on the definition of educational objectives, the determination of the content of courses and curriculum and the selection of textbooks to the extent such matters are within the discretion of the public school employer under the law. All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating, provided that nothing herein may be construed to limit the right of the public school employer to consult with any employees or employee organization on any matter outside the scope of representation. (Emphasis added.)

Additionally, the Act specifies a variety of employee and organizational rights which are not directly part of the processes Cumero identifies. These include the right to join and participate in organizational activities or to refuse to do

so (sec. 3543); to select an exclusive representative (sec. 3543); and to have access to work areas and certain of the employer's internal means of communications (sec. 3543.1(b)). Each of these rights, in turn, is protected by the further right to be represented by an employee organization in statutory unit determination and unfair practice proceedings conducted by PERB.

But the list does not end here, for each of these activities is intimately connected with, and often dependent upon, collateral organizational activities which must be ultimately considered as essential aspects of the representational function.

There will, of course, be difficult problems in drawing lines between collective bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibitive . . . [i]n the public sector the line may be somewhat hazier. The process of establishing a written collective bargaining agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining table, but subsequent approval by other public authority; related budgetary and appropriations decisions might be seen as an integral part of the bargaining process. Aboud, supra, 431 U.S. 209, 236 [95 LRRM 2421].

Clearly, many of the terms and conditions of employment applicable to the school system are created or affected by statute. Holidays, layoff and dismissal, tenure, professional certification and retirement are but a few examples. Matters of educational policy, whether or not subject to negotiations or consultation, which are within the range of employees' professional concerns, are formulated or directed by the Board of Education. Such matters are most certainly included among those constituting the "cause which justified bringing the group together." Id. at p. 222 [2416].

The United States Supreme Court, upholding the right of a union to distribute leaflets urging employee action on certain political issues (right-to-work and minimum wages), acknowledged that concerted activity for mutual aid and protection includes seeking improvement of working conditions through channels outside the immediate employer-employee relationship. Eastex v. NLRB (1978) 437 U.S. 556 [98 LRRM 2717].⁵

An examination of the specific issues raised by the parties should serve to illuminate the standard we perceive and as guidance in resolving the difficult problem of drawing lines

⁵While EERA does not employ the term "mutual aid and protection" found in NLRA section 7, its central thrust is to provide public school employees with the right to advance their employment relations interests by joint participation in organizational activity. The Eastex principle is relevant.

between activities for which contributions may be compelled and those nonrepresentational activities for which compulsion is prohibited.

Lobbying and Other Political Activity

We find in Abood no disapproval of the use of service fees for all political activity. Rather, the Court barred the use of fees only for such activity whose ideological purpose is unrelated to the representational process. Recognizing the difficulty of drawing lines between permitted collective bargaining expenditures and prohibited ideological spending in the public sector, the Court noted:

The process of establishing a written collective bargaining agreement presenting the terms and conditions of public employment may require not merely concord at the bargaining table, but subsequent approval by other public authorities; related budgetary and appropriations decisions might be seen as an integral part of the bargaining process. Id. at p. 236 [2421]⁶

Implied in this limited prohibition and the Court's approval of Hanson and Street, is the acknowledgment that union involvement

⁶Seay v. McDonnell Douglas Corp. (CD Cal.1973) 371 F. Supp. 754 [85 LRRM 2007] reversed on other grounds 1976, 9th Cir. 533 F.2d 1126 [92 LRRM 2063] may offer some assistance in distinguishing between allowable and non-allowable uses of service fees. The Court, in dictum, suggested the following uses would not be permitted: to support candidates for public office, contributions to political parties or to finance meetings and publications in support of such candidates or parties.

in some political activity may be required in pursuit of representational objectives.⁷ As Rehmus and Kerner express it:

Union objectives and union members' economic interests are as directly affected by tax policies as bargain wage rates. National health and Social Security legislation are no less important to employee economic interests than negotiated fringe benefits plans. Moreover, these arguments apply with greatly increased force and logic when one considers the fact conceded by the Court in Abood - that collective bargaining in the public sector is inherently political in any event.⁸

The test, therefore, is not simply the presence of political action but whether employee representation is the underlying purpose of such action.

CTA conducts lobbying activity through its Governmental Relations Department. This department is staffed by employees paid out of dues and service fees who monitor and testify on proposed legislation concerning school financing and employee working conditions.

⁷See also Eastex, supra; Demille v. American Federation of Radio Artists (1947) 31 Cal.2d 139.

⁸Charles M. Rehmus and Benjamin Kerner, "The Agency Shop After Abood: No Free Ride, But What's the Fare?" (October 1980) Industrial Labor Relations Review, Vol. 34, No. 1, reprinted in California Public Employee Relations No. 47, (December 1980), Institute of Industrial Relations, University of California at Berkeley.

The Association has also established an "Association for Better Citizenship" (ABC), essentially a political arm whose activities are directed toward the campaigns of individuals seeking local office and the support of or opposition to ballot propositions relating to teachers' employment concerns. ABC's activities are supported by voluntary contributions.

Some CTA staff members spent a portion of their time working on Propositions 6, 8, and 13. Each related directly to teachers' employment conditions or school financing.⁹

The record indicates that one staff employee was paid for such services out of the ABC voluntary funds. Another employee so engaged testified that he did not know the source of the compensation for this service.

CTA admits that it actively supports specific candidates for local office who are sympathetic toward teachers' concerns and supportive of their negotiation objectives.

We are mindful that candidates for public office and political parties operate in a broad arena and deal with an almost unlimited variety of ideologically saturated issues. Many of these matters - possibly most of them - bear no reasonable relationship to the employees' representational interests. We find that forced contribution to union action in

⁹Proposition 6 would have banned homosexuals from teaching in the public school system. Propositions 8 and 13 were property tax measures which would have a significant impact on school funding.

support of or opposition to individual candidates and political parties must be precluded.

Although there is no evidence that service fees are contributed to such candidates, there is evidence that teachers are trained by CTA to participate in local elections. The cost of such training and the source of funds to meet such costs is not made clear in the record. To the extent that service fees may be used to support candidates for local office or otherwise to assist in such campaigns, such as the training of teachers here, the Association has improperly interfered with Cumero's right to refrain from participation in activities which are outside the reach of CTA's representational functions. Since the evidence of CTA's improper use of service fees, if any, cannot be determined from the record¹⁰ and since Cumero has established an arguably improper use of his fees for this purpose, the matter will be remanded to the Chief Administrative Law Judge to take appropriate evidence and action.

Organizing and Recruiting

The goal of all organizing is to bring employees together in pursuit of the common cause.

¹⁰The evidence only indicates that CTA employed a consultant to train teachers, but fails to indicate the source of the consultant's compensation.

Union was essential to give laborers an opportunity to deal on equality with their employer . . . to render this combination at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because, in the competition between employers, they are bound to be affected by the standard of wages of their trade in the neighborhood.¹¹

A union's ability to secure representation rights and to maintain them in the face of fluctuating employee attitudes, shifting concerns, and encroaching competitive organizations requires that the organizing activity be ever ongoing. Particularly in view of the acknowledged political aspects of representation in the public sector and the fact that legislation affecting public school employees is almost always applicable on a statewide basis,¹² representational activity in the political arena is likely to be more effective when founded on a broad base of organized employees.

Overall union effectiveness is a factor of membership size and concomitant financial capability. It is from such union strength that the nonmember derives the benefit of representation. Accordingly, he may properly be compelled to

¹¹American Steel Foundries v. Tri-Cities Central Trades Council (1921) 257 U.S. 184 at 209; 66 L. Ed. 189. See also Theodore Kheel Vol. I Labor Law Matthew Bender NY (1980).

¹²There are over one thousand separate public school employers.

contribute a service fee towards the organizing activity, at least with respect to those employees covered by EERA.

Payment to Affiliates

The benefits of affiliation is reflected in its purpose: achievement of the consolidated strength of many organizations working together in pursuit of the common cause recognized in American Steel Foundries, supra. Payment to organizations with which the exclusive representative is affiliated ultimately inures to the benefit of the service fee payor in his employment relationship. Such affiliation can augment and enhance staff and legal assistance, training programs, research, communications and a host of activities designed to enhance the exclusive representative's own representational services. For these reasons, affiliation dues may be financed from compulsory service fees.

Publications

The vital role of communication between the exclusive representative and its constituents, the employer or the public in the representational process needs no expansive discussion. The issue raised is whether service fees should be apportioned to reflect the ratio of representational and nonrepresentational matters contained in the organization's publication.

Protection of Mr. Cumero's rights does not require an algebraic approach by this Board. Where the content of the

publication is representation oriented, no apportionment shall be required. Demanding column-inch exactitude in the resolution of disputes of this kind would place an undue and chilling burden on the very communications which redound to the benefit of all employees represented.

The [financial support] that may be lawfully imposed . . . relates . . . to the work of the union in the realm of collective bargaining. No more precise allocation of union overhead to individual members seems to us to be necessary . . . (Hanson, supra, at p. 235.)

CTA has several official publications, all of which are designed to either build a bond among teachers throughout the State around employment and professional issues, or to disseminate information on legislation and other political issues affecting teachers, or to instruct them in the most effective methods of collective bargaining. The publications are used both as an organizing tool and a teaching device to make CTA members more effective in their representational role.

In addition to the monthly newspaper, the CTA Action, the Association publishes manuals on strengthening teachers' positions during negotiations (Flying Colors); on public relations and media access concerning collective bargaining issues (Call to Action); and on organizing the community in support of collective bargaining demands (Blueprint for Community Action). Service fees spent on all of these is

permissible because of publications' direct relationship to the effective use of collective bargaining.

Administrative Expenses

The operating costs of the exclusive representative cannot reasonably be separated from its representational services. Rent, utilities, stationery, salaries and other costs of doing business provide the very means by which such services may be carried on. To deny the organization the right to apply service fees in meeting such costs would at once burden members with the exclusive obligation to support services beneficial to nonmembers and exempt such nonmembers from the requirement that they pay for representational services received.

However, where the organization maintains an operation which is unrelated to its representational duties, which is administered substantially independently of permissible functions, and where the costs of such administration are severable from permissible administrative costs, service fees should not be utilized to finance them.¹³

Social Activities

Cumero does not provide any evidence, either through direct or cross-examination, as to the nature of so-called social

¹³Here, for example, the Association maintains a political affairs department which is financed entirely by voluntary contributions.

activities. Nominal identification of such activities in the Association's budget is not sufficient to support a finding of improper application of service fees.

"Social" activities may, in reality, be organizing and communication devices. Attendance at regular union meetings, conferences, workshops and planning sessions may be made more appealing by the inclusion of some social amenities. Similarly, activities which may be characterized as "social" or "recreational" may actually serve as inducements to attendance at organizing and membership recruitment functions, much in the nature of door prizes and other such incentives. The test remains the presence of an underlying representational purpose as revealed by the facts.

Charitable and Philanthropic Activities

The record identifies only one activity, the Martin Luther King Scholarship Fund, characterized in this manner by the charges.¹⁴ While such matters may not be so readily perceived as related to the Association's representational services as, say, organizing or administration, such a possibility is not foreclosed by the test we set forth here.

¹⁴The Fund, which is supported by voluntary contributions, is described in the record as providing scholarships to minority group members to prepare for leadership roles in education. It is unclear from the record whether administrative costs of the Fund are paid for by CTA.

It is common knowledge that the propriety of collective negotiation for teachers has been questioned and that teachers have been accused of placing their own interests in wages and working conditions over educational quality. Such criticism has created some public hostility toward collective bargaining in the school system. By its scholarship fund, CTA seeks to improve the public's perception of teachers' concern for educational quality and thereby create a more favorable public climate for the Association and its negotiating efforts. Thus, the scholarship fund has a sufficient relationship to CTA's representational obligations to justify the use of service fees in its support.

The Board has been unable to reach a majority position on the propriety of using service fees for the administration of the Martin Luther King Scholarship Fund. However, the Board has unanimously agreed that the use of service fees in furtherance of nonrepresentational functions is not prohibited where the cost of such functions are minor and cannot be severed from those incurred in support of representational activities. Consequently, the matter of the administration of the Scholarship Fund is remanded to permit Mr. Cumero to prove that service fees are utilized in administering this fund and, if so, to permit the Association to prove that the service fees used for this purpose are not refundable under the principles stated here.

Other exceptions

Payroll deductions of service fees do not require the prior written authorization of the payor.¹⁵ Section 45060 of the Education Code, relied on by Cumero, refers expressly to membership dues.¹⁶ It makes no reference to service fees. Although the Legislature has amended Education Code sections 45168 and 88167 to allow classified employees the

¹⁵While the California Attorney General's contrary opinion (60 Ops. Cal. Atty. Gen. (1977) 370) is to be given weight by an adjudicatory body, it is not binding thereon. The Board finds ample reason here for reaching a different conclusion.

¹⁶Education Code section 45060 provides, in pertinent part:

Deductions for organization dues

The governing board of each school district when drawing an order for the salary payment due to a certificated employee of the district, shall with or without charge reduce the order by the amount which it has been requested in a revocable written authorization by the employee to deduct for the purpose of paying the dues of the employee for membership in any local professional organization or in any statewide professional organization, or in any other professional organization affiliated or otherwise connected with a statewide professional organization which authorizes such statewide organization to receive membership dues on its behalf and for the purpose of paying his pro rata share of the costs incurred by the district in making the deduction. (Emphasis added.)

option of making direct payments to the organization or having such payments deducted from their payroll, neither section requires prior authorization for deductions from nonmembers' salaries. Section 45060 remains unchanged. Nor has any other legislation passed since EERA's enactment requiring prior employee authorization for the deductions.

More significantly, membership in an employee organization is entirely voluntary. It is reasonable for the employer to be given evidence of that voluntary enrollment before deductions from payroll are made. Service fees, however, are mandatory if negotiated pursuant to the legislative authority found in EERA section 3546. Prior approval of the payor is not only unnecessary but inconsistent with the involuntary nature of such fees. Withholding approval would enable the nonmember to circumvent the legislative purpose and negotiated agreement. To provide involuntary payors with this option would inevitably lead to unduly burdensome collection problems and ultimately to the wholesale enforcement of the employment termination provisions of section 3540.1(i), a consequence that would be detrimental to the educational system and to peaceful labor relations in the districts. It is for this reason that we also find additional ground for holding that the Education Code provision is inapplicable to a deduction of service fees.

Prehearing Discovery is not required of an administrative agency except in limited circumstances inapplicable here.¹⁷ PERB does not provide for prehearing discovery. The record indicates that Mr. Cumero has had full opportunity in the proceeding below to examine and cross-examine witnesses and to obtain and inspect all requested organizational records. We fail to find in these circumstances a denial of due process.

Cumero's Request For Attorney's Fees, raised for the first time in his exceptions on appeal, is denied. In Unit Determination, State of California (12/31/80) PERB Decision No. 110c-S, the Board adopted the standard used by the National Labor Relations Board in unfair practice cases to determine when such awards would be made in representational cases. We are persuaded that the same standards should apply to requests made in unfair practice cases. Thus, attorney's fees will not be awarded to a charging party unless there is a showing that the respondent's unlawful conduct has been repetitive and that its defenses are without arguable merit. (See Tiidee Products, Inc. (1972) 194 NLRB 1234 [79 LRRM 1175]; Heck's, Inc. (1974) 215 NLRB 765 [88 LRRM 1049]; Wellman Industries, Inc. (1980) 248 NLRB 29 [103 LRRM 1483].

¹⁷See Stevenson v. State Board of Medical Examiners (1970) 10 Cal.App.3d 433; Romero v. Hern (1969) 276 Cal.App.2d 787.

The instant case cannot be so characterized. Cumero's further insistence that attorney's fees are in order because of the constitutional issues presented is inappropriate. As already indicated, PERB is dealing here solely with allegations of violations of the EERA.

The Burden of Proof

Cumero argues that because the uses to which his fees are put are solely within the respondent's knowledge, he should not be obligated to provide facts sufficient to constitute a prima facie charge; that the Association has the burden of going forward and proving that its use of his fees is permissible; and that, because of the constitutional issues involved, the Association must prove its case by "clear and convincing evidence" rather than by a mere preponderance thereof.

PERB rules require that unfair practice charges must be supported by statements of fact¹⁸ and proved by a

¹⁸California Administrative Code, title 8, section 32615 provides in pertinent part:

(a) The charge shall be in writing, signed by the party or its agent and contain the following information:

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(4) The sections of the Government Code alleged to have been violated;

(5) A clear and concise statement of the facts and conduct alleged to constitute an unfair practice, including, where known, the

preponderance of the evidence.¹⁹ There is no provision for waiver of these regulations. The Board recognizes that detailed information concerning the use of service fees may be within the representative organization's exclusive knowledge. Nevertheless, sufficient information is almost always available to nonmembers. Insurance programs, philanthropic activities, social events and political activity, as well as preparation for and the progress of collective negotiations, are usually publicized in organizational literature and openly discussed among unit employees and may be reported in local media. Charges based on such information, even if made upon the information and belief of the charging party, may suffice to establish a prima facie basis for issuance of a complaint. Further, a complete report of its financial transactions must be filed with PERB annually by each exclusive representative and, as a public document, would be available to nonmembers (section 3546.5 and Rule 32125). While, in this instance, the disclosure requirement is of limited use because most of

time and place of each instance of respondent's conduct, and the name and capacity of each person involved.

¹⁹California Administrative Code, title 8, section 32178 provides:

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

Cumero's service fees were used by the statewide Association,²⁰ we note that the state Association was joined as an indispensable party and was subject to examination about its use of the service fees.²¹ Therefore, Charging Party had the opportunity during the hearing to obtain full disclosure of precisely how CTA spent its budget and of the purpose of virtually every activity in which the local and statewide organization engaged.

The Prima Facie Case

We reject CTA's argument that Charging Party did not make a prima facie case. His original charges alleged that EERA had been violated in that the agency fee collected exceeded the "cost to Respondent in performing its duties to nonmembers as compared to the benefits to Petitioner," and that, consequently, a nonmember will pay more than a member for benefits received. At the opening of the hearing, in response to a request by the hearing officer, Charging Party further

²⁰See David W. Link v. California Teachers Association and National Education Association (12/29/81) PERB Order No. Ad-123. Two of four Board members found that CTA was not the exclusive representative of the Antioch Unified School District's certificated employees and, for that reason, was not required to file financial disclosure statements. Two other members found that nonmembers did not have standing to compel an organization to file the statements, and therefore did not reach the issue of whether CTA was required to file statements.

²¹For this reason we find it unnecessary to decide whether PERB may subpoena nonexclusive representatives.

defined the "cost of performing duties" as the cost of collective bargaining. These facts raised a sufficient legal issue to permit the hearing to proceed. While particularization may have been justified, CTA cannot claim prejudice, since it had exclusive control over information concerning its expenditures and could defend or admit the charges as it saw fit. In presenting his case-in-chief, Cumero demonstrated through testimony and exhibits specific uses of service fees which he contended were illegal. Thus, a prima facie case was established and the Association had the burden of going forward.

Cumero's contentions concerning the level of evidence required is rejected. PERB's determination is limited to the question of whether an unfair practice has been committed under EERA. Standards for constitutional challenges, if different, are not applicable to PERB's proceedings.²²

The Association's Legal Costs

Cumero objects to Respondent's use of his service fees for legal services utilized in the instant case.

²²See Mt. Healthy City School District Board of Education v. Doyle (1977) 429 U.S. 274 where the United States Supreme Court required that the employer justify its actions by a preponderance of the evidence even though an employee had asserted a violation of his constitutional rights by the employer.

Respondent seeks to enforce its negotiated agreement and defend itself against the charge that it has breached the duty of fair representation it owes Cumero. To accept Cumero's argument with respect to these purposes would be inconsistent with the holdings in this case approving the use of fees in pursuit of the organization's representational obligations. Further, the use of service fees to defend against a charge that the Association violated its duty of fair representation is not impermissible unless the defense is frivolous or taken in bad faith. Defending charges against itself preserves the strength and integrity of the exclusive representative, and thus benefits all unit members.

Group Legal Services

The record indicates that these services are for the representation of members and nonmembers alike on employment-related matters only. Examples cited in the record include grievance handling, representation in layoff, dismissal, credential revocation hearings, and unfair practice charge cases. These services are available through law firms on a statewide basis to supplement "in-house" staff availability. They are services toward which Cumero is properly obligated to contribute through his service fees.

Insurance Programs

The insurance program involved here is described as coverage for members' liability arising in the course of their

employment. The Board has not been asked to determine whether such job protection is a subject available to the negotiation process. We do not address that question now. However, insofar as this insurance does have a relation to one aspect of the employees' working conditions, it is of "representational" character. By providing free insurance to members only, the Association is, in effect, discriminating against Cumero in two ways: (1) it has addressed a working condition common to all employees in the unit only on behalf of those who are members; and (2) by denying this representational service to Cumero, CTA is offering more representational service to its members for the same monthly amount of dues as Cumero is expected to pay in service fees. Stating it otherwise, the Association is charging Cumero more for those services which are available to members and nonmembers alike. A refund in the amount of the Association's cost for this insurance should be made to Cumero and his future agency fee requirement should be reduced accordingly.

The Duty of Fair Representation

Cumero charges that the Association breached the duty owed him of fair representation²³ by imposing a discriminatory

²³Section 3544.9 reads:

The employee organization recognized or certified as the exclusive representative

charge for its services. His theory is that since his fee obligation is equal to the members' dues, he is paying more for the limited service he must support. As stated above, such a charge does have merit as to the Association's utilization of service fees to provide classroom liability insurance for members only. Beyond this, Cumero has failed to prove that he receives less compensable service than do members or that he is paying more for those services than do members.

The Rebate Procedure

Absent express statutory provision to this effect, we are without authority to refuse to hear an unfair practice charge.²⁴ Nor may we establish a general exhaustion requirement, if at all, through case adjudication rather than by appropriate rulemaking. In the instant matter, Respondent's rebate procedure seems to require submission to final binding arbitration. California public policy looks with disfavor on involuntary arbitration arrangements.²⁵

for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit.

²⁴It is possible that such charges can be avoided or minimized if the parties were to resort to internal rebate procedures.

²⁵See Code of Civil Procedure section 1281.2 (agreement to arbitrate prerequisite to obtaining court order compelling a party to arbitrate); Wheeler v. St. Joseph Hospital (1976) 63 Cal.App.3d 345 [133 Cal.Rptr. 775]; Ramirez v. Superior Court (1980) 103 Cal.App.3d 746 [163 Cal.Rptr. 223]. See Also Nolde

Service Fees as Condition of Employment

CTA excepts to an ambiguous ruling of the hearing officer which it construes as finding a negotiated service fee invalid if it does not require payment as a condition of employment.

Section 3541.5 of the EERA vests in PERB the initial, exclusive jurisdiction of the determination of unfair practice charges. The California Supreme Court has affirmed the preemptive nature of this Board's jurisdiction. San Diego Teachers Assocation, supra. We do not read section 3540.1(i)(2) as defining only permissible service fee arrangements. This language simply expresses the limits of the scope of negotiations on the subject of service fees. Just as this section permits service fees to equal membership dues, it permits enforcement through the termination provision. Just as this section permits the negotiation of agency fees which are less than membership dues, so it permits the negotiation of fees without the termination condition.

ORDER

Upon the foregoing facts and conclusions of law, the Public Employment Relations Board hereby ORDERS in the matter of William J. Cumero, Charging Party, v. King City High School District Association, CTA/NEA; King City Joint Union High

Bros. v. Bakery and Confectionery Workers (1977) 430 U.S. 243 [94 LRRM 2753] citing United Steelworkers of America v. Warrior and Gulf Navigation Co. (1960) 363 U.S. 574, 582 [46 LRRM 2416] for national policy.

School District; California Teachers Association; National Education Association, Respondents, that:

1. The proposed order of the hearing officer is vacated;
2. To the extent that activities of the King City High School District Association relate to its representational duties and obligations toward the employees in the pertinent unit of representation, it may use service fees to finance those activities.

3. The following organizational activities engaged in by the King City High School District Association relate to its representational duties and obligations toward the employees in the represented unit and may be financed through the use of service fees as provided for in the collectively negotiated agreement entered into by the King City Joint Union High School District and the King City High School District Association:

- a. Lobbying in favor of or in opposition to legislation or policy affecting school employees' interests with respect to matters of employer-employee relations;
- b. Contributing to campaigns for or against ballot propositions related to employees' interests with respect to matters of employer-employee relations and school financing;
- c. Organizing and recruiting;
- d. Payments for representational purposes to organizations with whom the Association is affiliated;
- e. Publications and communications;

f. Administrative expenses except as otherwise provided herein;

g. Social activities substantially related to the Association's representational services;

h. Charitable and philanthropic activities substantially related to the Association's representational services.

i. Legal fees incurred by the Association in seeking enforcement of the service fee provision in this case.

j. Group legal services related to representational matters.

4. The utilization of service fees to provide classroom liability insurance for members only is impermissible. /

5. Charging Party's request for attorney's fees is DENIED.

6. Payroll deduction of lawfully negotiated service fees may be made without the prior written approval of the service fee obligator.

7. A service fee arrangement which does not make payment as a condition of employment is not invalid.

8. The complaint issued herein pursuant to charges filed by William J. Cumero against the King City High School District Association, CTA/NEA; the King City Joint Union High School District; the California Teachers Association; and, the National Education Association are hereby DISMISSED, except as to the charge that the use of service fees to provide classroom

liability insurance is a violation of section 3544.9, which is SUSTAINED, and except as to paragraph No. 9 following:

9. The Board REMANDS to the Chief Administrative Law Judge the question of whether respondent has improperly utilized Charging Party's service fees in support of candidates' campaigns for public office.

The Board also REMANDS to the Chief Administrative Law Judge to determine whether service fees were used in the administration of the Martin Luther King Scholarship Fund and, if so, whether such use is not refundable pursuant to principles enunciated in this decision.

10. The Board hereby ORDERS the Association to refund to Charging Party the pro rata share of service fees collected which have been used to provide classroom liability insurance and, if found, the pro rata share of service fees used in support of candidates' campaign for public office, and to reduce his future fee obligation accordingly.

By: Harry L. Gluck, Chairperson John W. Jaeger, Member

Member Tovar's concurrence begins on page 38.

Irene Tovar, Member, concurring:

I concur with every aspect of the decision except for the portion dealing with administrative expenses incurred in relation to the administration of the Martin Luther King Fund. While I don't have a problem regarding the fund itself, since it is funded exclusively through voluntary contributions, I do feel the administration of the fund should be analyzed pursuant to the standard developed in this case.

There aren't sufficient facts on the record to indicate whether the operation of the fund is administered substantially independently, and whether the costs of such administration are severable from permissible administrative costs. If both of those conditions are proven, then I would agree that service fees should not be utilized to finance them. During the remand the Charging Party will have an opportunity, if he chooses, to present evidence of substantial independence of operation and severable administrative costs.

IRENE TOVAR, MEMBER

Member Moore's concurrence and dissent begins on page 39.

Barbara D. Moore, Member, concurring in part and dissenting in part:

I agree with the majority's approach to determining appropriate expenditures for agency fees and, with the exceptions noted below, concur with its opinion.

Deduction of service fees from employees' wages.

I disagree with the majority's analysis that no statutory authority is needed to withhold service fees from a service fee payor's paycheck and that, unless there is a statutory provision requiring prior authorization from an employee, money may simply be withheld from an employee's wages. Thus, according to the majority, since charging party's service fees were withheld at the time when section 45060 required authorization only for withholding union dues, no authorization was needed to withhold service fees.

The majority cites no authority for this proposition. The notion that a portion of employees' wages may be withheld absent a statutory prohibition to the contrary runs counter to the extensive statutory protection given employees' wages. The California codes are replete with provisions which afford such protection.¹

¹For example, the California Code of Civil Procedure at section 723.010 et seq. establishes the Employees' Earning Protection Law which restricts the procedures for garnishment and withholding of both public and private employees' wages. The Labor Code at section 300 sets forth a number of rigorous

More specifically, the majority's reasoning completely ignores significant Labor Code provisions which prohibit a public or private employer from withholding funds from an employee's paycheck unless the withholding has been specifically authorized. Section 221 of the Labor Code provides:

It shall be unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee.

Only section 224 provides exceptions to this broad prohibition and then only by permitting money to be withheld from an employee's paycheck where the employer is required or empowered to do so by state or federal law or when a deduction is expressly authorized in writing by the employee.² As noted above, there is no Labor Code section authorizing

restrictions on an employee's ability to assign his/her wages. An employee's claim for unpaid wages are given priority as among other creditors of the employer by the Insolvency Act, Code of Civil Procedure at section 1204. Section 487.020 of that code exempts from attachment all compensation payable to an employee for services performed.

²Section 224 provides in part:

The provisions of Sections 221, 222 and 223 shall in no way make it unlawful for an employer to withhold or divert any portion of an employee's wages when the employer is required or empowered to do so by state or federal law or when a deduction is expressly authorized in writing by the employee to cover insurance premiums, hospital or medical dues, or other deductions not

withholding of service fees from a certificated employee's paycheck with or without that employee's permission. Nor is there any provision in EERA authorizing withholding of service fees. Thus, unless one may infer such authority from EERA as a whole, the majority's holding directly contradicts the above Labor Code sections.

The majority argues that providing involuntary payors with the right to pay their service fees out-of-pocket would lead to unduly burdensome collection problems allowing the nonmember to circumvent the legislative purpose of agency shop. While it does not say so directly, the majority seems to rely on this potential difficulty to find that EERA must contain an implicit right to withhold service fees. This is simply an assumption which is at odds with both the Legislature's generally protective stance regarding workers' wages as well as with its specific statutory treatment of service fees.

Notably, the Legislature has authorized school employers to deduct service fees pursuant to a negotiated agreement covering classified employees, but it has reserved to the service fee payor a choice to either have the fees withheld or to pay fees

amounting to a rebate or deduction from the standard wage arrived at by collective bargaining or pursuant to wage agreement or statute, or when a deduction to cover health and welfare or pension plan contributions is expressly authorized by a collective bargaining or wage agreement.

out-of-pocket.³ Although the statute was enacted after passage of EERA and is prospective only, it evidences that, despite the potential problems noted by the majority, the legislative intent is to give service fee payors a choice of payment methods.⁴ This intent is ignored by the majority's interpretation when it asserts that authority to have an agency shop necessarily includes the authority to expropriate service fees from employees' wages without their authorization.

Since Cumero's service fee was owed to the Association, however, I would not refund the amount deducted, and I concur with the majority in this regard.

Prima Facie Case and Burden of Proof:

Charging Party contends that the simple assertion that agency fees have been improperly expended should be sufficient to state a prima facie case. He argues that since the Association has control of the information which will prove or disprove the charge, Respondent rather than Charging Party should then have the burden of going forward with the evidence.

³Assembly Bill No. 1797 introduced in April 1979 has been enacted into law and amends sections 45168 and 88167 of the Education Code. It became effective September 29, 1980 and has prospective effect only.

⁴Similar legislation is pending affecting certificated employees. Assembly Bill No. 404 would authorize either withholding service fees from a service fee payor's paycheck or, at the employee's option, paying the fee directly to the union. This bill also has prospective effect only.

Charging Party's amended charge simply stated:

That the unified membership fee, initiation fee and general assessment without membership has exceeded the cost to Respondent in performing his collective bargaining duties to nonmembers.

The Respondent made a preliminary motion to dismiss claiming that the Charging Party had not established a prima facie case. Section 32652(a) of PERB's rules provides in relevant part:

The Board shall issue a complaint if the charge and the facts presented in support of the charge constitute a prima facie allegation. . . . [Emphasis added.]

The majority's treatment of Cumero's charge is inconsistent. After quoting from Cumero's assertion that the agency fees collected exceeded Respondent's cost in performing collective bargaining duties, the majority concludes that the "facts" raised a "sufficient legal issue" to permit the hearing to proceed. Apparently it means by this that the charge stated a prima facie case. However, one must allege facts in support of a legal assertion in order to establish a prima facie case. I am at a loss to discern any factual allegations contained in Cumero's charge. While holding that Cumero's charge established a prima facie case, the majority actually bootstraps the facts presented at hearing to save Cumero's initial charge which, under the majority's analysis, was factually deficient. This development of the sufficiency of

Cumero's charge strains legal principles and is inconsistent with the majority's requirements as to facial sufficiency of a prima facie charge.

The confusion in the majority's discussion regarding establishing a prima facie case stems from its failure to deal with the issue of burden of proof. The hearing officer resolved this by finding that the charging party had successfully shifted the burden of proof to the respondent Association, citing Brotherhood of Railway Clerks v. Allen (1963) 373 U.S. 113, 118 [53 LRRM 2128, 2130]. That case involved a challenge by several union members in a union shop to the expenditure of union funds for allegedly political purposes which the union members claimed violated their First Amendment rights. In determining who had the burden of producing the evidence regarding the allegedly unconstitutional expenditures the Court stated:

Since the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of providing such proportion. [Supra, at p. 122.]

The majority rejects the hearing officer's determination of the burden of proof. And, while it fails to address the difficulty noted by the quoted language in the Allen case, it evidently disagrees with that Court's placement of the burden of proof. The majority maintains that the Charging Party bears

the burden hypothesizing that the information needed to establish a prima facie case is almost always available to a charging party. This assertion ignores the fact that most of the financial information that Charging Party needs can only be supplied by the state-wide or national affiliated organization, where the bulk of the service fees are spent⁵ and that, under the EERA [as we ruled in Antioch Unified School District (David W. Link) (12/29/81) PERB Order No. Ad-123], a nonmember such as Cumero is not entitled to the financial statements of the state-wide or national affiliates. (See majority opinion at page 28, footnote 20.) Thus, the majority's conclusion that the Charging Party must bear the burden because PERB rules regarding proof of unfair practice charges cannot be waived is unresponsive to the realities of the situation and ignores rather than reconciles these difficulties.

I would suggest that the Board establish the following standard regarding service fee cases. First, it is incumbent on the charging party to establish its prima facie case. The Board should therefore look at the alleged facts of each case to determine whether a prima facie case has been alleged. If an insufficient factual basis is alleged in the charge to

⁵In the instant case, the record demonstrated that only \$15 out of \$152, or less than 10 percent of Cumero's service fees, were retained by the local organization; the remainder was spent by either CTA or NEA.

establish a prima facie case, the Board should require the charging party to either amend the charge or allege why the information is not available.

I disagree with the hearing officer's view that a charging party may make a bare assertion that service fees have been spent improperly and thereby shift the burden of going forward to the Association. However, we need to provide a method by which the Board can reconcile the difficulty of requiring a charging party to carry the burden of proving the charge with the fact that only the respondent may have access to the necessary information to establish that charge.

The majority glosses over this problem by viewing Cumero's charge in concert with the facts addressed at hearing. This is both improper and, under the above test, unnecessary. Under my analysis, the Board's acceptance of Cumero's nonspecific charge in this case is appropriate. Since Cumero had no access to the needed CTA and NEA financial data, the nonspecific charge was sufficient to state a prima facie case. Cumero alleged that both CTA and NEA's financial records were not available to him until the time of hearing.⁶ Thus, in accordance with my test

⁶As noted above, the Board has no policy which would result in the availability of financial data from a state-wide or national affiliate of an exclusive representative. Cumero made several requests for subpoenas for prehearing discovery all of which were denied by the Board. The Board does not allow prehearing discovery. See majority opinion at page 25.

outlined above, Cumero adequately demonstrated that he did not have the necessary information to draft a more particularized charge.

Administrative Cost of Scholarship:

I dispute the lead opinion's assertion that the administrative costs expended in conjunction with the Martin Luther King Scholarship Fund may be financed through service fees.⁷ While I in no way minimize the value of such activity or its laudatory goal, I am unable to find that the fund's enhancement of the public's view of teachers' concern for educational quality is sufficiently related to CTA's representational goals. Any number of philanthropic endeavors could have similar results. Agency fee support, in my view, must be based on a more direct relationship to the organization's activities themselves than simply creating a more favorable climate in which such activities could be conducted. For this reason, I would not permit the use of service fees for administration of this scholarship fund.

It is not clear from the record, however, whether CTA rather than ABC funds are in fact used for such administrative purposes nor whether such funds are substantially independent

⁷Despite the fact that this fund is supported by voluntary contributions, my colleagues seem compelled to advise that the fund itself could be financed by service fees. Only the administrative costs are at issue, and it is with regard to these that I disagree.

and severable from other administration costs. I would direct on remand that Cumero be allowed to prove that the administrative costs are financed by CTA and that CTA be permitted to prove that they are not sufficiently distinct to warrant a rebate pursuant to the standard articulated in the majority opinion with regard to administrative costs in general.

Defense of Charges:

Finally, in discussing the Association's legal costs the majority states that defense of charges is an appropriate service fee expense. The issue in this case is whether service fees may be permissibly used to defend against charges that the Association violated its duty of fair representation. I limit my holding to that issue and do not decide whether defense of any other charges may be paid for from service fees.

Barbara D. Moore, Member