STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

WILCIA SMITH MOORE, Charging Party, v. BERKELEY FEDERATION OF TEACHERS, LOCAL 1078, AFL-CIO Respondent.	)	Case No. SF-CO-310 PERB Decision No. 658 February 22, 1988

Appearances: Wilcia Smith Moore on her own behalf.

Before Hesse, Chairperson; Porter, Shank, and Cordoba, Members.

CASE HISTORY

HESSE, Chairperson: Charging party, Wilcia Smith Moore, filed an unfair practice charge against respondent, Berkeley Federation of Teachers, Local 1078, AFL-CIO (Union), on February 2, 1987. In her charge, she alleged that respondent had violated sections 3543.2, 3543.5, and 3543.6 of the Educational Employment Relations Act (EERA or Act).[1] The charge was dismissed, in a letter attached hereto, on September 29, 1987, and an appeal was timely filed.

On appeal, this Board reviews the record de novo,[2] and

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

[2]Because our review of the file is de novo, we need not address charging party's request to remove the regional

examines the charge to see if it states a prima facie case. In other words, assuming for the purpose of analysis that the facts alleged are true,[3] is a violation of the Act stated?

In her charge, Mrs. Moore has identified sections 3543.2, 3543.5, and 3543.6 of the Act as the sections allegedly violated. Sections 3543.5(a)-(e), however, list unlawful practices committed by employers, and the respondent is not her employer. Thus, the allegation that section 3543.5 has been violated must be dismissed because charging party has not named her employer as the respondent.

As to the allegation that the Union violated section 3543.2, the mechanism by which this particular section has been addressed by the Board and the courts is through alleging a violation of either 3543.5 or 3543.6.[4] Section 3543.2 sets forth the scope of representation. A failure by the Union to bargain over those subjects would be a violation of section 3543.6(c). The charging party, however, lacks standing to allege such a violation.[5] The purpose of our agency is to

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attorney. At this point, the case is out of the hands of the regional attorney and is in the sole jurisdiction of the the Public Employment Relations Board (Board) itself.

[3]San Juan Unified School District (1977) EERB Decision No. 12. (Prior to January 1978, the Board was known as the Educational Employment Relations Board or EERB.)

[4]See, Oakland Unified School District v. PERB (1980) 120 Cal.App.3d 1007, wherein a change subject to negotiation under section 3543.2 was found to violate, inter alia, section 3543.5(c).

[5]The dissent, in postulating that an individual has standing to file a refusal to bargain charge against the union,

insure the statutory rights of the parties, so that the employer and the exclusive representative of the employees may meet and negotiate on terms and conditions of employment as defined in EERA.

The Board has recognized that the exclusivity of the chosen employee organization in representing unit employees is crucial to its ability to negotiate effectively and to stable employment relations generally. (Hanford Joint Union High School District (1978) PERB Decision No. 58.) While Hanford is distinguishable in that the Board held that a non-exclusive employee organization could not file a failure-to-negotiate

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confuses the union's duty to bargain in good faith with its duty to fairly represent all members of the bargaining unit. The latter duty may encompass elements of the former, but only within the context of standards set forth in Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124. Here, charging party has specifically disavowed any charge that the Union breached its duty of fair representation and has alleged an independent violation of section 3543.6(c). A search of fifty years of case law under the National Labor Relations Act has revealed no case wherein an individual employee had standing to charge a breach of the duty to bargain in good faith that was not part and parcel of a charge of a duty-of-fair-representation breach.

The standing requirement is basic, of course, to the notion that this system we administer is called collective bargaining. For an individual to have standing to allege an independent breach of the duty to bargain in good faith would not only undermine the union's authority, but would also likely leave a union so open to attack such that no union would ever want to be an exclusive representative and no employer would ever want to enter a collective bargaining agreement.

The dissent's concern for the individual's rights is amply addressed by holding the union to the duty of fair representation. To require more from the union (or the employer), vis-a-vis the individual, would destroy collective bargaining.

charge against the employer, we note that charging party in this case is not even a participant to the negotiations. A charge of a refusal by the exclusive representative to bargain in good faith must be brought by the employer, and cannot be brought by an individual employee because the union's duty to bargain is owed to the employer, not to the individual unit members. The union's duty to bargain in good faith as the exclusive representative carries with it the duty to fairly represent the interests of charging party in bargaining with the District. Under EERA, if the exclusive representative fails to negotiate a matter within the scope of negotiations, then it could be in breach of the duty of fair representation in violation of section 3544.9, but in so alleging that a union has violated that duty, a charging party must state facts that the union took action that was arbitrary, discriminatory, or motivated by bad faith.[6] Such was not alleged here. Thus, we conclude that the charging party's allegation that the Union breached section 3543.2, actionable through section 3543.6(c), must be dismissed for lack of standing.

Finally, charging party asserts independent violations of

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[6]Although the charging party alleges that she was denied representation on an Education Code contract matter and that the Union refused to file grievances, we note that, on appeal, charging party expressly states it is not her intention to allege a violation of section 3544.9. Instead, she alleges union leadership actions were the result of bad faith. Therefore, we do not analyze the charge within the context of the Union's duty to fairly represent all unit members.

3543.6[7] by the Union. No facts are alleged that even remotely constitute violations of 3543.6(a), (c), or (d). The remaining section that charging party alleges has been violated is 3543.6(b). This section protects employees against discriminatory treatment, reprisals, interference, restraints, and coercions by the union.[8] In alleging that a union has violated section 3543.6(b), a charging party must state sufficient facts to indicate the union interfered, discriminated, or took reprisals against her because of the exercise of rights protected by EERA.

Here, charging party has alleged racial discrimination by

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[7]Section 3543.6 reads:

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

[8]Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124.

the Berkeley Unified School District (District) and the Union.[9] Even if true, charging party has not charged the District, she has charged the exclusive representative. Charging party has already taken an appropriate course of action by filing against the District with the California Fair Employment and Housing Commission.

Read broadly, the charge could also be interpreted to allege discrimination by the Union for its failure to pursue charging party's case against the District for a contract under the Education Code. Interpreted in such a manner, the charge is still inadequate because there are no facts alleged to show that charging party was treated differently from other bargaining unit members because she engaged in activity protected by EERA.[10] Furthermore, the charge does not contain any facts that show the Union possesses the exclusive means by which she can obtain the remedy. The Union is not required by EERA to represent charging party in her effort to secure a contract under the Education Code. Accordingly, the failure of the Union to represent her in matters outside the

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[9]As with the allegation of racial discrimination by the employer, an allegation of racial discrimination by the Union may be cognizable under other statutes. See 42 USC section 2000e-2(c) (Title VII, sec. 703(c) of the Civil Rights Act of 1964); California Government Code section 12940(c) (California Fair Employment and Housing Act sec. 12940(c)).

[10]On appeal, charging party argues that she was a member of an employee organization rival to the respondent. Charging party did not so allege in her charge below, where the issue must first be raised.

collective bargaining setting are not violations of EERA.

ORDER

The unfair practice charge in Case No. SF-CO-310 is hereby DISMISSED.

Member Shank joined in this Decision.

Member Porter concurs in the dismissal.

Member Cordoba's concurrence and dissent begins on page 8.

Cordoba, Member, concurring and dissenting: I concur in the dismissal of the unfair practice charge. I must dissent, however, from that portion of the majority's opinion holding that no individual has standing to assert a violation of section 3543.6(c).

Since, as the majority opinion makes perfectly clear, "[n]o facts are alleged that even remotely constitute violations of 3543.6(a), (c), or (d)," either directly or derivatively, there is absolutely no need to make such a sweeping and potentially dangerous holding. Even assuming for the sake of argument that the circumstances in this particular case do not support a finding of standing (which the majority makes no attempt to do), this would not and does not justify the elimination of all individual standing under this section. To do so jeopardizes the few individual rights remaining under this Act.

The majority's conclusion that individual employees lack standing to assert a section 3543.6(c) violation is premised on the dubious proposition that the union's duty to bargain in good faith is owed only to the employer. No authority even arguably on point is cited in support of this position,[1] nor is any effort made to distinguish the union's duty to bargain under EERA from its federal counterpart, section 8(b)(3) of the National Labor Relations Act. This omission is surprising, for this Board has previously looked to National Labor Relations Board precedent for guidance on the nature and extent of a

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[1] Hanford is obviously inapposite.

party's duty to bargain under EERA. See Westminster School District (1982) PERB Decision No. 277 and Fremont Unified School District (1980) PERB Decision No. 136. In this instance, however, the NLRB's analysis runs directly counter to that of the majority herein: the union's duty to bargain in good faith is owed to the employees it represents as well as to the employer. Independent Metal Workers (Hughes Tool Co.) (1964) 147 NLRB 1573, 56 LRRM 1289. Accordingly, breach of the union's duty of fair representation can constitute bad faith bargaining in violation of section 8(b)(3). Ibid. See also Bell & Howell v. NLRB (DC Circuit 1979) 598 F.2d 136.

This Board previously has found that the duty of fair representation owed by a union to those it represents does not protect individuals from either negligence or the most egregious lapses in judgment on the part of the union, nor does it compel the union to pursue even the most meritorious claims or requests. To now hold, as the majority proposes, that these same individuals have no right whatsoever to charge the union with a failure to bargain in good faith on their behalf renders them even more powerless to protect their own interests.

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD
Headquarters Office
1031 18th Street
Sacramento, CA 95814-4174
(916) 323-8015

September 29, 1987

Wilcia Smith Moore

Re: Wilcia Smith Moore v. Berkeley Federation of Teachers, AFL-CIO No. 1078, Case No. SF-CO-310

Dear Ms. Moore:

I am writing regarding the above-referenced charge, which alleges that the Federation violated the Educational Employment Relations Act (EERA, Government Code section 3540 et seq.) through certain acts and/or omissions.

To eliminate any extraneous issues from this case,[1/] I have personally reviewed the entire case file. That review indicates that Regional Attorney Peter Haberfeld identified deficiencies in your charge in three separate documents that he sent or delivered to you. (These documents are letters dated May 22 and September 1, and a Discussion Outline dated August 13 that Mr. Haberfeld prepared in advance of a meeting that you, Mr. Haberfeld and I conducted on that date. The documents, identified as Attachments 1, 2, and 3 below, are incorporated by reference.) Mr. Haberfeld further informed you that your charge would be dismissed unless you amended it by September 25; I confirmed this due date in my letter to you dated September 17 (see Attachment 5, which is hereby incorporated by reference). No amendment has been received as of the date of this letter.

[1/]You have complained that Mr. Haberfeld mishandled your case. Your most recent complaint about Mr. Haberfeld is set forth in the letter identified below as document number 4. I specifically responded to your most recent complaint in document number 5 below, which is incorporated by reference.

My review of the charge indicates that the charge does not reflect a prima facie case of unfair practice. Additionally, you have been given numerous opportunities to cure the deficiencies in the charge, yet you have failure to do so. Hence, I conclude that the charge must be, and hereby is, DISMISSED.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal (California Administrative Code, title 8, section 32635(a)). To be timely filed, the original and five copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing (section 32135). Code of Civil Procedure section 1013 shall apply. The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty calendar days following the date of service of the appeal (section 32635(b)).

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See section 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail postage paid and properly addressed.

Extension of Time

A request for an extension of time in which to file a document with the Board itself must be in writing and filed with the Board at the previously noted address. A request for an

extension must be filed at least three calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party (section 32132).

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

JEFFREY SLOAN
General Counsel

By _____
Jeffrey Sloan
General Counsel

Attachments:

(1) Warning letter of May 22, 1987
(2) Outline for Discussion, August 13, 1987
(3) Warning Letter of September 1, 1987 to you from Peter Haberfeld
(4) Your letter to me of September 2, 1987
(5) My letter to you of September 17, 1987
(6) Lisa Standard's letter to you of September 17, 1987.

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STATE OF CALIFORNIA GEORGE DEUKMEJIAN, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD
San Francisco Regional Office
177 Post Street, Suite 900
San Francisco, California 94108
(415) 557-1350

PUBLIC EMPLOYMENT
RELATIONS BOARD
HEADQUARTERS OFFICE

1987 MAY 26 AM 11:33

May 22, 1987

Ms. Wilcia Smith Moore

Re: Wilcia Smith Moore v. Berkeley Federation of Teachers, AFL-CIO, No. 1078 (SF-CO-310)

Dear Ms. Moore:

On February 2, 1987, you filed an unfair practice charge against the Berkeley Federation of Teachers, AFL-CIO No. 1078 (Union), apparently intending to allege a violation of EERA section 3543.6(b) and section 3544.9. More specifically, the charge describes your efforts, dating between 1983 and November 1986, to obtain assistance from the Union in securing a contract pursuant to Education Code section 44887. You have alleged that: the union refused to assert your rights under the Education Code and that the refusal was racially motivated; the union took a similar case on behalf of Nancy Edwards to the Court of Appeals but it was a weaker case than yours, and, as a consequence, the Court found Edwards ineligible for the Education Code section 44887 contract; the union misrepresented the nature of the lawsuit when it referred to it as a class-action suit; you were led to believe by this misrepresentation that whatever benefits would be secured by Ms. Edwards would apply as well to you, a member of the class; and you were advised unfairly to await the outcome of the appeal before the union would consider asserting your rights.

The remainder of your charge describes district conduct which allegedly took place subsequent to your request for a contract pursuant to Education Code 44887. First, on October 31, 1986, the District scheduled an evaluation of your job performance despite its having undertaken an evaluation within the two preceding years. Second, on October 29, 1986, the Writing Proficiency class you were to teach was cancelled on the ground that there was insufficient enrollment. Third, you continued to be threatened with additional class cancellations on the ground that there were too few students enrolled. Fourth, you have been denied timely pay for services until December 5, 1986. Fifth, the employer attempted to cause you to "fraudulently accept payment from federal funds." Six, since the filing of the Court Case No. 579654-4 in 1983, you have been "subject to constant threats, harassment, and

intimidation" and there have been attempts to get you to quit your job. Seventh, subsequent to turning in a time sheet on September 19, 1985, which demonstrated that you were eligible for a contract under Ed. Code section 44887, the District took away your fourth hour of teaching.

You have alleged that the conduct described above was motivated by the District's racial bias against you. You are black, and Nancy Edwards as well as Gary Green, two similarly situated adult school teachers, are white. Green was given a contract and Edwards left for a better job.

To state a prima facie violation, charging party must allege and ultimately establish that the alleged unfair practice either occurred or was discovered within the six-month period immediately preceding the filing of the charge with PERB. EERA section 3541.5; San Dieguito Union High School District (1982) PERB Decision No. 194.

Charging Party has alleged that the union breached the duty of fair representation owed to her. While the charge fails to allege that the union is the exclusive representative, such fact is evident from the investigator in this case. The union therefore owes a duty of fair representation to all unit members.

The fair representation duty imposed on the exclusive representative by EERA section 3544.9 extends to contract administration (Castro Valley Teachers Association [McElwain]) (1980) PERB Decision No. 149; SEIU Local 99 (Pottorff) (1982) PERB Decision No. 203) and grievance handling (Fremont Teachers Association King) (1980) PERB Decision No. 125; United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258. PERB has ruled that a prima facie statement of such a violation requires allegations that: (1) the acts complained of were undertaken by the organization in its capacity as the exclusive representative of all unit employees; and (2) the representational conduct was arbitrary, discriminatory or in bad faith.[1]

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[1]PERB explicitly has followed decisions of the federal courts and the National Labor Relations Board interpreting the National Labor Relations Act's duty of fair representation. (Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3rd. 608 [116 Cal.Rptr. 507]; and SEIU, Local 99 (Kimmett) (1979) PERB Decision No. 106).

This charges focuses on the union's conduct in processing or failing to process a grievance. PERB has enunciated the standard to apply to the Union's conduct in this context. In United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258, the Board stated:

> Absent bad faith, discrimination, or arbitrary conduct, mere negligence or poor judgment in handling a grievance does not constitute a breach of the Union's duty. (Slip op. at p.5.)

The union's obligation to represent fairly the interest of all bargaining unit members does not extend beyond negotiation, administration and enforcement of collective bargaining agreements. San Francisco Classroom Teachers Association, CTA/NEA (Chestangue) (1985) PERB Decision No. 554; California State Employees' Association (Lemmons and Lund) (1985) PERB Decision No. 545-S (union is not obliged by EERA section 3544.9 to pursue extra-contractual remedies for unit member.) It may be that an employee organization will provide representation concerning an Education Code matter as a benefit of membership; however, it is not obliged under EERA to represent unit members concerning infringements of non-contractual rights and therefore may lawfully refuse to assert an employee's rights under the Education Code or to pursue the Education Code matter in a particular manner. San Francisco Classroom Teachers Association, CTA/NEA (Chestangue), supra.

PERB has held that a prima facie statement of unlawful discrimination and/or retaliation requires allegations that: (1) the employer took adverse action against a certain employee; (2) the employee engaged in activity protected by EERA; and (3) the employer would not have taken the adverse action against the particular employee "but for" his/her having engaged in activity protected by EERA code section 3543. Novato Unified School District (1982) PERB Decision No. 210.

The allegations of the charge fail to set forth a prima facie violation of EERA section 3543.6(b) and/or section 3544.9. First, all conduct occurring before August 2, 1986, is time-barred by EERA code section 3541.5. The charge, as presently written, does not allege the date on which certain of the conduct complained of occurred. PERB Rule 32615(a)(5) requires that a charging party, in order to state a prima facie violation, set forth "a clear and concise statement of the

facts and conduct alleged to constitute an unfair practice." It is presumed, where conduct's date of occurrence is not alleged, that the conduct occurred prior to the six-month period immediately preceding the filing of the charge. Second, the union is not required by EERA to represent Charging Party in her effort to secure a particular contract under California Education Code section 44887. Its refusal to do so is not a violation of EERA even if the refusal were motivated by racial bias. That kind of discrimination would have to be remedied in another forum. Third, Charging Party has failed to allege a charge of discrimination or retaliation. There are no allegations which suggest that: Charged Party failed to undertake an obligation owed towards Charging Party; Charging Party exercised rights protected by EERA Code section 3543, and there was a nexus or connection between the charged party's conduct and the charging party's exercise of rights.

For the reasons stated above, the charge as presently written does not state a prima facie case. If you feel there are any factual inaccuracies in this letter or any additional facts which would correct the deficiencies explained above, please amend the charge accordingly. The amended charge should be prepared on a standard PERB Unfair Practice Charge form clearly labeled First Amended Charge, contain <u>all</u> the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must be served on the respondent, and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from before May 29, 1987, I shall dismiss your charge. If you have any questions on how to proceed, please call me at (415) 557-1350.

Sincerely,

PETER A. HABERFELD
Regional Attorney

PAH:cpm

August 13, 1987

OUTLINE FOR DISCUSSION

Dear Ms. Moore:

I have prepared this outline (1) to facilitate the discussion at our meeting on August 13, and (2) to clarify my tentative analysis and conclusions about your case. This outline contains four parts:

1. What does your unfair practice charge allege?

2. What new information did you provide in telephone conversations with PERB staff which is not yet included in the unfair practice charge?

3. What facts does the applicable law require to be alleged in order for a complaint to be issued?

4. What are the apparent gaps in the unfair practice charge as it is presently written?

WHAT DOES YOUR UNFAIR PRACTICE CHARGE ALLEGE?

On February 2, 1987, you filed an unfair practice charge against the Berkeley Federation of Teachers, AFL-CIO No. 1078 (Union). Although you did not allege a particular section of the Government Code to have been violated, I have considered your charge to constitute a claim that the Union failed to meet its duty of fair representation and thereby violated EERA sections 3544.9 and 3543.6(b).

Conceptually, your charge has two parts. First, you describe your efforts, dating between 1983 and November 1986, to obtain assistance from the Union in securing a contract from the District pursuant to Education Code section 44887. You have alleged that the Union refused to assert your rights under the Education Code and that this refusal was racially motivated. You argue that the racial discrimination is evident from the Union's having taken a similar case on behalf of Nancy Edwards all the way to the Court of Appeals even though it was weaker than yours. Also on this point, you allege that Ms. Edwards and Mr. Green, both white, were assisted by the Union and eventually secured section 44887 contracts. You suggested the reason for this unequal treatment owes to you being black.

Further, you allege that the Court of Appeals found Ms. Edwards ineligible for the contract under Education Code section 44887 and that the Union thereafter refused to make efforts on your behalf to secure such a contract. You were led to believe that if Ms. Edwards' suit was successful, you would have benefited from the decision. As it turned out, according to your allegations, even if Ms. Edwards had prevailed, the result would not have applied to you because the lawsuit was not filed as a class action.

The second part of your charge describes certain District conduct which allegedly took place subsequent to your request that you be granted a contract pursuant to Education Code section 44887. In my letter to you of July 28, 1987, I described 11 types of District conduct which are arguably set forth by your unfair practice charge. They are as follows:

1. You were differentially scheduled for evaluation. — K: every 2 yrs 9/10/86 - last eval

2. You were differentially treated concerning class size.

3. You were differentially treated concerning attendant workload.

4. You were threatened with class cancellation.

5. Your writing proficiency class was cancelled.

6. You were denied timely payment of your salary until December 5, 1986.

7. You were threatened that you would lose your fourth period class unless you agreed to attempt funds from a federal program in which you did not participate.

8. Since the filing of the lawsuit in 1983, you were "subject to constant threats, harassment and intimidation to make (you) quit."

9. You were denied compensation when the District placed you unlawfully on the ISC payroll to the extent that the District did not make contributions to the employee retirement fund on your behalf concerning the ISC-compensated hours.

See # 6

~~10. You were paid late eight times.~~

11. Your pay was split up, your payday was changed, and part of the money was paid on the 15th of the month and the remaining portion at the end of the month.

WHAT NEW INFORMATION DID YOU PROVIDE IN TELEPHONE CONVERSATIONS WITH PERB STAFF WHICH IS NOT YET INCLUDED IN THE UNFAIR PRACTICE CHARGE?

During our telephone conversation of July 27, 1987, you provided information which is not alleged in the unfair practice charge. Specifically, you stated that: you complained to union representatives Wanda Pruitt, Shirley Van Bourg, ~~Jackie Ruby~~, Dorothy Lumberger, Don Hubbard, and Bonnie Robinson concerning the 11 types of District misconduct set forth above and on dates set forth in the charge, you requested those individuals, in their capacities as representatives of the Union, to represent your interests vis-a-vis the District.

WHAT FACTS DOES THE APPLICABLE LAW REQUIRE TO BE ALLEGED IN ORDER FOR A COMPLAINT TO BE ISSUED?

The fair representation duty imposed on the exclusive representative by EERA section 3544.9 extends to grievance handling (Fremont Teachers Association (King) (1980) PERB Decision No. 125; United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258). PERB has ruled that a prima facie statement of such a violation requires charging party to allege facts which suggest that (1) the acts complained of were undertaken by the organization in its capacity as the exclusive representative of all unit employees; and (2) the representational conduct was arbitrary, discriminatory or in bad faith.

PERB has applied these principles to mean that facts must be presented which answer the following questions:

(1) What adverse District conduct was directed against you?

(2) On what date did the District's adverse conduct occur?

(3) On what date did you complain of such conduct to the Union?

(4) To which union representative did you complain?

(5) What, if anything, did you request the union representative to do on your behalf?

(6) Was the adverse District conduct grievable under the collective bargaining agreement in effect between the District and the Union? If so, under which provision?

(7) What did the Union do or fail to do that you allege to be arbitrary, discriminatory or in bad faith?

See Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124; Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Decision No. 332; Los Angeles City and County School Employees Union (Local 99, Service Employees International Union, AFL-CIO) (Scates and Pitts) (1983) PERB Decision No. 341; California School Employees Association (Dyer) (1983) PERB Decision No. 342.

WHAT ARE THE APPARENT GAPS IN THE UNFAIR PRACTICE CHARGE AS IT IS PRESENTLY WRITTEN?

The allegations of the charge, as it is presently written, fail to set forth a prima facie violation of EERA section 3543.6(b) and section 3544.9. First, as stated in the warning letter of May 22, 1987,

> "The union is not required by EERA to represent Charging Party in her effort to secure a particular contract under California Education Code section 44887.

> Its refusal to do so is not a violation of EERA even if the refusal were motivated by racial bias. That kind of discrimination would have to be remedied in another form." San Francisco Classroom Teachers Association, CTA/NEA (Chestangue) (1985) PERB Decision No. 554; California State Employees Association (Lemmons and Lund) (1985) PERB Decision No. 545-S (union is not obliged by EERA section 3544.9 to pursue extra-contractual remedies for unit member; the union's obligation to represent fairly the interest of all bargaining unit employees does not extend beyond negotiation, administration and enforcement of the collective bargaining agreement.)

Second, the unfair practice charge, as presently written, merely lists the 11 alleged District adverse acts. To the extent that the charge refers to conversations between you and union representatives, it refers to discussions concerning your request that the Union assist you in obtaining a contract from the District pursuant to Education Code section 44887. The charge does not in anyway suggest that you requested union representatives on particular dates to assist you or represent your interests concerning the other of the District's alleged 11 separate adverse acts.

More specifically, although the charge describes 11 types of District adverse actions against you, there are no allegations of fact in the charge which answer the following questions:

(1) On what date or dates did the District's adverse conduct towards you occur?

(2) On what date or dates did you complain to the Union concerning each of the District's alleged 11 separate adverse acts?

(3) To which union representative did you complain of each of the District's alleged 11 separate incidents of adverse conduct?

(4) What, if anything, did you request the particular union representative to do on your behalf with regard to the District's alleged 11 separate adverse acts?

(5) Under which provision of the collective bargaining agreement in effect between the District and the Union were each of the District's alleged 11 separate adverse acts grievable?

(6) What, if anything, did the Union do or not do in response to your request for assistance and that is arbitrary, discriminatory or in bad faith?

SUMMARY OF TENTATIVE CONCLUSIONS

1. The allegation that you were denied fair representation regarding your desire to secure a contract under Education Code section 44887 does not appear to present a prima facie case of unfair practice. This is because the right to secure such a contract is grounded in the Education Code, not the collective bargaining agreement. Hence, the exclusive representative does not have the legal obligation to represent you in such an action, and its failure to do so did not violate the duty of fair representation.

2. The charge lists different types of district misconduct which might arguably have violated the collective bargaining agreement, and the union might have been legally obligated to represent you in such matters. The charge, however, does not disclose all of the facts necessary to state a violation. It does not contain necessary specifics, such as whether you complained to the union about this conduct, when you might have lodged such a complaint and asked for representation, who you complained to, or what the union's response was. To allow PERB to consider your allegations on these points, you must amend the charge.

3. During our telephone conversations, you said that you had complained to named union officials about the District's conduct (referred to in the preceding paragraph), that you asked for representation, and that the union refused to do anything. You stated that the dates on which these things happened, and all other necessary information, are contained in the charge. My review of the charge indicates the charge does mention certain dates on which you communicated with union officials; however, the allegations contained in the charge indicate that your communication with the union officials concerned your effort to secure a contract from the District under Education Code 44887. In other words, the charge currently does not contain allegations suggesting that you complained about any of the eleven types of misconduct listed above.

In our telephone conversation, you said that you were not inclined to amend the charge because it contained all necessary allegations. However, my tentative assessment is that the necessary allegations are not contained in the charge. Hence, to allow PERB to consider your allegations on these points, you must amend the charge. The timelines for your completion of an amendment (or for submission of any other factual material) will be arranged in our meeting today and will be confirmed by letter.

Sincerely yours,

Peter Haberfeld
Regional Attorney

Enclosures

2831D

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT REL .IONS BOARD
San Francisco Regional Office
177 Post Street, Suite 900
San Francisco, California 94108
(415) 557-1350

September 1, 1987

WILCIA SMITH MOORE

RE: Wilcia Smith Moore v. Berkeley Federation of Teachers, AFL-CIO No. 1078, Charge No. SF-CO-310

Dear Ms. Moore:

On August 13, 1987, you, PERB General Counsel Jeffrey Sloan, and I had a meeting regarding your case. As promised at the close of our meeting, this letter: (1) summarizes the allegations of the unfair practice charge filed by you in February 1987; (2) explains which facts must be alleged, according to applicable law, in order for a complaint to be issued; (3) identifies the apparent gaps in the current charge; (4) summarizes my conclusions regarding the current charge; (5) identifies the information you provided on August 13, 1987, which is not yet alleged in the charge, and which might state a prima facie violation of EERA if it were so alleged; and (6) concludes with a statement of the procedure you need to follow in amending the charge.

Please note that this letter refines and incorporates the points contained in the Discussion Outline that I prepared in advance of our meeting. Section V (identifying the information not yet alleged in the charge) and Section VI (Conclusion) are the most significant parts of this letter.

I. WHAT DOES YOUR UNFAIR PRACTICE CHARGE ALLEGE?

On February 2, 1987, you filed an unfair practice charge against the Berkeley Federation of Teachers, AFL-CIO No. 1078 (Union). Although you did not allege a particular section of the Government Code to have been violated, I have considered your charge to constitute a claim that the Union failed to meet its duty of fair representation and thereby violated EERA sections 3544.9 and 3543.6(b).

Conceptually, your charge has two parts. First, you describe your efforts, dating between 1983 and November 1986, to obtain assistance from the Union in securing a contract from the District pursuant to Education Code section 44887. You have alleged that the Union refused to assert your rights under the Education Code and that this refusal was racially motivated. You argue that the racial discrimination is evident from the Union's having taken a similar case on behalf of Nancy Edwards all the way to the Court of Appeals even though it was weaker than yours. Also on this point, you allege that Ms. Edwards and Mr. Green, both white, were assisted by the Union and eventually secured section 44887 contracts. You suggested the reason for this unequal treatment owes to you being black.

Further, you allege that the Court of Appeals found Ms. Edwards ineligible for the contract under Education Code section 44887 and that the Union thereafter refused to make efforts on your behalf to secure such a contract. You were led to believe that if Ms. Edwards' suit was successful, you would have benefited from the decision. As it turned out, according to your allegations, even if Ms. Edwards had prevailed, the result would not have applied to you because the lawsuit was not filed as a class action.

The second part of your charge describes certain District conduct which allegedly took place subsequent to your request that you be granted a contract pursuant to Education Code section 44887. In my letter to you of July 28, 1987, I described 11 types of District conduct which are arguably set forth by your unfair practice charge. Information provided by you during our meeting of August 13, 1987, it became clear that there was duplication in my list. Your charge describes 7, rather than 11, types of adverse conduct by the District. They are as follows:

1. You were differentially scheduled for evaluation.

2. You were differentially treated concerning class size and workload.

3. You were threatened with class cancellation.

4. Your writing proficiency class was cancelled.

5. You were denied timely payment of your salary between September, 1985 and December 5, 1986.

6. Since the filing of the lawsuit in 1983, you were "subject to constant threats, harassment and intimidation to make (you) quit."

7. You were denied compensation when the District placed you unlawfully on the ISC payroll to the extent that the District did not make contributions to the employee retirement fund on your behalf concerning the ISC-compensated hours.

II. WHAT FACTS DOES THE APPLICABLE LAW REQUIRE TO BE ALLEGED IN ORDER FOR A COMPLAINT TO BE ISSUED?

The fair representation duty imposed on the exclusive representative by EERA section 3544.9 extends to grievance handling (Fremont Teachers Association (King) (1980) PERB Decision No. 125; United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258). PERB has ruled that a prima facie statement of such a violation requires charging party to allege facts which suggest that (1) the acts complained of were undertaken by the organization in its capacity as the exclusive representative of all unit employees; and (2) the representational conduct was arbitrary, discriminatory or in bad faith.

PERB has applied these principles to mean that facts must be presented which answer the following questions:

(1) What adverse District conduct was directed against you?

(2) On what date did the District's adverse conduct occur?

(3) On what date did you complain of such conduct to the Union?

(4) To which union representative did you complain?

(5) What, if anything, did you request the union representative to do on your behalf?

(6) Was the adverse District conduct grievable under the collective bargaining agreement in effect between the District and the Union? If so, under which provision?

(7) What did the Union do or fail to do that you allege to be arbitrary, discriminatory or in bad faith?

See Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124; Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Decision No. 332; Los Angeles City and County School Employees Union (Local 99, Service Employees International Union, AFL-CIO) (Scates and Pitts) (1983) PERB Decision No. 341; California School Employees Association (Dyer) (1983) PERB Decision No. 342.

III. WHAT ARE THE APPARENT GAPS IN THE UNFAIR PRACTICE CHARGE AS IT IS PRESENTLY WRITTEN?

The allegations of the charge, as it is presently written, fail to set forth a prima facie violation of EERA section 3543.6(b) and section 3544.9. First, as stated in the warning letter of May 22, 1987,

> "The union is not required by EERA to represent Charging Party in her effort to secure a particular contract under California Education Code section 44887. Its refusal to do so is not a violation of EERA even if the refusal were motivated by racial bias. That kind of discrimination would have to be remedied in another form." San Francisco Classroom Teachers Association, CTA/NEA (Chestangue) (1985) PERB Decision No. 554; California State Employees Association (Lemmons and Lund) (1985) PERB Decision No. 545-S (union is not obliged by EERA section 3544.9 to pursue extra-contractual remedies for unit member; the union's obligation to represent fairly the interest of all bargaining unit employees does not extend beyond negotiation, administration and enforcement of the collective bargaining agreement.)

Second, the unfair practice charge, as presently written, merely lists the 7 alleged District adverse acts. To the extent that the charge refers to conversations between you and union representatives, it refers to discussions concerning your request that the Union assist you in obtaining a contract from the District pursuant to Education Code section 44887. The charge does not in anyway suggest that you requested union representatives on particular dates to assist you or represent your interests concerning the other of the District's alleged 7 separate adverse acts.

More specifically, although the charge describes 7 types of District adverse actions against you, there are no allegations of fact in the charge which answer the following questions:

(1) On what date or dates did the District's adverse conduct towards you occur?

(2) On what date or dates did you complain to the Union concerning each of the District's alleged 11 separate adverse acts?

(3) To which union representative did you complain of each of the District's alleged 11 separate incidents of adverse conduct?

(4) What, if anything, did you request the particular union representative to do on your behalf with regard to the District's alleged 11 separate adverse acts?

(5) Under which provision of the collective bargaining agreement in effect between the District and the Union were each of the District's alleged 11 separate adverse acts grievable?

(6) What, if anything, did the Union do or not do in response to your request for assistance and that is arbitrary, discriminatory or in bad faith?

IV. SUMMARY OF CONCLUSIONS REGARDING THE CURRENT CHARGE

Before reviewing the additional information you provided, which is not yet alleged in the charge, I emphasize the status of your present charge.

1. The allegation that you were denied fair representation regarding your desire to secure a contract under Education Code section 44887 does not appear to present a prima facie case of unfair practice. This is because the right to secure such a contract is grounded in the Education Code, not the collective bargaining agreement. Hence, the exclusive representative does not have the legal obligation to represent you in such an action, and its failure to do so did not violate the duty of fair representation.

2. The charge lists different types of district misconduct which might arguably have violated the collective bargaining agreement, and the union might have been legally obligated to represent you in such matters. The charge, however, does not disclose all of the facts necessary to state a violation. It does not contain necessary specifics, such as whether you complained to the union about this conduct, when you might have lodged such a complaint and asked for representation, who you complained to, or what the union's response was. To allow PERB to consider your allegations on these points, you must amend the charge.

3. During our telephone conversations preceding the August 13, 1987 meeting, you said that you had complained to named union officials about the District's conduct (referred to in the preceding paragraph), that you asked for representation, and that the union refused to do anything. You stated that the dates on which these things happened, and all other necessary information, are contained in the charge. My review of the charge indicates the charge does mention certain dates on which you communicated with union officials; however, the allegations contained in the charge indicate that your communication with the union officials concerned your effort to secure a contract from the District under Education Code 44887. In other words, the charge currently does not contain allegations suggesting that you complained about any of the eleven types of misconduct listed above.

V. THE NEW INFORMATION YOU PROVIDED IN CONVERSATIONS WITH PERB STAFF WHICH IS NOT YET INCLUDED IN THE UNFAIR PRACTICE CHARGE

During our telephone conversation of July 27, 1987, you provided information which is not alleged in the unfair practice charge. Specifically, you stated that: you complained to union representatives Wanda Pruitt, Shirley Van Bourg, Stewart Weinberg, Dorothy Lumberger, Don Hubbard, and Bonnie Robinson concerning the 7 types of District misconduct set forth above and on dates set forth in the charge you requested those individuals, in their capacities as representatives of the Union, to represent your interests vis-a-vis the District. At the meeting of August 13, 1987, you provided more specific information in support of these allegations.

A. Discrimination

(1) Beginning in approximately 1983, the District failed and refused to grant you a contract which you believed you were entitled to pursuant to Education Code section 44887. From the date you first sought that contract to the date on which you filed the unfair practice charge, you attempted to enlist the union's support in securing a contract. However, despite your efforts, the union refused to represent you.

As explained above, the collective bargaining agreement does not require the District to grant you a contract under Education Code section 44887. However, the District would arguably violate the contract, specifically Article VI (Equal Employment Opportunity and Non Discrimination), if the District's denial of a contract under Education Code section 44887 was motivated by racial animus.

(2) On August 13, 1987, you stated that the District's denial of a contract was not racially motivated and therefore you did not present that theory to the union at anytime including November 5, 1986, the date on which you last demanded union representation in your effort to secure an Education Code section 44887 contract. You explained that ultimately you suspected the union's failure to represent you was racially motivated. And, you added that had the union been an advocate of your position, the District would have awarded you a contract and would not have treated you adversely in other ways.

For the reasons stated above, the information you provided, if alleged in an amended complaint, would not appear to state a prima facie violation. The union's failure to file a grievance alleging violation of Article VI by the District does not appear to have been a breach of the duty of fair representation owed to you.

B. Evaluation

(1) On August 13, 1987, you stated that the District subjected you to a second evaluation within a two-year period. You were first evaluated on April 14, 1986. On October 29, 1986, the employer began a new evaluation. The District's conduct arguably violated Article XV (Evaluation Procedure) in three respects. First, an evaluation may only be undertaken once every two years. Second, if an additional evaluation is to be undertaken during that period, the employer is obligated to justify such conduct in writing. That was not done. Third, District representative Insley made 11 unannounced visits to your classroom. That is also arguably a violation of the contractual evaluation policy. (If you choose to amend the charge to include these allegations, please specify the sections of Article XV which you have in mind.)

Subsequent to October 29, 1986, you requested union representative Dorothy Laumberger to accompany you to a meeting. She refused. In January 1987, you requested that union representative Wanda Pruitt accompany you in connection with the evaluation. On January 13, 1987, you were informed by the District that the union had refused Ms. Pruitt permission to accompany you. You state that the union thereafter refused to file a grievance on your behalf concerning the District's alleged violation of the contractual evaluation policy.

(2) The above information, which you related to me on August 13, 1987, might arguably state a prima facie violation of EERA section 3543.6(b) and section 3544.9 if it is alleged in an amended unfair practice charge. The facts disclosed might well suggest the presence of the five elements which must be alleged: the nature of the incident which occurred, the date of the incident, the date on which you requested the union to represent you concerning the incident, the contractual provisions which were arguably violated by the District's conduct, and the union's refusal to represent you.

C. Class Size

(1) On August 13, 1987, you stated that the District violated Article XIII (Class Size) of the contract when it assigned more students to your class than were permitted under the teacher-student ratio set forth in the contract. You described this problem as commencing in approximately 1984 and continuing to the present. You stated that you complained to the union of the District's violation of the contract as late as September 16, 1985. However, you indicated that subsequent to that date you did not bring the problems of excess class size and work load to the attention of the union.

(2) The information provided by you on August 13, 1987, does not appear to state a violation of the EERA. The union's failure and refusal to file a grievance on your behalf alleging violation of Article XIII occurred on September 16, 1985, when you last requested and were denied representation. That conduct occurred more than six months before the date of which you filed the unfair practice charge and therefore it is time-barred. As explained in the warning letter sent to you on May 22, 1987, to state a prima facie violation, the charging party must allege and ultimately establish that the alleged unfair practice either occurred or was discovered within the six month period immediately proceeding the filing of the charge with PERB. EERA section 3541.5(a); San Dieguito Union High School District (1982) PERB Decision No. 194.

D. Threat to Cancel Fourth Period Class

(1) During our conversation of August 13, 1987, you stated that the union threatened that your fourth period class would be canceled in the event you refused to accept payment with "ICS" monies for teaching that class. According to Ms. Laumberger and Mr. Hubbard, representatives of the union, if you did not accept the money, the District would stop sending students and eventually cancel the class.

(2) The facts concerning the union's threat do not appear to state a violation of EERA sections 3543.6(b) and 3544.9. The conduct occurred in September, 1985, more than six months prior to the date on which you filed the instant unfair practice charge.

E. Cancellation of Writing Proficiency Class

(1) On August 13, 1987, you stated that your writing proficiency class was canceled by the District on October 30, 1986. You indicated that such conduct violated Article 18, specifically section 18.1 of the collective bargaining agreement because the District is prohibited from manipulating classes so as to prevent an employee from being placed on another salary scale. The District's refusal to pay you with general funds for the fourth period class enabled it to avoid granting your contract pursuant to Education Code section 44887 and also deprived you of a status which would have led to placement on the teacher's salary scale.

You stated that you requested the union, specifically Ms. Laumberger to represent you in a grievance against the District concerning the cancellation. Her response was to say simply that you were lucky you were not fired. The union refused to represent you in this matter.

(2) The information you provided concerning the cancellation of the writing proficiency class, if alleged in an amended unfair practice charge, appears sufficient to support a prima facie violation of the EERA. However, it may be that you did not intend to cite Article 18 (Retirement/Early Retirement) as the basis on which you requested the union to grieve the District's conduct. If you choose to amend the charge to include allegations concerning the cancellation of the class, please allege the specific section of the contract which you believe to have been violated.

F. Late Payment of Salary

(1) On August 13, 1987, you provided information concerning the District's failure and refusal to pay you in a timely manner. This conduct, according to your statement, occurred between September, 1985 and December 5, 1986. You first complained to the union of this conduct and requested representation on September 16, 1985. You also complained and requested representation on October 29 and 30, 1986. The District's failure to pay you in a timely manner violated, in your view, Article XIV (Teacher Compensation).

(2) The information you have provided concerning the District's failure to pay you in a timely manner, if alleged in an amended unfair practice charge might well support issuance of a complaint. The information appears to describe the elements necessary for a prima facie statement of violation: the nature of the incident which occurred, the date of the incident, the date on which you requested the union to represent you, the contract provision arguably violated, and the date on which the union refused to assist you.

G. Threats/Harrassment

(1) On August 13, 1987, you stated that the District threatened in other ways to harass you since the first day you requested a contract pursuant to Education Code section 44887. You described an incident which occurred when you were "locked up in the library with a man from Visual Arts." You also described a more recent incident involving the employer's refusal to discipline students in your class. You stated that the latter type of incident occurred throughout the past year and a half and that you specifically requested representation from the union on September 4, 16 and 19, 1985, October 7 and 8, 1985, March, 1986, October 29 and 30, 1986, and in January, 1987. You stated that the District's conduct is arguably prohibited by Article XVI, section 3.7 (Safety).

(2) The information you presented concerning the District's refusal to discipline students and the union's failure and refusal to address that wrong through the grievance procedure, if alleged in an amended unfair practice charge, appears sufficient to support issuance of a complaint. You have related information which suggests the presence of the necessary elements of the violation. (See above.) However, if you choose to amend the charge to contain allegations describing this conduct, please verify whether Article XVI is the section which arguably prohibits the District's conduct. Article XVII (Safety Conditions) may be more appropriate.

H. Denial Of Benefits

(1) On August 13, 1987, you also stated that the District's effort to you pay for the fourth period teaching with ICS money rather than District funds, resulted in your being denied several benefits, including but not limited to District contributions on your behalf to the retirement fund. You requested the union to represent you in this matter and urged that the District conduct was prohibited by Article XIV (Teacher Compensation) of the contract. You indicated that you requested representation from the union throughout the period in which the District refused to pay you with District funds for teaching the fourth period. Specifically, you complained on September 4, 16 and 19, 1985, October 7 and 8, 1985, March, 1986, October 29 and 30, 1986, as well as in January, 1987.

(2) This information, if alleged in an amended unfair practice charge, appears sufficient to support issuance of a complaint. If you intend to amend this charge, note that you must allege facts concerning the nature of the incident which occurred, the date on which it occurred, the date on which you requested the union to represent you by filing a grievance in this matter, the specific contract provision arguably violated by the District conduct, and the date on which the union refused to assist you.

I. Additional Incidents

(1) Finally, you described two other incidents. First, you related information concerning the District's failure to keep accurate records of your pay and deductions. As a consequence, you had problems with the IRS. You complained to the union and attorney Weinberg, refused to help you, stating "we all have problems with the IRS." This conduct by the union occurred in October, 1984.

(2) Even if this information were alleged in an amended unfair practice charge, it would not be sufficient to support issuance of a complaint. It occurred more than six months prior to the date on which you filed the unfair practice charge. For the reasons stated above, such an incident is time-barred.

(3) Second, you described an incident involving a situation which you believe was intentionally created by District representative Insley. You had an altercation with a student who was frustrated that a promise Insley had made to him could not be put into effect. You were injured.

(4) However, as you stated on August 13, 1987, you did not complain to the union of the incident involving the psychotic student and Mr. Insley. Consequently, the union was not asked to represent your interest by a filing a grievance and the failure to do so cannot be considered a breach of the duty of fair representation. Even if alleged in an amended unfair practice charge, the information related by you concerning this incident would not support issuance of a complaint.

VI. CONCLUSION

For the above reasons, the charge as presently written does not state a prima facie case. However, if you amend the charge to include the information set forth above in section V.B(1), E(1), F(1), G(1), and H(1), a prima facie case might be evident, and issuance of a complaint might be warranted.

If you choose to amend the charge, the amended charge must (1) be prepared on a standard PERB unfair practice charge form clearly labeled First Amended Charge, (2) contain all the facts and allegations you wish to make, (3) indicate the case number where indicated on the form (even though you are not to write in the box when originally filing a charge), (4) be signed under penalty of perjury by the charging party, and (5) be served on the respondent. Proof of service must be attached to the original as well as to all copies of the amended charge. For your convenience, blank charge forms, proof of service forms, and a leaflet on "How to File an Unfair Practice Charge" are enclosed.

I recognize that you may disagree with my assessment that certain elements of you case do not contribute toward a violation of the EERA. (I have pointed out five allegations which do not appear to establish an unfair practice, either because of limitations on the scope of the duty of fair representation (section V.A, above, and see section IV) or because the allegations appear to be time-barred (section V.C(1), (D)(1), (I)(1), I(3).) If you disagree with my assessment regarding any of these allegations and if you want to test the validity of my assessment, you should include these allegations in your amended charge as well. In that event, I would most likely dismiss those particular allegations, and you would have a right of appeal to the Board itself.

If I do not receive an amended charge or withdrawal from you on or before September 25, 1987, I shall dismiss your charge. If you have any questions on how to proceed, please call me at (415) 557-1350.

Sincerely yours,

PETER HABERFELD
Regional Attorney

Enclosures

FOREIGN SERVICE
RELATIONS BOARD
HEADQUARTERS OFFICE

1987 SEP 11 AM 11:43

(1)

SEPT 2, 1987

Mr Sloan,

I received Peter's letter today. Did you read it? There are DISTORTIONS on every page. I would like to request at this time that PETER HABERFEID BE REMOVED from my case. By Now even

you must KNOW
that he either
Can NOT or Will NOT
DO what you ask
him to do.

I feel in all
sincerity that I am
never going to get
fair or even APPROPRIATE
Consideration from
PETER HABERFIELD, AND I
DON'T THINK PETER MAKES MISTAKES,
I THINK HIS MESS-UPS ARE DELIBERATE A
STALL FOR TIME - TO DISCOURAGE AND TO
FRUSTRATE ME.

NOTES ON

The August 13, MEETING

1- IT is impossible for anyone who can read to have read my damage COMPLAINT and draw the conclusion that I was complaining about A TEACHERS AID.

2- ON the first Page of MY COMPLAINT NEXT TO THE little
(a) BOX [X] ED. EMPL (GOV ACT) I HAVE CHECKED GOV. CODE 3543.5 3543.6 and WRITTEN in 3543.2 3543.5, 3543.6

3- At NO TIME DID I MENTION AN EARLY RETIREMENT OR THE EARLY RETIREMENT ARTICLE XVIII (IS THIS WISHFUL THINKING) I AM NOT RESPONSIBLE FOR WHAT PETER PRETENDS TO BE MISTAKES, OR WHAT HE COPIED WRONG.

4- NEVER - DID I OR WILL I CHANGE MY MINE ABOUT THE PAST BIGOTRY PREJUDICE AND ACT of DISCRIMINATION BIASED ATTITUDES, OVERT and COVERT RACISM of THE BERKELEY FEDERATION of TEACHERS - AFT LOCAL 1078, AFL-CIO

AND I WILL NO LONGER BE POLITE ABOUT IT.

PETER ISN'T FOOLING ANY BODY BUT HIMSELF

NOR DID HIS LITTLE "ALL OR NOTHING FALLACY TRICK question." THIS TO "DID NOT FOOL ANYONE BUT PETER"

LITTLE TRICK question,

When Peter asked me did I think the Union discriminated against ALL Blacks, (ALL OR NONE FALLACY) my answer should not have been INTERPRETED TO mean I had changed my mine - I have been DISCRIMINATED against

I AM still being DISCRIMINATED AGAINST.

What I said was:

"The Union does not DISCRIMINATE against ALL BLACKS - THAT THE UNION like ALL RACIST and BIGOTS likes to Surround its self with SUBSERVIENT BLACKS."

SINCE I CAN NOT AMEND MY CHARGE WITH USE of LIES - DISTORTIONS

SINCE I ASK YOU TO BE sure that I WOULD RECEIVE YOUR LETTER BEFORE SCHOOL STARTED— I WILL NEED MORE TIME — I WAS OFF FOR 20 DAYS AFTER The AUGUST 13 MEETING I RECEIVED THE PERB LETTER THE FIRST DAY of SCHOOL — I will NEED MORE TIME. MY ANSWER CAN NOT BE READY BY SEPT 25 — WITH MY FIRST WEEKS of SCHOOL WORK LOAD.

I ASK YOU AGAIN TAKE PETER HABERFELD OFF MY CASE.

Hilda S Moore

OVER

(415) 237-5895

I CAN NOT MAKE ANY MORE COSTLY PHONE Calls TO SACRAMENTO

THE SCHOOL
SOLD ALL MY BOOKS (OR

GAVE THEN AWAY OR Threw
Them OUT while I
WAS OFF NOW I
HAVE TO WRITE
THREE NEW COURSE
OUT LINES BY SEPT 14TH

OR
ELSE.

Just FINISHED
This TODAY
SEPT 9 — will MAIL
MORNING SEPT 10,

AS FOR DORTHY LAUMBERGER
I NEVER SAID DORTHY REFUSED
TO ATTEND THE MEETING —
DORTHY AGREED.

(A)

DISTORTIONS

PAGE ONE — DID NOT GIVE SECTION? I DID!

Page TWO — THE JUDGE OVERRULED

NANCY NOT ED CODE

AS IT TURNED OUT... NOT TRUE

Page TWO — NOT DUPLICATIONS - DISTORTIONS

Page FOUR — MY COMPLAINT IS NOT AGAINT THE DISTRICT

PAGE FIVE — A REPEAT

Page FIVE — NOT TRUE III page 2

(4) STATE MENT of CHARGES

DATE, AND NAME and ANSWER

PAGE SIX — READ STATEMENT of CHARGES

1, 2, 3, 4, 6 — READ

PAGE SEVEN — NOT TRUE SHOWED THIS TO

YOU AT Aug 13 meeting

Page SEVEN — 3 — one and the SAME

page EIGHT — I. NEVER ASKED THE UNION TO GRANT ME A CONTRACT — IT CAN'T — I DON'T WORK FOR THE UNION. A. PH 3 —

PAGE 9 — THE BIG LIE (2)

THE BIG BULL PAGE

PAGE 9 — SPELLING "INSLEY"

pick 1

(B)

DISTORTIONS Page 10 - DORTHY
NOT TRUE — LAUMBERGER
Page 10 - C - NOT TRUE
Page 11 - Complaint
is NOT BASED ON What
HAPPENED SEPT 1985
VAN Bourg REFUSED DEC 6, 1987
WIEN BERG REFUSED DEC 20, 1987

Page 11 - "WHAT WARNING LETTER?"
Page 11 - D. NOT TRUE
Page 12 - I DID NOT
CITE ARTICLE 18, PETER
COPIED THE WRONG
ARTICLE
Page 13 - (2) My COMPLAINT is NOT
AGAINST THE DISTRICT (That is
FILED WITH FED DEPT of ED and
CIVIL R COM.
Page 13 NOT THREATENED
TO HARASS - DID! HARASS

OVER PLEASE

(C)

ALSO PETER CITES

THESE LITTLE CASES THAT are NOT PRECEDENTS AND THAT DO NOT APPLY TO MY "PROBS"

PURPOSE — TO BOG ME DOWN IN SUPERFLUOUS READING — SINCE he is THE LAWYER and I AM NOT — HE SHOULD also CITE what PART of THESE LONG CASES he is TALKING ABOUT —

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD
San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, California 94108
(415) 557-1350

September 17, 1987

Wilcia Moore

RE: Berkeley Federation of Teachers, Case No. SF-CO-310

Dear Ms. Moore:

This responds to your letter dated September 2, which was received on September 11.

Your letter accuses Mr. Haberfeld of bad faith and a wide range of misdeeds and distortions. You have requested that he be removed from your case. Indeed, in our telephone conversation of September 15 you informed me that you would not respond to his letter or file an amendment to the charge unless the case were assigned to another attorney. Also, although your recent letter to me indicates that you need more time to respond to Mr. Haberfeld's letter, in our telephone conversation you refuse to cooperate with me in working out a later due date unless I promise to remove Mr. Haberfeld from the case.

I have fully examined your allegations. In conducting my examination, I was mindful of the information that I have obtained from my lengthy discussions with you, from prior correspondence between us, and from the two very comprehensive letters that Mr. Haberfeld sent you.

Read in light of all the information I have obtained, your letter in no way persuades me that Mr. Haberfeld has erred in his analysis or approach to the case. Rather, I believe that you have misunderstood the intent of his most recent letter, which was to assist you in formulating an amended charge. Based on your apparently immutable perception that Mr. Haberfeld is intentionally attempting to undercut your case, I do not expect you to accept this explanation. Nevertheless, the reality is that the steps that Mr. Haberfeld and I have taken to assist you in this case have been considerable, and I have personally overseen Mr. Haberfeld's work on this case since you initially brought the matter to my attention.

These steps -- including conducting a two-hour meeting with you, drafting a long discussion outline to facilitate our meeting, and (in the most recent letter) organizing, digesting and summarizing information for your benefit -- truly exceed any efforts that any member of my staff has made "to assist the charging party to state in proper form" the elements of a prima facie case (see PERB Regulation 32620(b)(4)). I am sorry you do not recognize the efforts that we have made on your behalf.

Also, I am compelled to respond with particularity to some of your allegations. First, your accusation that Mr. Haberfeld distorted the information that you provided to him in our meeting is inaccurate. In virtually all respects, my own notes of that meeting independently corroborate the factual assertions contained in his letter. Furthermore, your complaints about inaccuracies in his letter are in large part based on a misreading of his letter. Second, to the extent that you claim that the information in his letter which he obtained prior to our last meeting is inaccurate, this claim is, in my view, unfair. All of that information was specifically provided to you in the Outline for Discussion that formed the basis for our meeting. You were given time to review the outline before our meeting, and to correct any assertions in the outline which you considered to be wrong. Third (and most importantly), even if the information he recited were inaccurate, no prejudice has been caused. You are still free to amend your charge to state the facts as you understand them, and no adverse inference can or will be drawn as a result of any misunderstanding.

For the foregoing reasons, the accusations in your letter are, in my view, unfounded. There is accordingly no basis in law or fact for my removing Mr. Haberfeld from the case.

The final issue is the request contained in your letter (at p. 6) for an extension of the September 25 due date for your response to Mr. Haberfeld's letter. The period of time that Mr. Haberfeld allowed for a response is well in excess of the time ordinarily provided to charging parties to amend their charges.[1]

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[1]Your letter indicates that you had previously asked me to ensure that the letter would be received before school started. Neither Mr. Haberfeld nor I have any recollection of your making this request, and our notes do not reflect it either. In any event, Mr. Haberfeld's other job

Furthermore, I called you earlier this week in response to your letter to find out how much more time you desired. You refused to answer my question unless I promised to remove Mr. Haberfeld from the case. I declined to make such a promise (the question of how much time you need to amend your charge is properly and logically separate from your complaint about Mr. Haberfeld). Given this stalemate and your refusal to indicate how much more time -- if any -- you required, the September 25 due date stands.

As indicated in Mr. Haberfeld's September 1 letter, the charge as presently written does not state a prima facie case. If you wish to amend the charge in an effort to cure the deficiencies outlined in his letter, you must file an amended charge by September 25. The amended charge must (1) be prepared on a standard PERB unfair practice charge form clearly labeled First Amended Charge, (2) contain <u>all</u> the facts and allegations you wish to make, (3) indicate the case number where indicated on the form (even though you are not to write in the box when originally filing a charge), (4) and be signed under penalty of perjury by the charging party. The amended charge must be served on the respondent, and proof of service must be attached to the original as well as to all copies of the amended charge.

If you have any questions on how to proceed, please call me at (916) 323-8015.

Sincerely yours,

JEFFREY SLOAN
General Counsel

3226D

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responsibilities precluded him from completing the letter in advance of the date issued. Additionally, to ensure your ability to make plans to complete an amended charge, I called you on the day that Mr. Haberfeld's letter issued and left a message on your answering machine which indicated that your response would be due on September 25. The first indication I received of your dissatisfaction with that date was in your most recent letter, received September 11.

STATE OF CALIFORNIA

GEORGE DEUKMEJIAN, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD
Headquarters Office
1031 18th Street
Sacramento, CA 95814-4174
(916) 323-8015

September 17, 1987

Ms. Wilcia Moore

Re: Attached Letter From Jeffrey Sloan Dated Sept. 17, 1987

Dear Ms. Moore:

To avoid the possibility of delivery delays caused by the certified mail process, I am sending a copy of the above reference letter to you by regular mail and the original by certified mail.

Sincerely,

Lisa Standard
Secretary

Att.

Attachment 6