

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



JOHN SHEK, )  
 )  
Charging Party, ) Case No. SF-CO-46-H  
 )  
v. ) PERB Decision No. 1173-H  
 )  
AMERICAN FEDERATION OF STATE, )  
COUNTY & MUNICIPAL EMPLOYEES, )  
COUNCIL 57, )  
 )  
Respondent. )  
\_\_\_\_\_ )

Appearances: John Shek, on his own behalf; Beeson, Tayer & Bodine by Joseph R. Colton, Attorney, for American Federation of State, County & Municipal Employees, Council 57.

Before Garcia, Johnson, and Dyer, Members.

DECISION

DYER, Member: This case comes before the Public Employment Relations Board (Board) on appeal from a Board agent's dismissal (attached) of John Shek's (Shek) unfair practice charge. As amended, the charge alleged that the American Federation of State, County & Municipal Employees, Council 57 (Federation) breached the duty of fair representation mandated by section 3578 of the Higher Education Employer-Employee Relations Act (HEERA) and thereby violated section 3571.1(b) of the HEERA,<sup>1</sup> when it

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<sup>1</sup>HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3571.1 provides, in relevant part:

failed to adequately pursue grievances against the University of California at San Francisco.

The Board has reviewed the entire record in this case, including Shek's original and amended unfair practice charge, the warning and dismissal letters, Shek's appeal, and the Federation's response thereto. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. SF-CO-46-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Garcia and Johnson joined in this Decision.

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It shall be unlawful for an employee organization to:

(b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

Section 3578 provides:

The employee organization recognized or certified as the exclusive representative shall represent all employees in the unit, fairly and impartially. A breach of this duty shall be deemed to have occurred if the employee organization's conduct in representation is arbitrary, discriminatory, or in bad faith.

## PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office  
177 Post Street, 9th Floor  
San Francisco, CA 94108-4737  
(415) 439-6940



August 5, 1996

John Shek

Re: **DISMISSAL OF UNFAIR PRACTICE CHARGE/REFUSAL TO ISSUE COMPLAINT**

John Shek v. American Federation of State, County and  
Municipal Employees, Council 57  
Unfair Practice Charge No. SF-C0-46-H

Dear Mr. Shek:

The above-referenced unfair practice charge, filed on March 27, 1996 and amended on July 22, 1996, alleges that the American Federation of State, County and Municipal Employees, Council 57 (AFSCME) failed to fairly represent John Shek with respect to his termination from employment from the University of California, San Francisco (University), and with respect to other matters. This conduct is alleged to violate Government Code section 3571.1 of the Higher Education Employer-Employee Relations Act (HEERA).

I indicated to you, in my attached letter dated June 20, 1996, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to June 28, 1996, the charge would be dismissed. After two extensions of time to file an amended charge were granted, an amended charge was filed on July 22, 1996.

The amended charge alleges that AFSCME's failure to arbitrate the November 1993 grievance involving the assault by the patient escort is not barred by the six-month statute of limitations because, despite having learned of the forfeiture of his arbitration on July 5, 1995, Shek "tried to work with the Union from July 10, 1995 to December 17, 1995." Shek claims that he did not discover that AFSCME breached its duty of fair representation until December 18, 1995, when he filed a civil suit alleging the breach. He further claims that processing of the civil suit tolled HEERA's statute of limitations.

Shek forfeited arbitration of the grievance involving the assault because he chose not to appear before AFSCME's review panel to

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present argument for why the grievance should be arbitrated. AFSCME's policy is that appearance before this panel is required in all cases. Shek was informed that AFSCME would not arbitrate the grievance on July 5, 1996. The conclusory nature of the claim that Shek did not discover the breach of the duty of fair representation until much later, in light of these circumstances, provides an insufficient basis on which to conclude that the statute of limitations period did not commence until December 17, 1995. (Regents of the University of California (1983) PERB Dec. No. 359-H [period commences when charging party reasonably should have known of the conduct underlying the unfair practice].) In addition, Shek's prosecution of a civil suit involving the same claim contained in this unfair practice charge does not toll the statute of limitations. (Regents of the University of California (1990) PERB Dec. No. 826-H.)

The amended charge further asserts that the undersigned's June 20, 1996 letter fails to properly assess the allegations of the charge and misses the core of the case. Although Shek's argument in this regard could be better explained, the undersigned understands it to be essentially as follows. The charge focuses on the most recent disputes involving Shek's June 30, 1995 placement on investigative leave without pay and his subsequent termination based on the same underlying circumstances. Shek has claimed that the termination was in retaliation for his complaint to the California Department of Health Services regarding the University's improper X-ray procedures. Shek claims here that AFSCME has demonstrated hostility towards him with regard to these matters as demonstrated by AFSCME's (1) failure to follow through on his earlier grievance involving the assault, (2) unreasonable delay in processing his latest grievance, (3) refusal to respond to his request that it require the University's production of patient daily logs, and (4) lack of good faith measured by the concept of the duty to bargain in good faith.

AFSCME's failure to follow through on his grievance involving the assault fails to support Shek's claim of hostility. AFSCME processed this grievance through the steps leading up to arbitration. As noted in the undersigned's June 20, 1996 letter, Shek refused to present the merits of his case for arbitration before AFSCME's review panel (thereby forfeiting his case) because he assumed that the panel had already decided against him. In light of this, little or no inference can be drawn of AFSCME's personal animus toward Shek.

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AFSCME's delay in processing his latest grievance has not been shown to be unreasonable. Shek's latest grievance was filed on November 27, 1995. AFSCME selected an arbitrator on May 17, 1996, although it has not yet made a decision whether to proceed with the case. AFSCME gave notice to Shek of his right to appear before the review panel on May 9, 1996. A decision has not yet been made as to whether or not the case will be taken to arbitration.<sup>1</sup> Shek contends that his arbitration must be held within 180 days according to the AFSCME-University memorandum of understanding (MOU). However, he has not provided the specific language of the MOU supporting this contention. AFSCME requested arbitration within 180 days and it has not been alleged that AFSCME has forfeited the grievance due to a lack of timely processing.

Finally, the concepts of the statutory duty to bargain in good faith and to provide information to the exclusive representative do not apply to an individual employee making a claim of a breach of the duty of fair representation. (See, e.g., Oxnard School District (1988) PERB Dec. No. 667.) Therefore, AFSCME's failure to provide Shek with patient logs that may support his grievance or its claimed lack of diligence in processing his grievance, as evidenced by its "merely going through the motions" or engaging in conduct analogous to surface bargaining, do not serve to demonstrate that AFSCME has acted in an "arbitrary, discriminatory, or bad faith" manner towards Shek. (Rocklin Teachers Professional Association (1980) PERB Dec. No. 124.)

Therefore, I am dismissing the charge based on the facts and reasons set forth above and in my June 20, 1996 letter.

#### 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. (Cal. Code of Regs., tit. 8, sec. 32635(a).) To be timely filed, the original and five copies of such appeal must be actually received by the Board itself

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<sup>1</sup> In a letter to the undersigned from AFSCME's attorney, Joe Colton, dated July 29, 1996, AFSCME indicates that Shek has been informed that the review panel hearing has been rescheduled to August 17, 1996 and, by copying the letter to Shek, urges him to attend.

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before the close of business (5 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing. (Cal. Code of Regs., tit. 8, sec. 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 (20) calendar days following the date of service of the appeal. (Cal. Code of Regs., tit. 8, sec. 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 Cal. Code of Regs., tit. 8, sec. 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 (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code of Regs., tit. 8, sec. 32132.)

#### Final Date

If no appeal is filed within the specified time limits, the

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dismissal will become final when the time limits have expired.

Sincerely,

ROBERT THOMPSON  
Deputy General Counsel

By  
DONN GINOZA  
Regional Attorney

Attachment

cc: Joe Colton

## PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office  
177 Post Street, 9th Floor  
San Francisco, CA 94108-4737  
(415) 439-6940



June 20, 1996

John Shek

Re: **WARNING LETTER**

John Shek v. American Federation of State, County and  
Municipal Employees, Council 57  
Unfair Practice Charge No. SF-CO-46-H

Dear Mr. Shek:

The above-referenced unfair practice charge, filed on March 27, 1996, alleges that the American Federation of State, County and Municipal Employees, Council 57 (AFSCME) failed to fairly represent John Shek with respect to his termination from employment from the University of California at San Francisco (University) as well as other matters. This conduct is alleged to violate Government Code section 3571.1 of the Higher Education Employer-Employee Relations Act (HEERA).

Investigation of the charge revealed the following. Shek was employed by the University as a Senior Radiologic Technologist for over eight years. He had received consistently good performance reviews. Shek was terminated on or about October 26, 1995.

On or about November 10, 1993, during his break, Shek was assaulted by Christopher Busby, a patient escort. Shek received multiple contusions and lacerations. He filed a grievance over the matter and was initially represented by AFSCME. The University concluded that there was mutual provocation and took some unspecified disciplinary action against Shek as a result of the incident. For this reason, the University denied Shek's claim for Worker's Compensation benefits. Shek requested that AFSCME meet with the University regarding the proposed discipline. AFSCME did not respond.

In an unrelated matter, Shek wrote to AFSCME in December 1993 complaining that he had not been provided a retroactive 5% pay increase following his taking and passing a "fluoro" test required by the University. AFSCME did not follow through on his request.

As a result of this matter and AFSCME's lack of response regarding the assault, Shek became dissatisfied with AFSCME's representation and informed AFSCME that in the future he would be represented in this matter by his private attorney, Paul Davis.

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Davis complained to the University that a police report of the assault incident indicated a possible criminal history for Busby but the history was not provided to Shek. Through Davis, Shek also claimed he had been threatened by Busby in the past. In a letter dated December 29, 1993, Davis demanded that Busby be terminated. The University refused. Around the same time, Shek requested that his shift be changed from the night to the day so that he could avoid contact with Busby. He made two such requests to the University in December 1993.

In a letter dated January 3, 1994, Shek requested that AFSCME provide assistance with respect to the University's refusal to change his shift. Apparently because AFSCME's response was too slow, Shek utilized Davis to obtain a transfer to another shift. However, as a result of the change, Shek suffered a \$2.00 per hour reduction in pay.

Davis represented Shek in the processing of the grievance involving the assault. A Step 2 meeting was scheduled for May 9, 1994. Davis demanded, for a second time, the presence of a Campus Police officer at the meeting. At a Step 3 meeting, the University claimed that the grievance had not been appealed on a timely basis. Davis responded that the appeal was timely and that the University had been at fault in sending its response to the wrong address.

AFSCME elevated the grievance involving the assault to arbitration by letter dated August 8, 1994, but did so at this time only to preserve Shek's timelines. AFSCME informed Davis that the grievance would have to be reviewed by its Arbitration Appeals Panel. In November 1994, Shek notified AFSCME that he had chosen to have Davis represent him in the arbitration and requested that the files be forwarded to Davis. In January 1995, Davis wrote to AFSCME responding to a request for information about the case. Davis also indicated that he was unable to supply AFSCME with an arbitration date because of the University's lack of cooperation.

By letter dated March 9, 1995, Shek indicated that he was refusing to attend a meeting with AFSCME to present reasons for pursuing his grievance because he believed the outcome regarding whether to arbitrate the matter had been predetermined. Shek complained that he had been waiting 15 months for a decision on whether AFSCME would arbitrate the grievance and asserted that it was pointless for him to explain again why the case should be pursued. Shek alleges that the Memorandum of Understanding (MOU) between the University and AFSCME requires that grievances be arbitrated within 180 days.

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By letter dated May 8, 1995, Shek wrote to AFSCME complaining about being denied pay raises while others without significant experience were being paid nearly as much as him. AFSCME did not respond. He would later claim that the University discriminated against him because he is Asian.

On or about June 22, 1995, Shek reported to work as usual. At that time he prepared to perform his customary assignment of adult morning X-rays using a portable unit. Patient X-ray orders are submitted by physicians on forms known as requisitions. Shek proceeded to the station where he picked up his morning requisitions for chest X-rays. On this occasion, however, a physician instructed him that he needed an X-ray performed and developed immediately. When Shek completed this priority job, he could find no one to deliver the film for developing because the nurses were in the process of changing shifts. Therefore, Shek delivered the film himself and returned to deliver the prints to the physician who had requested it. As he was attempting to complete his normal morning run, he encountered a further delay using the elevators. While detouring, he heard his supervisor, Jim Buescher paging him over the intercom. Shek went to a telephone but was unsuccessful reaching Buescher because the line was busy. Since being paged in this manner is highly unusual, Shek believed it was critical that he get in contact with Buescher to respond to the page. Consequently, Shek decided to use his pager to leave a message with Buescher to call the telephone Shek was using. When Buescher did not return the page, Shek paged him again. Still receiving no response, Shek went back to his department.

Before reaching Buescher's office, he realized he had left his requisitions and stopped to make a call to the receptionist at the desk where he had left them. While he was on the telephone, Buescher came out of his office and ordered Shek to drop everything and come talk to him. Shek pleaded with Buescher to give him five minutes to collect his films. Buescher insisted that they talk. Buescher proceeded to repeatedly admonish Shek for paging him since it was against department policy. Shek was previously unaware of such a policy.

The following week, on June 29, Shek again reported to work in the morning to perform X-rays with the portable unit. He discovered that there were no requisitions at the front desk, which was unusual. Along with the receptionist, Shek attempted to find the resident physician, without success. Then the receptionist remembered that there was a log sheet listing the patients needing X-rays. Using this information, Shek performed the X-rays.

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When Shek returned to develop the films, Buescher saw him and asked Shek where he had been. Shek responded that he had just completed his morning X-rays. Buescher accused Shek of lying. Buescher said he had possession of the requisitions and accused him of X-raying patients without proper orders. Shek then explained which patients he had X-rayed and insisted they were the correct ones. Buescher then screamed at Shek and again accused him of lying. Buescher telephoned a secretary attempting to confirm his suspicions. The secretary was uncooperative. Shek then was able to demonstrate that the patients he had X-rayed matched the requisitions which Buescher had. Shek also spoke with a hospital aide, Lenette, who confirmed Shek's story. Buescher later attempted to solicit a statement from Lenette to discredit Shek, but she refused to cooperate.

Later that day, Buescher told Shek that Parrish Scarboro, Technical Director of the Department of Radiology, wanted to see him. Scarboro asked Shek of his version of what happened on June 22. Shek felt uncomfortable with what he considered a vague accusation and asked that Buescher be required to put the information in writing. Shek then left to continue his work. Sometime later, Buescher instructed Shek to return to see Scarboro a second time. During this second discussion, Shek leveled a number of accusations at Buescher because of what he perceived as Buescher's unwarranted persecution of him. Shek claimed that Buescher would schedule his lunch hour at the end of the day so he could leave early to go to St. Luke Hospital where he had another job. Shek also claimed that Buescher would call in sick, but report to St. Luke's to work, and that Buescher also scheduled himself for unnecessary overtime.

The next day, June 30, 1995, Shek reported for work. As he went to pick up his requisitions, he saw Buescher taking them. Shek asked for them. Buescher refused. Shek told Buescher that the requisitions were for Shek's patients not Buescher's. Buescher responded that he was the supervisor. Shek told him it was before his official duty time and that he was not under Buescher's supervision until then. Shek reached for the requisitions but Buescher slapped his hand away. Shek proceeded to complete his morning rounds using labels assigned the patients. These labels identified which patients needed X-rays but did not indicate any special instructions, as would appear on the requisitions. For example, although the X-rays Shek performed were usually chest X-rays, on occasion they would be for other parts, or, the requisition might indicate the need for a greater dosage than normal. Later that day, Scarboro ordered Shek home and placed him on an investigative leave. Shek claims that Buescher ordered him to perform the X-rays without the requisitions and only the labels. This, he claims, constituted

an abnormally hazardous practice in violation of State law because if the patients did not in fact need chest X-rays it would have been necessary to repeat an X-ray of those patients to get the correct part of the body,

Shek would later report this incident to the Radiation Health Branch of the California Department of Health Services. Following discovery of this report, the University terminated him. The University responded to the Department of Health Services indicating that Buescher did make a practice of giving labels to the responsible technologist doing portable procedures, instead of the requisitions, but that Buescher would indicate on the label whether an X-ray other than of the chest was ordered. The University claimed that there was no evidence of procedures having to be repeated, although it acknowledged the risk of error in the transfer of information from the requisitions. The University reported that the aberrant practice was stopped.

Shek alleges that under University policy, investigative leaves may be for no longer than 15 days. He requested that AFSCME file a grievance over this on July 26, 1995. With the help of Assemblyman John Burton's office, Shek was returned to work on August 7, 1995, but was denied all of the wages he claims were due him. AFSCME would later tell him that he could be made whole if he prevailed in a grievance described immediately below.

On or about October 26, 1995, the University terminated Shek. Shek would claim, among other things, that the termination was in retaliation for his filing a complaint with the Department of Health Services. Shek was represented by AFSCME in a Skelly hearing with the University. On or about November 27, 1995, AFSCME filed a grievance on Shek's behalf challenging the termination. The grievance alleges that the termination was without just cause in violation of article 8, section A.1 of the MOU. Shek alleges that the grievance was not filed within 30 days as required by the MOU.<sup>1</sup>

AFSCME attended a step 2 meeting on the grievance, without a successful resolution. The grievance was appealed to step 3 and again the University denied the grievance. Thereafter, AFSCME filed an appeal requesting arbitration. Shek does not allege

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<sup>1</sup> The MOU does state that grievances must be filed "no later than thirty (30) calendar days from the date the grievant or the Union first became aware of, or should have become aware of with the exercise of reasonable diligence, the alleged violation of the Agreement." (Emphasis added.)

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that the University has objected to this grievance on grounds of lack of timeliness.

On or about December 18, 1995, Shek filed a civil suit against AFSCME in the San Francisco County Superior Court alleging a breach of the collective bargaining agreement, breach of the duty of fair representation, and several other theories. On or about December 26, 1995, Shek filed a civil suit against the University in the same court challenging his termination.

In a letter to Shek, dated May 9, 1996, AFSCME informed Shek of his right to appear before AFSCME's Executive Board on June 7, 1996 to request that the matter proceed to arbitration. AFSCME states in the letter that in all cases the employee must make a presentation to the Executive Board before AFSCME commits to arbitrating a grievance.

Based on the facts stated above, the charge as presently written fails to state a prima facie violation of the HEERA for the reasons that follow.

Government Code section 3563.2(a) states that the Public Employment Relations Board (PERB) "shall not . . . issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." PERB has held that the six month period commences to run when the charging party knew or should have known of the conduct giving rise to the alleged unfair practice. (Regents of the University of California (1983) PERB Dec. No. 359-H.) The charge was filed on March 27, 1996. In order to be timely, alleged violations must have occurred on or after September 27, 1995.

The claim that AFSCME breached its duty of fair representation with respect to the matters involving the assault, denial of pay raises, denial of shift change, and the extended involuntary investigative leave are untimely because Shek knew or should have known of the conduct giving rise to the alleged unfair practice prior to September 27, 1996.

The only allegation in the charge involving a breach of the duty of fair representation that is timely concerns Shek's grievance challenging the University's termination of his employment.

PERB has held that a breach of the duty of fair representation occurs when a union's conduct toward a member of the bargaining unit is arbitrary, discriminatory, or in bad faith. (Rocklin Teachers Professional Association (1980) PERB Dec. No. 124.) In

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the context of grievance handling, PERB has defined the scope of the duty as follow:

. . . 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.  
[Citations omitted.]

A union may exercise its discretion to determine how far to pursue a grievance in the employee's behalf as long as it does not arbitrarily ignore a meritorious grievance or process a grievance in a perfunctory fashion. A union is also not required to process an employee's grievance if the chances for success are minimal. [Citations omitted.]  
(United Teachers - Los Angeles (Collins)  
(1982) PERB Dec. No. 258.)

In addition, in order to show a prima facie violation involving a breach of the duty of fair representation, the charging party must present facts which would justify a finding that the union acted without a rational basis or in a way that is devoid of honest judgment. (Reed District Teachers Association. CTA/NEA (Reyes) (1983) PERB Dec. No. 332.)

AFSCME filed a grievance on Shek's behalf challenging his termination, processed it through the pre-arbitration steps, and it appealed the case to arbitration. AFSCME has a practice of requiring all employees seeking arbitration to make a presentation to its Executive Board. The charge does not allege that AFSCME has made any decision not to arbitrate the grievance. The facts alleged in the charge, as well as the supplementary allegations supplied by Shek, fail to demonstrate that AFSCME has acted in an arbitrary, discriminatory, or bad faith manner with respect to the processing of Shek's grievance challenging his termination.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts which would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by 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

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amended charge or withdrawal from you before **June 28, 1996**, I shall dismiss your charge. If you have any questions, please call me at (415) 557-1350.

Sincerely,

DONN GINOZA  
Regional Attorney