

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



NICK FOX,)	
)	
Charging Party,)	Case No. LA-CO-712
)	
v.)	PERB Decision No. 1220
)	
DUARTE UNIFIED EDUCATION)	September 26, 1997
ASSOCIATION,)	
)	
Respondent.)	

Appearances: Manshardt & Santa Romana by Patrick J. Manshardt, Attorney, for Nick Fox; California Teachers Association by Charles R. Gustafson, Attorney, for Duarte Unified Education Association.

Before Johnson, Amador and Jackson, Members.

DECISION

AMADOR, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Nick Fox (Fox) to an administrative law judge's (ALJ) proposed decision (attached). The ALJ dismissed the complaint and unfair practice charge which alleged that the Duarte Unified Education Association (Association) breached the duty of fair representation guaranteed by the Educational Employment Relations Act (EERA) section 3544.9 thereby violating section 3543.6(b)¹ by

¹EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3544.9 provides:

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

Section 3543.6 states, in pertinent part:

refusing to represent Fox because of his religious objector status, failing to speak on his behalf at a disciplinary meeting and failing to return his calls regarding a grievance.

The Board has reviewed the entire record in this case, including the proposed decision, transcript, exhibits, Fox's exceptions and the Association's response. The Board finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and adopts them as the decision of the Board itself.

FOX'S APPEAL

Fox contends that the ALJ erred in making credibility determinations that credited Ron Plessen's (Plessen) testimony that he never told Fox the Association would not represent him at the informal conference of February 15, 1996, over Fox's testimony. Fox also argues that the ALJ erred in determining that Robin Whitlow's (Whitlow) failure to return his calls was not arbitrary, discriminatory or in bad faith. Fox maintains that the Association had an obligation to explain why it chose not to process his grievance and failed to do so. (Oakland

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.

Education Association. CTA/NEA (Mingo) (1984) PERB Decision No. 447.)

ASSOCIATION'S RESPONSE

The Association maintains that the evidence supports the ALJ's credibility determinations. In addition, the Association asserts Whitlow's failure to return Fox's telephone calls did not breach the duty of fair representation because Fox failed to request help from the Association prior to filing a grievance.

DISCUSSION

Fox contends that the ALJ erred by crediting Plessen's testimony that he never told Fox the Association would not represent him over Fox's contrary testimony. It is a well established principle of PERB caselaw that the Board grants great deference to the ALJ's credibility determinations. This principle recognizes that the ALJ, who conducts the hearing and observes the witness' testimony, is in a better position to make accurate credibility determinations than the Board, who in an appellate capacity, has only the benefit of the transcripts.

(Temple City Unified School District (1990) PERB Decision No. 841.) Absent any evidence in the record to support overturning the ALJ's credibility determinations, the Board defers to the ALJ's findings and rejects this exception.

(Whisman Elementary School District (1991) PERB Decision No. 868.)

Fox also contends that Whitlow's failure to return his calls regarding the grievance was arbitrary, discriminatory or in bad

faith because the Association never explained why it did not process Fox's grievance. (Oakland Education Association, CTA/NEA (Mingo), supra, PERB Decision No. 447.) Fox did not allege in the unfair practice charge, complaint or hearing that the Association never explained why it did not process his grievance. Under PERB Regulation 32635(b), the Board will not consider new allegations on appeal absent good cause.² Since Fox's appeal did not contain a good cause explanation for his failure to raise this allegation in the unfair practice charge, complaint or hearing, the Board cannot consider this argument. (California School Employees Association (Watts) (1993) PERB Decision No. 1008.)

ORDER

The unfair practice charge and complaint in Case No. LA-CO-712 are hereby DISMISSED.

Members Johnson and Jackson joined in this Decision.

²PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. Regulation 32635 states, in pertinent part:

- (b) Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence.



STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

NICK FOX,)	
)	
Charging Party,)	Unfair Practice
)	Case No. LA-CO-712
v.)	
)	PROPOSED DECISION
DUARTE UNIFIED EDUCATION)	(6/10/97)
ASSOCIATION,)	
)	
Respondent.)	

Appearances: Patrick J. Manshardt, Attorney, for Nick Fox; California Teachers Association by Charles R. Gustafson, Attorney, for Duarte Unified Education Association.

Before Thomas J. Allen, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, a teacher alleges his exclusive representative violated its duty to provide him with fair representation. The exclusive representative denies any violation of this duty.

On October 29, 1996, teacher Nick Fox (Fox) filed an unfair practice charge against the Duarte Unified Education Association (Association), alleging the Association failed to represent him fairly in his relations with his employer, the Duarte Unified School District (District). On November 21, 1996, the Office of the General Counsel of the Public Employment Relations Board (PERB) issued a complaint, alleging the Association's conduct was inconsistent with its duty under section 3544.9 of the Educational Employment Relations Act (EERA) and therefore

violated EERA section 3543.6(b).¹ On December 16, 1996, the Association filed an answer denying any violation. On December 17, 1996, PERB held an informal settlement conference with the parties, but the matter was not resolved.

PERB conducted a formal hearing on the complaint on March 31 and April 1, 1997. After the filing of post-hearing briefs, the matter was submitted for decision on May 28, 1997.

FINDINGS OF FACT

At all relevant times, Fox was a public school employee covered by EERA. At all relevant times, the Association was an employee organization covered by EERA, and it was the exclusive representative of the bargaining unit in which Fox was employed.

For the term July 1, 1994, through June 30, 1996, there was a collective bargaining agreement in effect between the Association and the District. Article 5 of the agreement included an agency shop provision requiring unit members who were

¹Unless otherwise indicated, all statutory references are to the Government Code. EERA is codified at section 3540 and following. EERA section 3544.9 provides as follows:

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

In relevant part, EERA section 3543.6 provides 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.

not Association members to pay the Association a service fee.

Article 5.3 provided the following exception:

Any unit member who is a member of a religious body whose traditional tenets or teachings include objections to joining or financially supporting DUEA/CTA/NEA as a condition of employment; except that such unit member shall pay, in lieu of a service fee to one of the following non-religious, organizations, charitable funds exempt from taxation under Section 5.1 (c) (3) or Title 26 of the Internal Revenue Code:

- 5.3.1 American Cancer Society
- 5.3.2 American Heart Association
- 5.3.3 City of Hope

As the designation "DUEA/CTA/NEA" indicates, the Association (DUEA) is affiliated with the California Teachers Association (CTA) and the National Education Association (NEA).

Fox was hired by the District as a probationary teacher for the 1995-96 school year, and he thus became subject to the agency shop provision. The Association encouraged Fox to become a member but also informed him, in writing, of his rights under the Article 5.3 exception. The Association set a deadline of September 30, 1995, for Fox to exercise those rights by providing the Association with proof he had made payment to one of the three designated charities.

Fox felt the Article 5.3 exception applied to him, because he found the positions of the NEA on abortion and Catholic schools to be inconsistent with his own beliefs as a Catholic. Fox obtained from his pastor a letter of support, which the Association accepted. Fox was also concerned, however, the

charities designated in Article 5.3 might somehow be inconsistent with his beliefs.

Prior to the September 30 deadline set by the Association, Fox talked on the telephone with CTA Representative Robin Whitlow (Whitlow). Whitlow, who had been raised Catholic herself, empathized with Fox's concerns and attempted to accommodate them. She promised to check with CTA attorneys on whether Fox could make payment to some other charity. She also promised to talk to the local Association about allowing Fox to submit a check to be held by the Association for up to one month, while Fox researched the designated charities. On September 28, 1995, Fox did submit a check to the Association, as what he understood to be "collateral."

Whitlow was informed by CTA attorneys, however, that Fox could not make payment to any other charity, and she so informed Fox. Also, the local Association was unwilling to give Fox up to one month to research the designated charities. On October 5, 1995, the Association returned Fox's check and gave him a deadline of October 15, 1995, to choose one of the designated charities. On October 12, 1995, Fox made payment to one of those charities (the American Heart Association).

Despite Whitlow's attempts to accommodate his concerns, Fox testified he found her "no help," because he had to call her several times and wait "days and days" to get a call back. He testified, "It may have been just because she was busy. She was just an extremely difficult person to get in touch with."

For the 1995-96 school year, Fox was assigned as a seventh grade science teacher at the District's Northview Intermediate School (Northview), where his principal was Dr. Mary George. Shortly after Fox started working at Northview, Dr. George told him "our personalities were a misfit," and this appears to have been true.

On February 8, 1996, a parent filed a complaint against Fox. Fox had sent the parent's daughter out of his classroom because (as he testified) she was so "doused" in perfume that the smell was "overwhelming." According to the complaint, however, the daughter said she had been sent out simply because Fox "didn't like her perfume." Dr. George informed Fox there would be a conference on the parental complaint on February 15, 1996. Dr. George told Fox the conference was "very serious" and the complaint "would probably go onto a higher level."

Fox was "scared" by what Dr. George had told him, so he made a written request to Association Building Representative Ron Giberson (Giberson) that "association counsel" be present at the conference. Giberson referred the request to Association President Roger Plessen (Plessen). Giberson told Fox in writing that Plessen "said that he would call you and put you in touch with a CTA attorney."

Fox testified that at some point he and Plessen spoke and Plessen "basically said I was not a Union member and I could not get representation from the Union." Fox could not remember whether this conversation was on the telephone or in Plessen's

classroom, nor could he remember when it took place, other than that it was before the February 15 conference. Fox testified he did not ask anyone else for representation. In particular, he testified he did not believe he contacted CTA Representative Whitlow to see if he could be put in touch with a CTA attorney. Fox attended the February 15 conference without representation. At the conference, the situation was amicably resolved after Fox explained what had really happened.

The unfair practice charge filed by Fox and the complaint issued by PERB do not mention this February 15 conference or the events surrounding it. The charge alleges Fox requested legal representation from the Association on April 26, 1996, for a meeting on April 30, 1996, and the Association "initially declined . . . due to his status as a conscientious objector." The PERB complaint similarly alleges Fox requested representation on or about April 26, 1996, for a meeting on April 30, 1996, and on or about April 26, 1996, Plessen said the Association "would not represent Charging Party due to Charging Party's status as a religious objector."² Fox testified, however, he did not think Plessen or the Association ever indicated the Association would not furnish representation for an April 30 meeting.

Plessen testified to his own version of a conversation with Fox that concerned the February 15 parental complaint conference. Plessen testified he and Fox spoke at length on February 13, 1996; Plessen thinks it was on the telephone. Plessen testified

²No motion to amend the complaint has been made.

he advised Fox to contact CTA Representative Whitlow, who might be able to provide him with a lawyer. Plessen further testified he advised Fox to "seek counsel" with the District's deputy superintendent for personnel/student services, Dr. Alan L. Johnson, because it appeared from the conversation that Fox was starting to get in trouble with Dr. George, who might be starting to evaluate Fox negatively. Plessen's testimony was corroborated in part by his contemporaneous handwritten notes, which appear to read in part as follows:

- Adv: 1 CTA
- 2 Lawyer
- 3 Counsel with Dr. J

Plessen testified he told Fox what he has told many teachers who want representation: to call the CTA service center, where Whitlow worked.

Plessen denied he told Fox that as a non-member he could not get representation from the Association. Plessen described their discussion of that issue as follows:

When approached by Mr. Fox on the subject and he was asking for all kinds of things from a lawyer to whatever, I indicated to him that I would have to check our legal obligation to him. Because as you know, a non-paying member, if it goes to binding arbitration, there might be legal implications. So I, at several times, I said I have to check to see what our obligation to him is.

I at no time said that he would not be represented. I wouldn't be that dumb to say something like that because we do have a legal obligation.

Plessen appeared nervous on the witness stand, his hands shaking visibly some of the time. Nervousness on the witness

stand is understandable, however, and I do not conclude from Plessen's nervousness that he was not telling the truth as he remembered it. On the contrary, Plessen appeared to be a conscientious witness. He was responsive to questions from both attorneys, and he asked both attorneys to rephrase questions he did not understand. He did not appear to be someone likely to blurt out something he regarded as "dumb."

CTA Representative Whitlow testified that on February 13, 1996, she had a telephone conversation with Fox, in response to a phone message she received from Fox that day. The message stated as follows:

(Referred by Roger.) Has to attend a
complaint meeting Thursday at 4:15. Wants
CTA rep with him.

Whitlow testified that when she talked to Fox she told him she had a scheduled meeting on February 15 and could not accompany him. She testified she suggested Fox take the Association building representative (Giberson) or one of some other individuals she named. She specifically remembered suggesting a particular woman, only to have Fox tell her the woman had become an assistant principal. Whitlow assumed Fox would find someone to accompany him. She testified she does not normally represent employees at first-level parental complaint conferences, which local representatives are trained to handle.

With regard to the events surrounding the February 15 parental complaint conference, I credit the testimony of Plessen and Whitlow over that of Fox. Fox's testimony about these events

(that Plessen "basically" said Fox could not get representation, and that Fox did not believe he (Fox) had contacted Whitlow about getting representation) was relatively vague, and it was inconsistent with the unfair practice charge he filed as to the date and circumstances of the conversation with Plessen. The testimony of Plessen and Whitlow, on the other hand, was more detailed, and it was corroborated in part by contemporaneous records (Plessen's notes and the phone message for Whitlow).

Fox may have felt understandably frustrated in his attempt to get representation from the Association. He was, by his own account, "scared" about the upcoming conference, and he found his request for representation referred from Giberson to Plessen, then from Plessen to Whitlow, and then from Whitlow back to Giberson and other local representatives. Fox may have felt he found the explanation for his frustration in Plessen's admitted statement he would have to check on the Association's legal obligation to Fox.³ I find, however, Plessen did not actually tell Fox that as a conscientious objector he could not get Association representation; I find Plessen actually referred Fox

³The relationship of an employee organization to a conscientious objector is in fact somewhat unusual. EERA section 3546.3 specifically states as follows:

. . . If such employee who holds conscientious objections pursuant to this section requests the employee organization to use the grievance procedure or arbitration procedure on the employee's behalf, the employee organization is authorized to charge the employee for the reasonable cost of using such procedure.

to Whitlow for such representation as might be available, and Whitlow handled the referral in a normal fashion.

Between February and April 1996, Fox and Plessen had several more conversations, sometimes in Plessen's classroom. Since Plessen was also a science teacher, Fox sometimes went to Plessen to borrow a piece of equipment, but he also complained to Plessen about being constantly harassed by his principal, Dr. George. Plessen counseled Fox on how to deal with Dr. George, and on Fox's career options.

The problems between Fox and Dr. George came to a head on April 26, 1996, when the two had a conversation in the front office of Northview, in the presence of students and staff. Fox asked Dr. George for a laboratory key to replace one he had lost. Dr. George refused, saying Fox would have to come to the office whenever he needed a key. Fox objected to this arrangement, but Dr. George insisted. The two then had a discussion about the parental complaint procedure that Fox had experienced in February. By Fox's account, Dr. George was confusing facts, and Fox was trying to clarify them. At some point, Dr. George told Fox not to interrupt, so he let her talk and then asked, "May I speak now?" When Dr. George said nothing, Fox began to speak, but Dr. George said, "I didn't say you could speak." Fox responded, "Simon says, 'May I speak?'" At that point, Dr. George went to her office door and told Fox to go in.

By Fox's account, Dr. George screamed, "Get in here." The only other witness to the event who testified described this

event somewhat differently. Donald La Plante (La Plante), a teacher and Association officer who was present at the time, testified Dr. George's tone was "relatively polite," although he also said her words were "yelled loud enough" for everyone in the front office to hear. He denied Dr. George's voice was in a scream.

La Plante further testified Fox then stamped his foot and yelled, "No." Fox did not describe his own behavior at this point, other than to say, "I was not about to walk into a room with a screaming person like that." Dr. George then apparently got Dr. Johnson (the deputy superintendent) on the phone. La Plante remembered Dr. George saying, "I have an insubordinate employee;" Fox remembered her saying she had asked him into the room and he had refused.

Dr. Johnson then came to Northview and met privately with Fox. Fox explained the situation from his point of view; he said Dr. George was a power-mad tyrant and he was going to sue her from here to kingdom come for harassment. Dr. Johnson told Fox that the following Monday there would be a meeting to resolve the differences between Fox and Dr. George, at which Fox could have representation.

Fox then prepared a written request for Association representation. The request was addressed to Plessen, with a "cc" to Whitlow, and it read as follows:

I am requesting legal representation from
DUEA/CTA/NEA for a meeting with Dr. Johnson
(Duarte School District) and Dr. George
(Principal, Northview Intermediate School) on

Monday, April 29, 1996 at 9:00 during my second period conference. I had made a written response to the union once before for representation and did not receive it. I have spoken to my counselor, and he said that you have a "duty of fair representation" and if you do not comply with my request, I want you to know that I will be suing you for "breach of duty."

Fox took two copies of the request to Plessen's classroom, where Plessen was in front of his class. Fox gave Plessen a copy and asked him to sign for it. Plessen refused to sign, but Fox still left a copy of the request. Plessen then took action on the request by calling Dr. George, reading her the request, and explaining "we need to be represented." Plessen also called Whitlow to ask who would represent Fox; Whitlow said she herself would.

Fox himself also called Whitlow; a message he left for her on April 26, 1996, stated in part, "His attorney has told him to sue for breach of duty." Whitlow returned the call the same day. She told Fox she had a calendar conflict on Monday but would contact Dr. Johnson and reschedule the meeting so she could be there. She did in fact call Dr. Johnson, and they rescheduled the meeting for Tuesday morning, April 30, 1996. She informed Fox and Plessen of the change. Before the meeting, Plessen gave Fox a note confirming Whitlow would represent him.

Fox asked a friend, Harry Snyder (Snyder), to attend the meeting with him for support. When Fox and Snyder arrived for the meeting, Fox introduced Snyder to Whitlow. Whitlow was surprised to see Snyder there, and she questioned whether Snyder

was an attorney. Fox thought Whitlow was being "paranoid" about this; Whitlow testified she was concerned the District would only allow Fox to have one advocate.⁴ Whitlow agreed Snyder could attend the meeting.

Before the meeting, Whitlow talked to Fox; Snyder did not listen in. Whitlow testified she advised Fox they were there to hear the District's concerns, and it was better for them not to speak or respond during the meeting, but rather to formulate a response afterwards. Fox testified he did not recall being given such advice. Whitlow testified that at a first meeting she normally advises employees not to speak, and does not speak much herself.

When the meeting began, it soon appeared it would be a different and more formal meeting than Fox, Snyder and Whitlow expected. In addition to Dr. Johnson and Dr. George, the District had its attorney present. When Dr. Johnson started the meeting, he said it was to review Fox's status with the District, while Fox and Snyder had believed it would be to resolve differences between Fox and Dr. George.

Fox attempted nonetheless to go through a list of issues between himself and Dr. George and to question Dr. George about them. Whitlow tried to quiet Fox with "discreet motions" Fox did not acknowledge. Dr. George did not answer Fox, but spoke only to the District's attorney. After Fox had gone through a few of

⁴I also note Whitlow had four days earlier received Fox's phone message stating, "His attorney has told him to sue for breach of duty."

his issues, Dr. Johnson said this was not the purpose of the meeting, which thereafter focused on Fox's conduct and status.

Whitlow took notes throughout the meeting. Fox and Snyder testified Whitlow said nothing in support or defense of Fox; Whitlow testified she "did not speak a lot" but rather listened, took notes, and attempted to have Fox not speak. Whitlow testified she did ask what the District's next step would be, and her notes appear to indicate someone asked, "What happens now?" Fox testified Whitlow did not ask any such question.

At the end of the meeting, Dr. Johnson said the District would make a decision on Fox's status. He also said there would be a meeting that afternoon after school, when Fox would receive his evaluation. By the end of the morning meeting, Fox and Snyder felt the decision had been made to get rid of Fox. Whitlow told Fox she suspected he would be placed on administrative leave, and she told Fox he could call her.

At the meeting after school, Fox received not only his evaluation but also a letter from Dr. Johnson stating Fox was being placed on administrative leave for the remainder of the school year. Fox did not immediately call Whitlow; in fact, Fox did not remember trying to call Whitlow again until June, over a month later. A phone message dated May 2, 1996, however, indicated Fox tried to call Whitlow that morning. Whitlow testified she returned the call on May 6, 1996, and she and Fox discussed the possibility of filing a grievance. She told Fox she had gone through the contract and had not found the basis for

a grievance, and she invited Fox to go through the contract himself and get back to her about any possible grievance. Fox testified he did not remember this conversation. Fox did not get back to Whitlow again that month.

On May 8, 1996, Fox went ahead and filed a grievance on his own, without consulting or informing the Association. Fox's grievance was addressed to Dr. Johnson, and it alleged Dr. Johnson and Dr. George had "violated my rights to the grievance process as outlined in Article 4 of the DUEA/DUSD agreement." Dr. Johnson responded with a letter dated May 9, 1996, stating in part, "The grievance process has not been violated because no grievance has been filed." Dr. Johnson advised Fox to "call your DUEA representative" if he had questions. Fox did not, however, call the Association at that point.

On May 24, 1996, Dr. Johnson sent Fox a letter advising him he "shall not be reelected as an employee" and his "employment with the District will therefore end at the conclusion of the 1995-96 school year." Fox did not contact the Association when he received this letter.

Also on May 24, 1996, Fox filed a Level II grievance, in response to Dr. Johnson's May 9 letter. The Level II grievance stated in part as follows:

Article 4.2.1 states before filing a written grievance, the grievant must attempt to resolve it by an informal conference with the grievant's immediate supervisor. I was never given the chance to do so even though Dr. Johnson said that Dr. George and I would try to resolve our differences at the meeting of April 30, 1996. At this meeting, I wanted to

present evidence showing Dr. George had created a hostile work environment and by doing so, had violated her own code of ethics as outlined in E 4319.21(a) of the District Policy Handbook. Also, by creating a hostile work environment, she had violated my right to free speech which is in violation of the district loyalty oath she signed and in violation of Article 20 of the DUEA/DUSD contract ["Personal and Academic Freedom"].

Furthermore, Article 4.3.1 states that the immediate supervisor shall communicate a decision to the employee in writing within (10) days after receiving the grievance. Dr. George has not responded to me at all. Once again, my right to due process within the grievance procedure has been violated.

Fox did not consult Whitlow about filing this Level II grievance, but he did send her a copy by certified mail, which her office received on May 28, 1996.

Dr. Johnson denied the Level II grievance in a letter to Fox dated June 6, 1996. The letter stated in part as follows:

Article 4.2.1 states in relevant part that "Before filing a formal written grievance, the grievant must attempt to resolve it by an informal conferences [sic] with the grievant's immediate supervisor". Such a process presupposes that a grievance exists. Neither your Level I nor Level II grievance forms identifies a section of the current collective bargaining agreement that has been violated, mis-interpreted or mis applied [sic]. This precondition must exist **before** the meeting referred to in Article 4.2.1 can occur. If you wish to file a proper grievance, please identify the section of the contract that has been violated. The meeting referred to in Article 4.2.1 can only occur after such an identification has taken place. [Emphasis in original.]

The letter indicates copies were sent to Whitlow and Plessen, among others.

The week of June 10, 1996, was Fox's last week as a District employee. On June 10, 1996, he called Whitlow and left a message, saying, "He has not received a response from the District." According to Fox, he called again on June 11, 1996.

It is not clear exactly when Fox received Dr. Johnson's June 6 letter. The letter was postmarked June 7, 1996, and was addressed to Fox's old address in La Habra rather than his current address in Monrovia. The envelope bears a forwarding label with the date "06/10/96." Fox testified that when he received the letter he made a note on the envelope; the note says "recieved [sic] June 10, 1996." Fox also testified, however, that he prepared other notes the same week, and those notes say he got the letter on Tuesday, June 11, 1996. At least one of these two records is inaccurate as to the exact date of receipt, but I credit Fox's testimony that he received the letter before June 13, 1996.

Fox called Whitlow again on June 13, 1996, and left an "urgent" message to call him. According to Fox's testimony, and the notes he says he prepared that week, Whitlow's secretary told him Whitlow was out of town, but the secretary would talk to Whitlow and then get back to Fox personally. According to Fox and his notes, neither Whitlow nor her secretary ever called him back.

Whitlow testified, on the contrary, that she left a message for Fox on his answering machine on June 11, 1996. Whitlow also testified she called Fox on June 13, 1996, and they discussed why

Fox had not received a response to his grievance, although Whitlow "didn't have the document" and "wasn't aware of what grievance he had filed."

With regard to the events of the week of June 10, 1996, I credit Fox's testimony over that of Whitlow. Whitlow's account of the June 13 conversation does not make sense in light of the other evidence. Whitlow testified that at the time of the conversation she "didn't have the document" and "wasn't aware of what grievance he [Fox] had filed," but her office had received Fox's Level II grievance by certified mail over two weeks earlier. Whitlow also testified she and Fox discussed why Fox had not received a response, but Fox had in fact received the June 6 response letter by then. Also, since the June 6 letter indicates copies were sent to Whitlow and Plessen, it appears Whitlow should have known about the District's response by June 13 even if, for some reason, Fox himself did not tell her. Whitlow may be remembering another conversation with another employee about another grievance, but I do not believe she had such a conversation with Fox on June 13, 1996, as she testified.

Fox's memory and his records do not appear to be entirely reliable. Nonetheless, it is hard to believe he would fail to remember or record the event if Whitlow had in fact returned his calls the week of June 10, 1996, especially his "urgent" message of June 13, 1996. I therefore find Whitlow did not return Fox's calls the week of June 10, 1996.

At the time of the hearing, Fox was unemployed. After leaving the District, he sought employment with "under ten" other school districts and had three interviews. In some of the interviews it appeared to him "things shut down" when he had to explain why he could not get a letter of reference from the District. Fox also had two or three interviews with employers other than school districts. Until a few weeks before the hearing, Fox received unemployment benefits, and then he had a computer job that lasted four days. He testified "pretty soon I'm going to break into my retirement fund" and "[e]ventually, I'm going to have to get a lesser job."

ISSUE

Did the Association violate its duty to provide Fox with fair representation?

CONCLUSIONS OF LAW

As the charging party, Fox has alleged that the Association, as his exclusive representative, denied him the right to fair representation guaranteed by EERA section 3544.9 and thereby violated EERA section 3543.6(b). The duty of fair representation imposed on the exclusive representative extends to grievance handling. (Fremont Teachers Association (King) (1980) PERB Decision No. 125; United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258 (UTLA (Collins))).) In order to establish a violation of the duty, a charging party must show the exclusive representative's conduct was arbitrary, discriminatory or in bad faith. In UTLA (Collins), PERB 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. [Citations.]

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....

In order to state a prima facie case of arbitrary conduct violating the duty of fair representation, a charging party:

"... must at a minimum include an assertion of sufficient facts from which it becomes apparent how or in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment. (Emphasis added.)" [Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Decision No. 332, p. 9, quoting Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124.]

In the present case, the complaint alleges three actions as inconsistent with the Association's duty of fair representation:

1. Plessen's alleged statement that the Association would not represent Fox due to his status as a religious objector.
2. Whitlow's alleged failure to speak on Fox's behalf at the April 30 meeting.
3. Whitlow's alleged failure to respond to Fox's messages the week of June 10, 1996.⁵

⁵In his opening brief, Fox cites a fourth action: the Association's failure to help Fox get a transfer. This action, however, is not mentioned in the complaint or the underlying charge. Furthermore, there is no evidence that Fox ever sought a transfer; the only testimony is Plessen's acknowledgement "it is

With regard to the first of these three alleged actions, I have already credited the testimony of Plessen and Whitlow over that of Fox; I find Plessen did not make the alleged statement either in February 1996 (as Fox testified) or in April 1996 (as the complaint and underlying charge alleged).⁶

With regard to the second alleged action, the evidence shows Whitlow said little or nothing in Fox's support or defense at the April 30 meeting. The evidence also shows Whitlow listened, took notes, and attempted to have Fox not speak. Whitlow testified without contradiction this was her normal practice at a first meeting, and there is thus no evidence her conduct at the April 30 meeting was discriminatory. Furthermore, Whitlow's strategy of listening rather than speaking has not been shown to be without a rational basis or devoid of honest judgment. (Cf. Lindsay Teachers Association (Gonzales) (1992) PERB Decision No. 935 [no apparent violation of duty where exclusive representative failed to advocate on behalf of probationary teacher at meeting

possible" Fox talked to him about getting a transfer. There is insufficient evidence to make any findings with regard to this fourth action.

⁶If I were to find Plessen made the alleged statement in February 1996 (as Fox testified), I still could not find the statement in itself constituted an EERA violation within PERB's jurisdiction, because the statement would have been made more than six months before October 29, 1996, when Fox filed his charge. EERA section 3541.5(a)(1) states PERB "shall not . . . [i]ssue 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 this limitation is jurisdictional. (Calexico Unified School District (1989) PERB Decision No. 754; California State University, San Diego (1989) PERB Decision No. 718-H.)

at which teacher was informed she would not be rehired].) Whitlow's strategy of not speaking may not have helped Fox any more than his own strategy of speaking, but it has not been shown that Whitlow's strategy was arbitrary or in bad faith.⁷

With regard to the third alleged action, I have already credited Fox's testimony over that of Whitlow; I find Whitlow did not return Fox's calls the week of June 10, 1996. The question is whether Whitlow's failure was merely negligent at worst, or whether it has been shown to be arbitrary, discriminatory or in bad faith.

In his opening brief, Fox contends Whitlow's failure to return his calls the week of June 10, 1996, was "motivated by a discriminatory intent based on his status as a conscientious objector." The preponderance of evidence does not support this contention, however. Whitlow became aware of Fox's status as a conscientious objector in September 1995, but her subsequent course of conduct does not show any discriminatory intent based on that status. On the contrary, Whitlow testified without contradiction she empathized with Fox's concerns and attempted to accommodate them. I have credited Whitlow's testimony that she handled Fox's representation requests, both for the February 15 parental complaint conference and for the April 30 meeting, as

⁷It is true Whitlow never implemented the next step in her strategy: to formulate with Fox a response to the District. This may be explained, however, by Whitlow's failure to find a basis for a grievance (as Whitlow testified) or by Fox's failure to consult with Whitlow before filing a grievance on his own (as both Fox and Whitlow testified).

she normally handles such requests. Nothing Whitlow said or did betrays a discriminatory intent.

On the other hand it does appear, as Fox himself put it, Whitlow "was just an extremely difficult person to get in touch with." Even in September of 1995, when Whitlow was trying to accommodate Fox's concerns, Fox found he had to call her several times and wait "days and days" to get a call back. It appears the situation may have been the same in June of 1996. This situation might evidence some negligence on Whitlow's part, or at least an overburdened schedule, but it has not been shown to evidence discrimination.

In his opening brief, Fox also contends Whitlow's failure to return his calls the week of June 10, 1996, was arbitrary and in bad faith. PERB has held an exclusive representative's failure to respond to an employee's inquiries may be part of "a pattern demonstrating a prima facie showing of an arbitrary failure . . . to fairly represent." (American Federation of State, County and Municipal Employees, International, Council 57 (Dehler) (1996) PERB Decision No. 1152-H.) In the present case, however, I have not found a larger pattern of conduct demonstrating a failure to represent Fox fairly. PERB has also held that an exclusive representative's failure to respond to an employee's inquiries, standing alone, does not demonstrate a violation of the duty of fair representation. (California Faculty Association (Pomerantsev) (1988) PERB Decision No. 698-H; Reed District Teachers Association. CTA/NEA (Reyes), supra, PERB Decision

No. 332.) In the present case, where Whitlow's failure to return Fox's calls the week of June 10, 1996, now stands alone as evidence the Association failed to represent Fox fairly, I conclude Fox has not proved that the Association violated this duty.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law, and upon the entire record in this matter, it is ordered that the complaint and the underlying charge in Unfair Practice Case No. LA-CO-712, Nick Fox v. Duarte Unified Education Association, are hereby DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (See Cal. Code Regs., tit. 8, sec. 32300.) A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing ". . . or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing" (See Cal. Code Regs., tit. 8, sec. 32135; Code Civ. Proc, sec. 1013 shall apply.) Any statement of exceptions and supporting brief must be served

concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, secs 32300, 32305 and 32140.)

THOMAS J. ALLEN
Administrative Law Judge