

**STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD**

JOHN ROSSMANN, ET AL.,

Charging Parties,

v.

ORANGE UNIFIED EDUCATION  
ASSOCIATION & CALIFORNIA TEACHERS  
ASSOCIATION,

Respondent.

Case No. LA-CO-1086-E

PERB Decision No. 1569

December 18, 2003

Appearance: John Rossmann, on his own behalf.

Before Baker, Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case comes before the Public Employment Relations (PERB or Board) on appeal by John Rossmann, et al. (Rossmann) of a Board agent's dismissal (attached) of an unfair practice charge. The charge (as amended) alleged that the Orange Unified Education Association (OUEA) and the California Teachers Association (CTA) violated the Educational Employment Relations Act (EERA)<sup>1</sup> by proposing and agreeing to collective bargaining agreement (CBA) provisions in 2001 and 2002 regarding health benefits for retirees and allegedly discriminatory salary increases. Rossmann alleged that this conduct constituted

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<sup>1</sup>EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

a violation of the employee organizations' duties of fair representation (DFR), codified at EERA section 3544.9<sup>2</sup>.

The Board agent found that the allegedly discriminatory retiree benefit provisions cited by Rossmann as evidence of a DFR violation were contained in a draft memorandum of understanding (MOU) resulting from bargaining in March 2000. This draft MOU was never ratified. The Board agent determined that the provisions challenged by Rossmann were proposed by the District, not OUEA.

In September 2001, the U.S. Equal Employment Opportunity Commission issued a determination that there was reason to believe the retiree provisions violated the Age Discrimination in Employment Act. The Board agent noted that the alleged problems with those provisions were thereafter eliminated when modified language was adopted in the final MOU ratified by OUEA and the Orange Unified School District (District) upon completion of negotiations in October 2001. In light of those facts, the Board agent applied settled standards set forth in PERB case law and concluded that the union's alleged conduct was not arbitrary, discriminatory or undertaken in bad faith (Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124). The Board agent also found that the union did not knowingly waive employees' statutory rights. Thus, the Board agent found the charge failed to state a prima facie DFR violation.

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<sup>2</sup>EERA section 3544.9 states:

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.

Regarding allegations relating to salary changes, the Board agent found that, although not all bargaining unit members received the same percentage salary increases in the 2001 and 2002 agreements, there was no evidence OUEA and CTA's agreement to the varying increases was motivated by animus toward bargaining unit members or was damaging to their rights. Instead, the Board agent found the disparities resulted from bargaining that was shaped, *inter alia*, by the District's stated objective to provide incentives for new teacher recruitment. Therefore, the charge was dismissed.

#### ROSSMANN'S APPEAL

On appeal, Rossmann argues that the plain meaning of Section 3544.9 imposes on exclusive representatives a duty to represent all bargaining unit members fairly and provides no exception to that rule. Rossmann, therefore, argues that the Board agent "usurped" the authority of the Legislature by applying the principle that an exclusive representative is not required to satisfy all bargaining unit members.

Rossmann also contends that the salary increase disparities created in the 2001 and 2002 contracts were designed to remedy unlawful disparities created in earlier negotiations memorialized in a 1997 MOU, and that allegations regarding the 1997 negotiations should have been considered, notwithstanding EERA's six-month limitations period. Rossmann argues that, just as there is no statute of limitations for capital crimes in criminal law, there should be no statute of limitations for duty of fair representation allegations.

Rossmann also asserts that individuals who file DFR charges with PERB are "at the mercy of exclusive representatives to police violations of the law" and states "it's extremely unlikely that members can discover in just 180 days that their union agent has violated the law." He further asserts that requiring "specific 'smoking gun' documents" to prove animus

by an exclusive representative places an “impossible burden of proof” on individual charging parties who are alleging DFR charges against their unions.

### DISCUSSION

The Board is attentive to the difficulties individuals may face when attempting to prosecute unfair practice charges against institutions such as employers or employee organizations. However, although it may in some cases be difficult for a charging party to quickly develop factual allegations to support a DFR charge, the Board is constrained by the statutory six-month limitations period for filing of PERB charges alleging violations of EERA.<sup>3</sup> Absent an exception to the limitations period based on other Board powers, policy arguments directed to the Board regarding the effect of the limitations period cannot change this explicit statutory mandate.<sup>4</sup>

The Board also notes that Rossmann was not required to proffer “smoking gun documents” evincing animus against unit members in order to state a prima facie DFR charge. Factual allegations, taken as a whole, establishing that the respondent employee organization

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<sup>3</sup>EERA section 3541.5(a)(1) provides, in pertinent part:

[T]he board 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.

<sup>4</sup>Rossmann alleges that a CBA signed in 1997 contained salary provisions that conflicted with rules governing the State Teachers Retirement System (STRS). He asserts that allegedly discriminatory salary disparities contained in the 2001 and 2002 agreements were related to the allegedly unlawful 1997 provisions. Therefore, he argues, the Board should consider the allegations regarding the 1997 agreement as timely. However, Rossmann’s allegations regarding compliance with STRS regulations are beyond this Board’s subject matter jurisdiction. Moreover, even if the 2001 and 2002 negotiations and resulting contract provisions are examined in the context of Rossmann’s allegations regarding the 1997 contract, the Board finds no prejudicial error in the Board agent’s determination that, under all the facts of this case, the 2001 and 2002 salary provisions fell within the range of the union’s reasonable discretion.

acted arbitrarily, discriminatorily, or in bad faith will establish a prima facie DFR case. Thus, if, as here, the charging party does not produce evidence of bad faith or discriminatory intent, a prima facie case still may be stated if the factual allegations indicated the union's conduct was arbitrary. (See Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124 (Rocklin)).) The Board's review of the allegations and materials submitted by Rossmann revealed that the Board agent's dismissal of Rossmann's charge for failure to state a prima facie case was free of prejudicial error.

Regarding Rossmann's contention that the plain meaning of Section 3544.9 precluded the Board agent's dismissal in this case, the Board notes that the standards governing DFR charges derive from long-settled case law of which the Legislature was aware when EERA was enacted. (See Rocklin, supra, interpreting sec. 3544.9 in accordance with the standards articulated in the seminal U.S. Supreme Court decision in Vaca v. Sipes (1967) 386 U.S. 171 [64 LRRM 2369].) The Board agent correctly applied those standards to the facts of this case.

After reviewing the unfair practice charge and its amendments, attachments thereto, the warning and dismissal letters, and Rossmann's appeal, the Board finds that the warning and dismissal letters are free of prejudicial error and adopts them as the decision of the Board itself.

#### ORDER

The unfair practice charge in Case No. LA-CO-1086-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Baker and Whitehead joined in this Decision.

## Dismissal Letter

October 3, 2002

John Rossmann, et al.  
14661 Berkshire Place  
Tustin, CA 92780

Re: John Rossmann, et al. v. Orange Unified Education Association & California Teachers Association  
Unfair Practice Charge No. LA-CO-1086-E  
**DISMISSAL LETTER**

Dear Mr. Rossman:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on December 27, 2001. That charge was amended on February 8, April 29, and May 3, 2002. John Rossmann, et al. alleges that the Orange Unified Education Association & California Teachers Association violated the Educational Employment Relations Act (EERA)<sup>1</sup> by violating its duty of fair representation in negotiations regarding health benefits and salary. I called you on this date, however there was no answer. Investigation reveals the following.

I indicated to you in my attached letter dated September 20, 2002, 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 October 2, 2002, the charge would be dismissed.

I have not received either an amended charge or a request for withdrawal. Therefore, I am dismissing the charge based on the facts and reasons contained in my September 20, 2002 letter.

### Right to Appeal

Pursuant to PERB Regulations,<sup>2</sup> 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. (Regulation 32635(a).) Any document filed with the Board must contain the case

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<sup>1</sup> EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at [www.perb.ca.gov](http://www.perb.ca.gov).

<sup>2</sup> PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

name and number, and the original and five (5) copies of all documents must be provided to the Board.

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 mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Regulations 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board  
Attention: Appeals Assistant  
1031 18th Street  
Sacramento, CA 95814-4174  
FAX: (916) 327-7960

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. (Regulation 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 Regulation 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. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

#### 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. (Regulation 32132.)

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October 3, 2002  
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Final Date

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

Sincerely,

ROBERT THOMPSON  
General Counsel

By \_\_\_\_\_  
Bernard McMonigle  
Regional Attorney

Attachment

cc: Robert E. Lindquist, Attorney

## Warning Letter

September 20, 2002

John Rossmann, et al.  
14661 Berkshire Place  
Tustin, CA 92780

Re: John Rossmann, et al. v. Orange Unified Education Association & California Teachers Association  
Unfair Practice Charge No. LA-CO-1086-E  
**WARNING LETTER**

Dear Mr. Rossman:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on December 27, 2001. That charge was amended on February 8, April 29, and May 3, 2002. John Rossmann, et al. allege that the Orange Unified Education Association & California Teachers Association violated the Educational Employment Relations Act (EERA)<sup>1</sup> by violating its duty of fair representation in negotiations regarding health benefits and salary. I called you on this date, however there was no answer. Investigation reveals the following.

### Health Benefits

Your first allegation is that OUEA violated its duty of fair representation on August 28, 2001, when union negotiator Paul Collins signed a document titled Memorandum of Understanding regarding Health and Welfare benefits (Exhibit B to your charge). That document appears to permit a change in carriers from Health Net to Blue Cross and continue the remainder of the health benefits as per the collective bargaining agreement which was in effect. The first page also notes that the parties shall begin negotiations on the 2001-2002 collective bargaining agreement on or before September 15, 2001.

The second page of Exhibit B describes health and welfare benefits as set forth in the collective bargaining agreement between OUEA and the Orange Unified School District. In relevant part, it states "All District plan participants over the age of 65 may be placed in a Medicare Risk HMO at the discretion of the District." This provision, which permits the District to place current employees and retirees in a Medicare Risk HMO, was proposed by the District during the 2000-2001 negotiations. In March 2000, the District implemented its final

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<sup>1</sup> EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at [www.perb.ca.gov](http://www.perb.ca.gov).

offer in those negotiations. In October 2000, OUEA members ratified the District's final offer including the health plan change for current bargaining unit members over the age of 65.

Exhibit B, which you attached to your charge, is not signed by the employer. This document was not ratified by the union or the employer.

On September 24, 2001, the U.S. Equal Employment Opportunity Commission issued a "Determination" that the collective bargaining agreement between OUEA and the employer contained a provision "which is age-based and denies to current employees who are 65 or over, that is, over the age of eligibility for Medicare benefits, the same benefits, under the same conditions that it offers to any current employee under the age of 65". The agency found that there was reason to believe that the provision violated the Age Discrimination in Employment Act of 1967.

From the information provided with your charge it appears that the employer and the union were both put on notice, in August and September of 2001 that there were significant legal problems with the age provisions of the health plan in the current collective bargaining agreement<sup>2</sup>. This information was provided to the employer and the union when they were engaged in reopening bargaining for the health plan.

On September 27, 2001, OUEA and the District both signed a document that became the MOU regarding health and welfare benefits. It states that on September 20 a proposed MOU (presumably Exhibit B) was presented to the District Board and current board members had raised objection to the requirement that active plan participants over the age of 65 could be placed in a Medicare Risk HMO at the discretion of the District. With this MOU the District and OUEA agreed to revise the health and welfare benefits to remove the language permitting the District to place current employees over 65 in a Medicare Risk HMO<sup>3</sup>. Instead, they are entitled to the same health benefits as other current employees.

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<sup>2</sup> In addition to the EEOC determination, you have submitted other materials to support your contention that OUEA had knowledge that the age provision was illegal. Exhibit W is a January 2002 letter from Kay Sandell Lampson to fellow teachers which recounts that she had received information from a federal agency which indicated that the District "had no legal right to force 65 yrs & over active teachers into Medicare..." and had passed this information on to OUEA. She states that she spoke at three union executive council meetings asking that the improper provisions be removed, after summer 2001 negotiations had begun. You have also supplied some of the information which Ms. Lampson received from the federal government (Exhibit X), and a letter from AON Consulting to the District of August 14, 2001. That letter informed the District that no provider would administer its health plan because it does not offer employees over 65 the same benefits as it provides for employees under 65.

On July 30, 2002, the U.S. Equal Employment Opportunity Commission issued Ms. Lampson a Notice of Right to Sue. It appears from the fact that only the employer's attorney was copied on the document, that this was an action that she had filed against the employer.

<sup>3</sup> It also eliminated the requirement that employees pay Medicare premiums.

You contend that the OUEA actions with regard to health benefits for bargaining unit members over 65 evidences a violation of its duty of fair representation. Your charge notes the OUSD board members objections to Exhibit B and states, "Clearly, the provisions that discriminated against over-65 OUEA Members (sic) originated from OUEA/CTA and were not "imposed" by the District."

However, as described above, the facts do not demonstrate that the subject health care provision originated with the OUEA. The provision resulted from a District proposal in 2000. If you allege that the union's ratification of the proposal in October 2000 is a violation, that allegation appears to be untimely. EERA section 3541.5(a)(1) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.) The charging party bears the burden of demonstrating that the charge is timely filed. (Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.) Accordingly, any allegation regarding union actions in October 2000 is untimely.

Additionally, the OUEA actions in August and September 2001 do not evidence a violation of the duty of fair representation. During that time, the OUEA and the District were in negotiations over changes in health care. During those negotiations, prior to the EEOC "Determination", the union's chief negotiator signed one proposal that was not ratified by the union or the employer. The document never became operative and thus never affected the rights of any bargaining unit members. The negotiations continued until there was agreement by OUEA and OUSD to change the health plans so that the age discriminatory application to bargaining unit members was removed.

In order to state a prima facie violation of the duty of fair representation, Charging Party must show that the Respondent's conduct was arbitrary, discriminatory or in bad faith. Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124. The Board has determined that a union may violate its duty of fair representation by agreeing in negotiations to contractual language that violates certain statutory guarantees. Oxnard Educators Association (Gorcey et al.) (1988) PERB Decision No. 664. In Oxnard Educators, the Board concluded that a prima facie case of a violation is set forth when a charging party alleges that 1) a union was advised that a contract proposal violated a statute, 2) the union acknowledged the concerns, 3) the union provides no rationale for negotiating a provision in conflict with the statute, 4) a request to correct the conflict is made to the union and refused, and 5) the union "knowingly bargained away Charging Parties rights".

In this case, the health care negotiations of August/September 2001 did not result in the bargaining away of the statutory rights of Charging Parties. While an early proposal may have been a violation if it had been adopted, it was not. Rather, before negotiations were completed

the right of employees to a health plan that is not age discriminatory was restored. Accordingly, this allegation must be dismissed.

### **Salary**

On September 27, 2001, OUEA and OUSD executed an agreement on a salary increase. Salary increases were not uniform. Salary increases in some entry level positions received increases greater than the 5.5% increase received by the more experienced bargaining unit members.

You contend that there was no financial or staffing reason for the salary discrimination. In support of this allegation you state that the lack of a staffing reason is demonstrated by the District approving a budget (Exhibit D) “establishing a uniform 5.9% salary increase for Teachers.” (Statement of Charge, page 3, emphasis in original). However, a review of Exhibit D, a chart of District general fund expenditures, merely states that total funding for teacher salaries will increase by 5.9%. It does not state or imply a District position that the increase will be applied in a uniform manner to all levels on the salary scale.

Additional investigation reveals that the OUSD set forth its initial proposal for these negotiations in the board agenda for May 24, 2001. That document states that the “District’s objective in the collective bargaining negotiations with Orange Unified Education Association is to raise salaries to the greatest extent possible in order to recruit and retain the finest teacher’s “ and other staff. That agenda also sets forth the Teacher/Nurse salary matrix. The percent increase offered by the District in its initial proposal varies from approximately 12% for the newest and least educated teaching staff to less than 1% for teachers with the most educational credits and greatest number or years teaching. This initial proposal reflects a strong employer preference to increase salaries for recruitment and the newer teachers. This preference was expressed by District negotiators to Union negotiators at the bargaining table<sup>4</sup>.

Investigation also reveals that the OUEA, in both oral and written communications with bargaining unit members, took the position that the salary schedule needed to be made more competitive to attract and retain teachers and that the salary schedule should be compacted to increase career earnings. After an MOU on salary was reached on September 27, 2001, the OUEA distributed a highlight sheet that stated in relevant part,

The parties have reached an Interim Salary Schedule retroactive to July 1, 2001. All salary cells for credentialed certificate unit members will be increased by 5.5%. Beginning cells in Column 1 and 2 will receive a higher increase (see attached schedules).

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<sup>4</sup> Your Exhibit G is an October 2001 Orange Unified School District Assessment by Sorenson Consulting. Your charge states that it demonstrates “that even prior to the September 27, 2001, raise, unit members on Column 2 of Step 1 were already paid a higher salary than the competitive rate paid at that level in peer districts.” However, the salary table to which you refer shows OUSD lagging behind the competitive rate in most entry and new employee levels as well as the experienced levels.

On April 29, 2002, you amended your charge to include another salary agreement between OUSD and OUEA that was reached on April 23, 2002. The joint announcement by the employer and union bargaining teams states that they reached agreement on a new three year contract and that they “met cooperatively to craft restructured salary schedules as part of a new agreement. It is the mutual goal of both teams to have the salary schedule equivalent to the median teacher salary schedule of the 12 Unified School Districts in Orange County.” A new restructured salary schedule was attached. The announcement also stated that the new schedules would provide uniform step increases.

You contend that the April 2002 agreement further discriminates against the more senior teachers by freezing Column 1 salaries at nine years, Column 2 at ten years and other freezes in the advanced years of Columns 3 and 4. You state “ Implicit in these discriminatory salary freezes is the declaration by Respondents that the added teaching experience of these senior teachers is worth nothing, while a corresponding year of teaching experience by members in other Steps and Column cells is worth thousands of added dollars in salary.” You also state that when this increase is combined with the September 2001 increase the result is unequal percentages ranging from 3% to more than 13%<sup>5</sup>.

Your charge states that the information which you have provided establishes that the salary agreements of September and April recommended for acceptance by OUEA “fails the Rational Basis test” established by the courts to determine whether there has been a violation of the duty of fair representation. You contend that the settlements were irrational because there was no economic or personnel foundation.

In your charge, you contend that the alleged discriminatory salary settlements are part of a continuing course of conduct. You state that the OUEA seeks “To eliminate the ‘troublesome’ veteran teachers who have consistently demanded fair representation and services from the Associations...” and “replace the demanding veteran teachers with docile new and uncredentialed teachers who will not question or challenge the Associations’ actions...”. You contend that salary and benefit discrimination is used to force veteran teachers to leave the District and disband them “as a unified force”.

According to your charge, this discriminatory course conduct by OUEA in negotiations has been ongoing since 1997<sup>6</sup>. Your charge states that since that time veteran teachers have filed a

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<sup>5</sup> The third amended charge also argues that it is misleading to state the salary matrices in the tentative agreement as if the salary increases were based on a full year (2001-2002) when the final matrices were negotiated in March 2002 . However, the salary matrix for teacher/nurse salary schedule clearly states “% Increase Over 2000-2001 Schedule”. It does not state that the full % would be received during the 2001-2002. In fact the % table is preceded by dollar amount tables which clearly state that part of the negotiated raise is “Retroactive to 3/1/02”. Accordingly, the percentage table does not appear deceptive or misleading.

<sup>6</sup> It should be noted that you were the OUEA President from June 1999 to early 2000.

charge at PERB against OUEA, sought recall of the OUEA President, and attempted to decertify the OUEA. You contend that the result is continuing discriminatory conduct against veteran teachers.

As a general rule, an exclusive representative enjoys a wide range of bargaining latitude. As the United States Supreme Court stated in Ford Motor Co. v. Huffman (1953) 345 U.S. 330, 338:

Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to good faith and honesty of purpose in the exercise of its discretion.

Acknowledging the need for such discretion, PERB determined that an exclusive representative is not expected or required to satisfy all members of the unit it represents. (California School Employees Association (Chacon) (1995) PERB Decision No. 1108.) Moreover, the duty of fair representation does not mean an employee organization is barred from making an agreement which may have an unfavorable effect on some members, nor is an employee organization obligated to bargain a particular item benefiting certain unit members. (Ibid.; Los Rios College Federation of Teachers (Violet) (1991) PERB Decision No. 889.) The mere fact that Charging Parties were not satisfied with the agreement is insufficient to demonstrate a prima facie violation. (Los Rios College Federation of Teachers (Violet), supra, PERB Decision No. 889.)

In sum, the fact that all members of the bargaining unit did not receive the same percentage salary increase from the September 2001 negotiations does not evidence a violation of the duty of fair representation<sup>7</sup>. As the U. S. Supreme Court has observed, union negotiators are given wide latitude and “the final product of the bargaining process may constitute evidence of a breach of duty only if it can be fairly characterized as so far outside a ‘wide range of reasonableness...that it is wholly ‘irrational’ or ‘arbitrary’.” O’Neill v. Air Line Pilots (1991) 499 U. S. 65.

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<sup>7</sup> Your allegation of discriminatory salary appears to be based only on different percentages. Teachers in the most advanced salary cells actually received more in dollars than did beginning teachers. For example, the salary for Column 1 Step 1 had the largest September 2001 percentage increase, 8.82%. That salary cell increased from \$34,000 to \$37,000. Veteran teachers in Column 3 and Column 4 in Steps 15 through 30 all received more than \$3000 when the salary was increased by 5.5%. (Exhibit 2-B)

In this case, the employer's original proposal (described above) greatly favored the newer faculty. The outcome of negotiations in September 2001 was that all bargaining unit members would receive at least a 5.5% increase. Some of the new hires would receive a larger percentage increase. There was discussion at the bargaining table that this would assist the District as it attempted to hire new teachers. Although the settlement was not as beneficial for some as others, it appears to have been well within the bounds of reasonableness established by PERB and the courts.

Similarly, the agreement of April 2002 does not demonstrate a violation of the duty of fair representation. Your Exhibit 1-B states that the OUEA and OUSD agreed that the salary schedule goal was the "salary schedule equivalent to the median teacher salary schedule of the 12 Unified Districts in Orange County. The District will pay for this increase retroactively to March 1, 2002."<sup>8</sup>

Your amended charge of April 29, 2002 states that when the March 1 increase is combined with that from the previous September the results are unequal percentages of increase. For the reasons discussed, this result does not evidence a violation of the duty of fair representation. The second amended charge also alleges that it is discriminatory to freeze salaries in certain cells. However, this allegation is again based on the erroneous assumption that each salary cell must be increased by the same percentage. The freezing of some salary cells in pursuit of the goal of comparable pay to similar districts is not outside the "wide range of reasonableness" afforded union negotiators.

You have alleged that in addition to being arbitrary and unreasonable, the OUEA actions complained of in your charge were retaliation for an earlier unfair practice charge, an attempt to recall certain union officers, and a decertification effort. However, you have provided no factual basis to demonstrate that the OUEA was motivated in its negotiations by hostility or bad faith toward any particular bargaining unit members who may have been involved in those efforts.

For the reasons discussed, the allegations that the union violated the duty of fair representation when it negotiated the salary increases of September 2001 and April 2002 must be dismissed.

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 that 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 have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an

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<sup>8</sup> The new schedules were attached.

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amended charge or withdrawal from you before October 2, 2002, I shall dismiss your charge.  
If you have any questions, please call me at the above telephone number.

Sincerely,

Bernard McMonigle  
Regional Attorney

BMC