

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

ELVINA G. GUTIERREZ,

Charging Party,

v.

CALIFORNIA SCHOOL EMPLOYEES  
ASSOCIATION & ITS CHAPTER 244,

Respondent.

Case No. LA-CO-1152-E

PERB Decision No. 1606

February 26, 2004

Appearances: Elvina G. Gutierrez, on her own behalf; California School Employees Association by Maureen C. Whalen, Staff Attorney, for California School Employees Association and its Chapter 244.

Before Baker, Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Elvina G. Gutierrez (Gutierrez) of a Board agent's dismissal (attached) of the unfair practice charge. The charge alleged that the California School Employees Association and its Chapter 244 (CSEA) breached its duty of fair representation. Gutierrez alleged that this conduct constituted a violation of the Educational Employment Relations Act (EERA).<sup>1</sup>

After review of the entire record, including the unfair practice charge, the amended charge, the Board agent's warning and dismissal letter, the Board hereby adopts the Board agent's dismissal as a decision of the Board itself.

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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.

## DISCUSSION

Gutierrez disputes the dismissal regarding the dates she raised the scheduling and slander allegations. She claims that she raised the slander issue with CSEA Representative Denise Williams (Williams) on April 7, 2003, as stated in the amended charge, not October 16, 2002, and Williams in turn refused to process a grievance. Gutierrez thus argues that the allegation regarding slander is not untimely. However, she did not provide an alternative date for her first contact with CSEA regarding the scheduling issue.

In its response to the appeal, CSEA asserts that the appeal fails to meet the specificity requirements in compliance with PERB regulations.<sup>2</sup> CSEA further argues that all the allegations are untimely. According to CSEA, Gutierrez is trying to choose dates for events that she prefers. She has provided the Board agent with conflicting dates for the slander and scheduling allegations, which the Board can consider during an investigation. CSEA concludes that the appeal should be summarily dismissed.

Gutierrez expresses her frustration that Williams has refused to represent her under any circumstances. She states that Williams typically turns complaints over to the chapter's executive board, who, being school district employees, are ignorant of the duties of job stewards. She also said that CSEA will let timelines run as an excuse not to process a grievance that has no resolution. Gutierrez does not identify other specific aspects of the dismissal that she finds objectionable nor point to specific facts that support a prima facie case.

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

The majority of the appeal fails to meet the specificity requirements under PERB Regulation 32635(a)(1).<sup>3</sup> Gutierrez however does dispute the specific date ascribed to her complaint about Colton Joint Unified School District (District), Special Education Director, Diane D'Agostino's allegedly slanderous statement. In her appeal, Gutierrez continues to maintain that she raised the issue with CSEA on April 7, 2003, despite the finding in the dismissal that Gutierrez informed the Board agent on October 31, 2003 that she originally raised the slander issue in a meeting with CSEA Representative, Tom Alessandro on October 16, 2002. In determining whether the charging party has stated a prima facie case, the Board must credit the charging party's allegation of facts over those of other parties. (San Juan Unified School District (1977) EERB Decision No. 12<sup>4</sup>; Golden Plains Unified School District (2002) PERB Decision No. 1489.) Therefore, we must conclude that Gutierrez first spoke to CSEA regarding the slander allegation on April 7, 2003.

Gutierrez also argues that the Board agent erred in timing her contact with CSEA regarding the change in her work schedule. However, she failed to provide an alternative date for which she first contacted CSEA.

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<sup>3</sup>PERB Regulation 32635(a)(1) provides:

(a) Within 20 days of the date of service of a dismissal, the charging party may appeal the dismissal to the Board itself. The original appeal and five copies shall be filed in writing with the Board itself in the headquarters office, and shall be signed by the charging party or its agent. Service and proof of service of the appeal on the respondent pursuant to Section 32140 are required.

The Appeal shall:

(1) State the specific issues of procedure, fact, law or rationale to which the appeal is taken;

<sup>4</sup>Prior to January 1978, PERB was known as the Educational Employment Relations Board or EERB.

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 statute of limitations is an affirmative defense which has been raised by CSEA in this case. (Long Beach Community College District (2003) PERB Decision No. 1564.) Therefore, Gutierrez now bears the burden of demonstrating that the charge is timely filed. (cf. Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.) Gutierrez did not meet that burden regarding either the work schedule.

Since the Board must accept Gutierrez' version of the dates, we find the slander allegation to be timely filed. However, this allegation lacks any specificity regarding dates of occurrence, circumstances, the nature of the alleged slander, or the substance of CSEA's refusal to grieve the issue. (PERB Reg. 32615(a)(5)<sup>5</sup>.) The Board therefore dismisses this allegation for failure to state a prima facie case.

The other allegations regarding the reduction in pay, which was related to the change in Gutierrez' work schedule, and the longevity pay also do not state a prima facie case for breach

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<sup>5</sup>PERB Regulation 32615(a) provides, in pertinent part:

(a) A charge may be filed alleging that an unfair practice or practices have been committed. The charge shall be in writing, signed under penalty of perjury by the party or its agent with the declaration that the charge is true, and complete to the best of the charging party's knowledge and belief, and contain the following information:

(5) A clear and concise statement of the facts and conduct alleged to constitute an unfair practice;

of the duty of fair representation. Gutierrez has alleged that CSEA denied her the right to fair representation guaranteed by EERA section 3544.9 and thereby violated Section 3543.6(b).

The duty of fair representation imposed on the exclusive representative extends to grievance handling. (Fremont Unified School District Teachers Association, CTA/NEA (King) (1980) PERB Decision No. 125; United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258 (United Teachers of Los Angeles (Collins).) In order to state a prima facie violation of this section of EERA, Gutierrez must show that the CSEA's conduct was arbitrary, discriminatory or in bad faith. In United Teachers of Los Angeles (Collins), the Public Employment Relations Board stated:

Absent bad faith, discrimination, or arbitrary conduct, mere negligence or poor judgment in handling a grievance does not constitute a breach of the union's duty. [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. (Dismissal letter, p. 5.)

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

. . . 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. (Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Decision No. 332, p. 9, citing Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124; emphasis added.)

In this case, the evidence shows that CSEA Representative, Yolanda Guerrero (Guerrero) investigated the pay and longevity pay issues. From her investigation, Guerrero concluded that the District paid Gutierrez the appropriate amounts. Gutierrez provided no evidence to show that CSEA's refusal to process her complaint further was without rational

basis or devoid of honest judgment. The Board agent's warning and dismissal letters fully address the issues raised by Gutierrez. Therefore, the Board adopts the Board agent's dismissal as a decision of the Board itself.

ORDER

The unfair practice charge in Case No. LA-CO-1152-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Baker and Neima joined in this Decision.

## Dismissal Letter

October 31, 2003

Elvina G. Gutierrez  
2250 West Chestnut Street, Space #23  
San Bernardino, CA 92410

Re: Elvina G. Gutierrez v. California School Employees Association & its Chapter 244  
Unfair Practice Charge No. LA-CO-1152-E  
**DISMISSAL LETTER**

Dear Ms. Gutierrez:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on September 5, 2003. Elvina G. Gutierrez alleges that the California School Employees Association & its Chapter 244 violated the Educational Employment Relations Act (EERA)<sup>1</sup> by violating its duty of fair representation.

I indicated to you in my attached letter dated October 14, 2003, 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 24, 2003, the charge would be dismissed. On October 21, 2003, I spoke with you regarding this charge and agreed to extend the deadline to file an amended charge. On October 28, 2003, I received a first amended charge. On October 29, 2003, I returned your telephone call and confirmed receipt of the first amended charge. On October 31, 2003, I spoke with you regarding the charge.

In the original charge Gutierrez alleges CSEA violated its duty of fair representation with regard to the following issues: (a) a teacher making sexual innuendos to her; (b) the District changing her schedule; (c) the District lowering her pay; (d) the District failing to pay her longevity pay; and (e) the District's Director slandering her name. The warning letter indicated the issues of lowering her pay and not paying her longevity pay were timely filed, but that the other allegations were untimely filed. Each of these allegations is addressed below.

### Sexual Innuendo

The charge does not provide additional information regarding the sexual innuendo allegation and it is therefore dismissed for the reasons stated in the warning letter.

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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).

### Schedule Change

The District changed Gutierrez' schedule in June 2001. The District did not properly process the paperwork for that change. The original charge alleges that in 2002 Labor Relations Representative Denise Williams told Gutierrez that CSEA would not represent her regarding the schedule change. The first amended charge indicates Gutierrez told Williams about the loss of wages due to a schedule change on or about April 7, 2003. The first amended charge, however, did not indicate whether this was the first time Gutierrez spoke with Williams regarding this issue. On October 31, 2003, I spoke with Gutierrez, who indicated that this was not the first time she spoke with Williams about the schedule change and acknowledged that Williams had originally dealt with this issue in 2002.

Thus, as stated in the warning letter, the allegation regarding CSEA's failure to pursue a grievance on the schedule change is untimely filed and outside PERB's jurisdiction. Williams notified Gutierrez that CSEA would not represent her regarding the schedule change in 2002. As Gutierrez filed this charge on September 3, 2003, conduct occurring in 2002 is outside the six-month statute of limitations period.

### Decrease in Pay and Failure to Pay Longevity Pay

In March 2003, Gutierrez learned that the District paid her less in 2002 than in 2001. The change in Gutierrez' pay was related to the change in Gutierrez' schedule. The warning letter indicated that CSEA had investigated these pay issues and concluded that the District paid Gutierrez appropriately.

The first amended charge alleges the District's payroll office told Gutierrez her wages were reduced because of the schedule change. In 2001, Gutierrez received \$20542 in wages, while in 2002 she received \$15963. The first amended charge also acknowledges that CSEA First Vice President Yolanda Guerrero investigated the claim and confirmed the underlying schedule change paperwork was not properly filed. Gutierrez alleges that Guerrero indicated that it looked like she had been demoted. The first amended charge does not provide facts demonstrating CSEA acted in an arbitrary, discriminatory or bad faith manner. As stated in the warning letter, it appears Guerrero investigated the pay issues and determined that the District properly paid Gutierrez. Guerrero's disagreement with that position does not demonstrate CSEA violated its duty of fair representation.

### Slander

The warning letter indicated that CSEA addressed D'Agostino's slanderous comments about Gutierrez in 2002, and that this allegation was therefore untimely filed. The first amended charge alleges that on or about April 7, 2003, Gutierrez spoke with Williams regarding the slanderous statements. The first amended charge, however, did not indicate whether this was the first time Gutierrez spoke with Williams regarding this issue. On October 31, 2003, I spoke with Gutierrez, who indicated that this was not the first time she spoke with Williams

about the slanderous statements and acknowledged that she had met with CSEA representative Tom Allesandro regarding this issue on or about October 16, 2002. Thus, this allegation is untimely filed and outside of PERB's jurisdiction.

### 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 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

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

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.)

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 \_\_\_\_\_  
Tammy Samsel  
Regional Attorney

Attachment

cc: Maureen Whelan

## **Warning Letter**

October 14, 2003

Elvina G. Gutierrez  
2250 West Chestnut Street, Space #23  
San Bernardino, CA 92410

Re: Elvina G. Gutierrez v. California School Employees Association & its Chapter 244  
Unfair Practice Charge No. LA-CO-1152-E  
**WARNING LETTER**

Dear Ms. Gutierrez:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on September 5, 2003. Elvina G. Gutierrez alleges that the California School Employees Association & its Chapter 244 violated the Educational Employment Relations Act (EERA)<sup>1</sup> by violating its duty of fair representation. My investigation revealed the following information.

CSEA is the exclusive representative of the classified employees at the Colton Joint Unified School District. The District employs Elvina Gutierrez in the classified service. Gutierrez alleges CSEA violated its duty of fair representation with regard to the following issues: (a) a teacher making sexual innuendos to her; (b) the District changing her schedule; (c) the District lowering her pay; (d) the District failing to pay her longevity pay; and (e) the District's Director slandering her name. Each of these allegations is addressed below.

Gutierrez contacted CSEA in June 2001 regarding a teacher who made sexual innuendos to her. CSEA Labor Relations Representative Denise Williams referred Gutierrez to the Department of Fair Employment and Housing.

During the year that Gutierrez participated in the DFEH process the District Director changed Gutierrez' schedule and work year. In 2002, Williams told Gutierrez that CSEA would not represent her regarding the change in her schedule.

On March 24, 2003, Gutierrez learned that the District paid her approximately \$5,000 less in 2002 than in 2001. She also noted that not all of her pay stubs reflected that the District had paid her longevity pay. In April 2003, Gutierrez contacted CSEA. Gutierrez indicates she was "given the run around" so she contacted Senior Labor Relations Representative Chuck Sheppard. Sheppard referred her back to the local chapter. Chief Job Steward Tom Alessandro contacted Gutierrez and indicated First Vice President Yolanda Guerrero would be

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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).

handling Gutierrez' pay issue. Guerrero requested Gutierrez' permission to review her personnel file, which Gutierrez granted with the request that she accompany Guerrero during this process. Guerrero reviewed the file without Gutierrez.

On April 17, 2003, Gutierrez told Labor Relations Representative Denise Williams that she wanted to file a grievance against Director Diane D'Agostino for slandering her name. Guerrero informed Gutierrez that such a grievance would be untimely. CSEA's Tom Alessandro had met with Gutierrez, and Gutierrez' supervisor, Janet Nichols, regarding D'Agostino's comments in 2002.

On May 5, 2003, Gutierrez left Guerrero a message. Guerrero returned the call on May 7, 2003 and they agreed to meet on May 13, 2003. On May 13, 2003, Guerrero cancelled the meeting because she was sick. Gutierrez requested another representative, but Guerrero indicated it was her assignment. Guerrero contacted Gutierrez on May 27, 2003, and they met the next day. Guerrero reviewed documents with Gutierrez and indicated she would get back to her in a week.

On June 27, 2003, Gutierrez contacted Guerrero as she had not heard back from her. Guerrero indicated her doctor had placed her on an off-work order. Gutierrez requested another representative. Guerrero indicated that they were not sure that the District owed her money. After the June 27, 2003 conversation, Guerrero informed Gutierrez that she had checked into it and the District had paid the proper longevity pay. Guerrero also informed Gutierrez that although D'Agostino did not follow the proper procedure for changing her schedule in 2001, the District had paid her the proper amounts for 2001 and 2002.

The above-stated information fails to state a prima facie violation for the reasons that follow.

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.)

Gutierrez filed this charge on September 3, 2003, by certified mail. Therefore, allegations regarding events occurring on or before March 3, 2003 are untimely filed and outside of PERB's jurisdiction. With regard to the sexual innuendo allegation, CSEA referred Gutierrez to DFEH in 2001, more than a year before the filing of this charge. With regard to the change in schedule allegations, Williams told Gutierrez that CSEA would not represent her in 2002, more than six months before the filing of this charge. The charge also indicates that CSEA addressed D'Agostino's comments about Gutierrez in 2002. Thus, Gutierrez knew of the conduct underlying this allegation more than six months prior to the filing of this charge. These allegations must be dismissed as untimely filed.

The timely filed allegations regarding lower pay and longevity pay are addressed below.

Charging Party has alleged that the exclusive representative denied Charging Party the right to fair representation guaranteed by EERA section 3544.9 and thereby violated 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.) In order to state a prima facie violation of this section of EERA, Charging Party must show that the Respondent's conduct was arbitrary, discriminatory or in bad faith. In United Teachers of Los Angeles (Collins), the Public Employment Relations Board stated:

Absent bad faith, discrimination, or arbitrary conduct, mere negligence or poor judgment in handling a grievance does not constitute a breach of the union's duty. [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.

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, citing Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124.]

The charge fails to present facts demonstrating CSEA acted in arbitrary, discriminatory, or bad faith manner. Guerrero met with Gutierrez, reviewed documents and ultimately told Guerrero that the District had paid her the appropriate amounts, and that the District had properly paid her longevity pay. Although Gutierrez does not agree with Guerrero's assessment of these issues, the facts demonstrate Guerrero investigated Gutierrez' complaints. Although Guerrero's illnesses effected the duration of CSEA's investigation, the charge does not demonstrate CSEA violated its duty of fair representation. Thus, these allegations 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

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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 amended charge or withdrawal from you before October 23, 2003, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Tammy Samsel  
Regional Attorney

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