STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

VANESSA K. HAMILTON, Charging Party, v. ORANGE COUNTY EMPLOYEES ASSOCIATION, Respondent.	Case No. LA-CO-215-M PERB Decision No. 2674-M October 15, 2019

Appearances: Vanessa K. Hamilton, on her own behalf; Bridgette Washington, Senior Labor Relations Representative, for Orange County Employees Association.

Before Banks, Shiners, and Krantz, Members.

DECISION

SHINERS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by the Orange County Employees Association (OCEA) to the attached proposed decision of an administrative law judge (ALJ). The complaint in this case alleged that OCEA breached its duty of fair representation under the Meyer-Milias-Brown Act (MMBA)[1] by failing to file a grievance signed and approved by Vanessa K. Hamilton (Hamilton) which included race and gender discrimination and retaliation claims, and instead, without informing Hamilton, filing a different grievance on her behalf that omitted the discrimination and retaliation claims. Following an evidentiary hearing, the ALJ found OCEA's conduct was arbitrary and breached its duty to fairly represent Hamilton, and ordered,

[1] The MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

among other things, that OCEA pay reasonable attorney fees Hamilton incurred challenging her termination in court.

Based on our review of the proposed decision, the entire record, and relevant legal authority in light of the parties' submissions, we conclude that the ALJ's factual findings are supported by the record and, except as discussed below, her conclusions of law are well-reasoned and consistent with applicable law. We therefore adopt the proposed decision as the decision of the Board itself, as modified by the discussion below.

FACTUAL BACKGROUND[2]

Hamilton worked for the Orange County Sheriff's Department (Department) as a Correctional Services Assistant in the Department's Central Women's Jail. At all times of her employment with the Department, Hamilton was included in a bargaining unit represented by OCEA.

Hamilton had been approved to take vacation time off on Wednesday, May 25, 2016. Approximately two weeks before that date, Hamilton's supervisor, Sergeant Chris Hibbs, notified Hamilton by e-mail that she needed to report to work on May 25 for a mandatory overtime shift because of staffing shortages. According to Hamilton, the Department never cancelled her vacation time on May 25 and so she did not report to work that day.

In September 2016, Hamilton was applying for peace officer positions with other agencies. At this time, Hamilton learned from two background investigators that there was an ongoing personnel investigation into her use of vacation time and failure to report to work on

[2] We summarize the material facts here to provide context for our discussion of OCEA's exceptions. A full recitation of the facts and procedural history can be found in the attached proposed decision.

May 25, 2016. This was the first time Hamilton became aware that she was the subject of an investigation by the Department.

Concerned that the Department's investigation would negatively impact her employment opportunities, Hamilton contacted OCEA to initiate a grievance. She worked with OCEA representative Michael Moore (Moore) to draft a grievance alleging that the Department discriminated against her based on race and gender when it ordered her to work mandatory overtime on May 25, 2016, as well as retaliated against her based on her prior accusations of discrimination. Hamilton signed the grievance on September 21, 2016, and confirmed with Moore a couple of days later that it had been filed with the Department.[3]

A Step 1 grievance meeting was scheduled for the morning of October 18, 2016. On that morning, Hamilton received a call from Department Human Resources to let her know that the grievance meeting was cancelled because Moore was no longer with OCEA. Hamilton was advised to contact OCEA representative Charles Barfield (Barfield) for further information. She did so, and Barfield confirmed that Moore was gone and he would handle her case going forward.

Over the next several weeks, Hamilton repeatedly asked Barfield if he had obtained a date from the Department to reschedule the Step 1 meeting. Each time, Barfield responded that he was "working on it." Hamilton ultimately arranged a meeting date herself in early December. Hamilton asked for OCEA to resume handling the matter but to assign a new representative. Bridgette Washington (Washington) was assigned to handle the grievance thereafter.

[3] For consistency with the attached proposed decision, we refer to this version of the grievance as the "Hamilton grievance."

Hamilton and Washington attended the Step 1 meeting with Human Resources official Richard Sanchez (Sanchez) on December 1, 2016. When Hamilton attempted to discuss the Department's alleged retaliation against her through its personnel investigation into her use of vacation time, Sanchez said that issue could not be raised because it was not presented in the grievance. At Hamilton's request, Sanchez showed her the grievance form. Hamilton told Sanchez that was not the grievance she had signed and approved, and she had never seen this one before. Sanchez asked Hamilton to show him the correct grievance. Hamilton tried without success to retrieve it from her e-mail account accessed from her phone. Washington promised to look into the issue when she returned to her office. After doing so, Washington confirmed that the grievance Sanchez had shown them during the meeting was the same as the one in OCEA's files.

The grievance on file with the Department was dated September 22, 2016, and a cover page acknowledged that Human Resources received it on September 23, 2016.[4] Among other differences, the OCEA grievance did not include the race and gender discrimination or retaliation claims, or the material facts regarding the Department's investigation into Hamilton's use of pre-approved vacation time on a day that she was ordered to report for mandatory overtime, Hamilton learning of this fact from outside employment background investigators, and her history of accusing the Department of racial discrimination. Instead, the grievance statement in the OCEA grievance stated without elaboration: "I learned that adverse statements have been placed in my personnel file without my knowledge."

After the Step 1 meeting, Hamilton located a copy of the grievance form and discrimination statement she had originally submitted to Moore on September 21, 2016, and

[4] For consistency with the attached proposed decision, we refer to this version of the grievance as the "OCEA grievance."

forwarded them to Washington. Hamilton asked Washington whether the OCEA grievance could be amended to include all of the information she had supplied in the Hamilton grievance, or if her grievance could be substituted for the one filed by OCEA. Washington responded that "it's better to have something on file now than not to have anything." There is no indication in the record that Washington asked to amend the grievance at that time.

On December 15, 2016, Sanchez issued a detailed written decision denying the Step 1 grievance. Hamilton requested that Washington appeal the grievance to Step 2. Washington did so, and attached to the appeal a discrimination statement Hamilton had prepared, at Washington's request, on December 5, 2016. Employee and Labor Relations Manager Shawn Weiske (Weiske) denied the grievance at Step 2 via e-mail to Washington on December 22, 2016. The denial noted that the time to file a discrimination claim through the grievance process had passed but nonetheless invited OCEA to amend the grievance with additional facts.

Shortly after the Step 2 denial, Washington asked Weiske if the County would agree to hold the grievance in abeyance until the conclusion of the Department's personnel investigation, assuming Hamilton also agreed to that plan. Washington told Hamilton that if the grievance was held in abeyance until after the personnel investigation concluded, they could grieve any adverse decision resulting from the investigation. Hamilton responded that she did not mind putting the OCEA grievance on hold, but she really wanted her original grievance to be submitted. Weiske ultimately agreed to hold the grievance in abeyance.

On December 27, 2016, Hamilton asked Washington whether OCEA could submit the Hamilton grievance to the County. Having received no response, Hamilton wrote to

Washington on February 15, 2017, again asking whether the Hamilton grievance could be substituted for the OCEA grievance. Hamilton again received no response.

On or around May 24, 2017, Hamilton was served with a "Notice of Intent to Dismiss," describing the Department's findings from the personnel investigation and notifying her of its proposed decision to terminate her employment. A "*Skelly* hearing" was held in mid-June 2017, where Washington appeared with Hamilton.[5] On June 22, 2017, Hamilton was served with the Department's Notice of Dismissal, noting that the hearing officer had determined to uphold the proposed dismissal action, effective immediately.

On June 23, 2017, Washington filed a grievance for Hamilton over the termination action, alleging as a violation that Hamilton received a "Notice of Dismissal without reasonable cause"; discrimination was not alleged. On June 28 and 29, 2017, Hamilton and Washington exchanged a number of e-mails in response to Hamilton's questions about the arbitration level of the grievance procedure. In response to those questions, Washington told Hamilton that arbitration under the Memorandum of Understanding (MOU) is binding and provided the relevant MOU section regarding disciplinary appeals, describing that the arbitrator in employment termination cases is empowered to decide if the termination action should be modified or rescinded. Washington also told Hamilton that the arbitration provided an opportunity to raise all of her outstanding issues. Hamilton asked Washington whether arbitration was voluntary or mandatory, and stated that if voluntary, she preferred to use her "right to sue" instead.[6] The record does not reflect that Washington answered the voluntary

[5] The term "*Skelly* hearing" refers to a pre-disciplinary hearing that complies with due process requirements set forth in *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194.

[6] It appears from the record that as of June 29, 2017, Hamilton had received a "right to sue" letter from the California Department of Fair Employment and Housing.

versus mandatory question, but she responded to Hamilton, "By way of your email, I will withdraw the request submitted to advance to arbitration. The matter is now closed." On June 29, 2017, Weiske issued a letter to Hamilton stating that the OCEA grievance would no longer be held in abeyance because she was no longer employed by the County, and deeming the grievance resolved without the opportunity for appeal.

DISCUSSION

When considering exceptions to a proposed decision, the Board applies a de novo standard of review. (*City of Milpitas* (2015) PERB Decision No. 2443-M, p. 12.) Under this standard, we review the entire record and are free to reach different factual and legal conclusions than those in the proposed decision. (*Ibid.*) However, when our review leads us to conclude that an adopted proposed decision properly resolves issues underlying particular exceptions, the Board need not further address those exceptions. (*City of San Ramon* (2018) PERB Decision No. 2571-M, p. 5.)

Under the MMBA, unions owe a duty of fair representation that requires them to refrain from representing employees "arbitrarily, discriminatorily, or in bad faith." (*International Association of Machinists (Attard)* (2002) PERB Decision No. 1474-M, p. 4; *Hussey v. Operating Engineers Local Union No. 3* (1995) 35 Cal.App.4th 1213, 1219; *Vaca v. Sipes* (1967) 386 U.S. 171, 191-192.)[7] It is well-settled that the duty of fair representation applies to grievance handling. (*Coalition of University Employees (Buxton)* (2003) PERB Decision No. 1517-H, p. 6 (*Buxton*), citing *Fremont Unified District Teachers Association, CTA/NEA*

[7]Analogous federal precedent, while not controlling, often provides persuasive guidance in construing California's public sector labor relations statutes. (*County of Santa Clara* (2019) PERB Decision No. 2670, p. 19, fn. 20 & p. 28; *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 616.)

(King) (1980) PERB Decision No. 125.) In *United Teachers of Los Angeles (Collins)* (1982) PERB Decision No. 258, the Board stated:

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

(*Id.*, adopting notice of dismissal, p. 5, emphasis added.) A union's "mere negligence" in handling a grievance may rise to the level of arbitrary conduct that breaches the duty of fair representation only "[in] cases in which the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim." (*Buxton, supra*, PERB Decision No. 1517-H, p. 10, quoting *Dutrisac v. Caterpillar Tractor Co.* (9th Cir. 1983) 749 F.2d 1270, 1274, bracket in original (*Dutrisac*).)

Here, the ALJ concluded, based on both the conduct alleged in the complaint and a wide array of unalleged violations described in the attached proposed decision, that OCEA breached its duty of fair representation by processing Hamilton's first grievance in an arbitrary fashion. OCEA argues in its exceptions that it did not breach its duty because OCEA filed a grievance over Hamilton's termination and would have represented her in arbitrating that grievance had Hamilton not withdrawn it. OCEA's willingness to represent Hamilton in the termination grievance does not absolve OCEA of liability for its arbitrary handling of Hamilton's first grievance, but it does warrant a modification of the proposed remedy.

In the rare case where conduct by a union's representatives is proven to be so extreme that they cannot be relied on to represent the employee further in a grievance proceeding,

potential remedies include ordering the union to pay outside counsel to represent the employee in the grievance process, or ordering the union to reimburse attorney fees the employee paid out-of-pocket to pursue a breach of contract action in court. For example, in *California Union of Safety Employees (Baima)* (1993) PERB Decision No. 967-S, the respondent union was found to have acted arbitrarily and in bad faith when it refused to process an employee's pending grievances after the employee threatened litigation against the union. (*Id.*, adopting proposed decision at pp. 15-16.) Relying on federal cases where the union had acted in bad faith toward an employee in grievance handling, the ALJ ordered the union to reinstate the employee's grievances and pay for outside counsel to represent the employee in those grievances. (*Id.*, adopting proposed decision at pp. 16-17.) On appeal, the Board affirmed this remedy based on the facts presented. (*Id*. at p. 3.)

Here, the ALJ relied on *Dutrisac* to award Hamilton reasonable attorney fees she incurred challenging her termination in court. In *Dutrisac*, the appellate court affirmed the district court's conclusion that a union engaged in arbitrary conduct in violation of its duty of fair representation when it negligently filed an arbitration request two weeks late, resulting in the arbitrator denying the grievance on procedural grounds. (*Dutrisac*, *supra*, 749 F.2d at p. 1274.) The court also affirmed the district court's order requiring the union to reimburse attorney fees the employee incurred pursuing the claims in the denied grievance via a breach of contract action against the employer in court. (*Id*. at pp. 1275-1276.) The court reasoned that the cost of hiring an attorney to pursue those claims constituted the harm from the union's failure to fairly represent the employee, and thus attorney fees were appropriate damages to remedy that harm. (*Ibid*.)

Given the difficulty of proving arbitrary conduct under the high standard set out by the court in *Dutrisac* and adopted by PERB in *Buxton*, we have not had occasion to address whether an award of attorney fees as damages for such a violation is appropriate under California's public sector labor relations statutes. Although existing federal and non-California case law is split as to whether the underlying grievance must be meritorious or merely colorable to justify awarding attorney fees,[8] all authorities agree that attorney fees may be awarded only when the employee hires private counsel to pursue the claims in the grievance impacted by the union's unlawful conduct. (See *Dutrisac, supra*, 749 F.2d at pp. 1275-1276 [plaintiff pursued in court the same termination claim as in the grievance extinguished by the union's arbitrary conduct]; *Wood, supra*, 807 F.2d at p. 503 [because of union's failure to fairly represent them, plaintiffs hired private counsel to represent them in arbitration hearing]; *Del Casal, supra*, 634 F.2d at p. 301 [same].)

[8] Some jurisdictions find such an award appropriate as long as the grievance was not frivolous, reasoning that the denial of fair representation in pursuing the claim constitutes the harm to be remedied. (*Dutrisac, supra*, 749 F.2d at pp. 1275-1276; *Stanton v. Delta Air Lines, Inc.* (1st Cir. 1982) 669 F.2d 833, 838; *Del Casal v. Eastern Airlines, Inc.* (5th Cir. 1981) 634 F.2d 295, 301-302 (*Del Casal*); *Self v. Drivers, Chauffeurs, Warehousemen and Helpers Local 61* (4th Cir. 1980) 620 F.2d 439, 444; *Anchorage Police Dept. Employees Assn. v. Feichtinger* (Alaska 1999) 994 P.2d 376, 385.) Other jurisdictions will award attorney fees only when the employee proves the employer violated the collective bargaining agreement, reasoning that when an employee does not prevail on the merits of the grievance, they have suffered no harm from the union's denial of fair representation. (*Wood v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 406* (6th Cir. 1986) 807 F.2d 493, 503 (*Wood*); *Foster v. United Steelworkers of America, Local Union No. 13600* (11th Cir. 1985) 752 F.2d 1533, 1534; *Roy v. Buffalo Philharmonic Orchestra Society* (2d Cir. 2017) 682 Fed.Appx. 42, 46; *Folsom v. Montana Public Employees' Association, Inc.* (Mont. 2017) 400 P.3d 706, 718.) Because we conclude Hamilton did not meet the threshold requirement for an award of attorney fees, i.e., that her lawsuit did not raise the same claims as the extinguished Hamilton grievance, we need not decide whether to follow either of these lines of cases. Additionally, because we do not reach this issue we do not adopt the proposed decision's discussion of the relative merits of the Hamilton grievance.

That threshold requirement is not met here. OCEA's unexplained substitution of the OCEA grievance for the Hamilton grievance, and its failure to seek to amend the grievance to include the discrimination and retaliation claims, prevented those claims from being heard as potential violations of the MOU's non-discrimination provision. But Hamilton's lawsuit against the County does not appear to have involved an alleged breach of the MOU. Rather, Hamilton's reference to a "right to sue" in her communications with Washington, her expressed concern to Washington that a binding arbitration decision could impact a future lawsuit, and her subsequent voluntary withdrawal of the termination grievance indicate she intended to file a lawsuit challenging her termination. The record clearly indicates OCEA was willing to pursue the termination grievance through arbitration. Thus, unlike in *Dutrisac*, OCEA's arbitrary handling of Hamilton's first grievance did not deny Hamilton union representation on the termination claim she ultimately pursued in court. Accordingly, she suffered no harm that would justify awarding attorney fees as damages.

For these reasons, we modify the proposed order by deleting the requirement that OCEA reimburse Hamilton for reasonable attorney fees. All other aspects of the proposed order are affirmed.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is found that the Orange County Employees Association (OCEA) violated the Meyers-Milias-Brown Act (MMBA) section 3506 by breaching its duty of fair representation owed to Vanessa K. Hamilton (Hamilton). OCEA failed to fairly represent Hamilton by substituting a different grievance for one that Hamilton and a union representative had prepared, and which Hamilton had signed and approved, without providing any rationale or explanation. The

grievance substituted by OCEA omitted material claims and changed the requested remedy, again without explanation. OCEA also failed to fairly represent Hamilton by not amending the grievance to correct the material omissions after being asked to do so several times by Hamilton and invited to do so by the County of Orange. These unexplained actions by OCEA ultimately resulted in the grievance being dismissed without right to further appeal by the County of Orange.

Pursuant to MMBA section 3509, subdivision (b), it is hereby ORDERED that OCEA and its representatives shall:

A. CEASE AND DESIST FROM:

1. Breaching its duty of fair representation owed to employees by processing grievances in an arbitrary and perfunctory manner.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE PURPOSES OF THE MMBA:

1. Within ten (10) workdays following the date this decision is no longer subject to appeal, post at all work locations where notices to bargaining unit employees are customarily posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of OCEA, indicating that OCEA will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by OCEA to communicate with bargaining unit employees. Reasonable steps shall be taken to ensure that this Notice is not reduced in size, altered, defaced, or covered with any other material.

2. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board, or the General Counsel's

designee. OCEA shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on Hamilton.

Members Banks and Krantz joined in this Decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. LA-CO-215-M, *Vanessa K. Hamilton v. Orange County Employees Association*, in which all parties had the right to participate, it has been found that the Orange County Employees Association (OCEA) violated the Meyers-Milias-Brown Act, Government Code section 3500 et seq., by violating its duty of fair representation owed to Vanessa K. Hamilton (Hamilton). OCEA failed to fairly represent Hamilton by substituting a different grievance for one that Hamilton and a union representative had prepared, and which Hamilton had signed and approved, without providing any rationale or explanation. The grievance substituted by OCEA omitted material claims and changed the requested remedy, again without explanation. OCEA also failed to fairly represent Hamilton by not amending the grievance to correct the material omissions after being asked to do so several times by Hamilton and invited to do so by the County of Orange, which resulted in the grievance being denied without right to appeal.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

Failing to fairly represent employees by processing grievances in an arbitrary and perfunctory manner.

Dated: _____

ORANGE COUNTY EMPLOYEES ASSOCIATION

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

VANESSA K. HAMILTON, Charging Party, v. ORANGE COUNTY EMPLOYEES ASSOCIATION, Respondent.	UNFAIR PRACTICE CASE NO. LA-CO-215-M PROPOSED DECISION (August 31, 2018)

Appearances: Vanessa K. Hamilton, on her own behalf; Bridgette Washington, Senior Labor Relations Representative, and Charles Barfield, Labor Relations Specialist, for Orange County Employees Association.

Before Valerie Pike Racho, Administrative Law Judge.

INTRODUCTION

This case involves allegations that an exclusive representative violated its duty of fair representation under the Meyers-Milias-Brown Act (MMBA)[1] by substituting a different grievance for one that an employee had prepared with the assistance of a union representative. The grievance filed by the exclusive representative without the employee's knowledge or approval materially changed the underlying allegations and requested remedy. The employee further alleges that the exclusive representative did not fairly represent her by assigning a new representative who caused a delay in the grievance process, and by failing to correct the omissions in the grievance that it filed, which resulted in the grievance being dismissed short of arbitration by the employer. The exclusive representative denies any unfair practices and

[1] The MMBA is codified at Government Code section 3500 et seq. Unless otherwise specified, all statutory references herein are to the Government Code.

argues that the total course of its conduct shows conscientious representation of the employee in multiple grievances and other proceedings.

PROCEDURAL HISTORY

On January 3, 2017, Vanessa K. Hamilton filed an unfair practice charge with the Public Employment Relations Board (PERB or Board) against the Orange County Employees Association (OCEA) alleging that OCEA violated its duty of fair representation under MMBA section 3506 by substituting a different grievance than one she had prepared with the assistance of a union representative, and which omitted material facts that she was alleging as violation of the contract between OCEA and the County of Orange.

On February 6, 2017, OCEA filed a position statement in response to the unfair practice allegations.

On February 13, 2017, Hamilton filed a "Rebuttal" to OCEA's position statement, and on February 16, 2017, Hamilton filed a first amended charge.

On June 22, 2017, the PERB Office of the General Counsel issued a Complaint alleging that the above conduct by OCEA violated the duty of fair representation owed to Hamilton.

On July 12, 2017, OCEA filed its Answer to the Complaint, denying all material allegations and raising affirmative defenses.

On August 4, 2017, the parties participated in an informal settlement conference with a PERB agent but the case was not resolved.

On November 28, 2017, the Division of Administrative Law convened a formal hearing.

By January 19, 2018, both parties had filed their closing briefs. At that point, the record was considered closed and the matter submitted for proposed decision.

FINDINGS OF FACT

Jurisdiction

It is undisputed that OCEA is an exclusive representative within the meaning of PERB Regulation 32016, subdivision (b),[2] and at all relevant times Hamilton was a public employee within the meaning of MMBA section 3501, subdivision (d). The parties are therefore under the jurisdiction of PERB.

Background

Hamilton began working for the Orange County Sheriff's Department (Department) in 2009 as a Records Technician. After holding that position for approximately two years, Hamilton was promoted to the position of Correctional Services Assistant (CSA) in the Department's Central Women's Jail. In or around late 2011, Hamilton attended the Department's internal academy to become a sworn peace officer, but she did not complete that training after making accusations of racial discrimination. Hamilton then briefly returned to her position as a Records Technician in early 2012 before resuming her position in the Central Women's Jail as a CSA later that year. In 2016, Hamilton was still working in that position for the Department while also attending a Sheriff's training academy in San Bernardino. According to Hamilton, the Department did not like the fact that she was attending an outside Sheriff's academy. Hamilton regularly received a few hours off of work per week to attend the outside academy. At all times of her employment with the Department, Hamilton was included in a bargaining unit represented by OCEA.

[2] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

Hamilton's Use of Vacation Time in May 2016

Hamilton was notified by e-mail from her supervisor, Sergeant Chris Hibbs, that she needed to report to work on Wednesday, May 25, 2016, for mandatory overtime hours because of staffing shortages. Hamilton testified that when she was ordered to work on May 25 she already had scheduled and been approved for vacation time off that day. The sergeant's e-mail notification was sent to Hamilton around two weeks before May 25. According to Hamilton, her vacation time was never cancelled by the Department and so she did not report to work on May 25. Hamilton testified that she was attending to "academy business" on that date, and did not notice several missed telephone calls from the Department and her mother until well after the calls had been placed. She also learned that a police officer had visited her mother's home at the Department's request to do a welfare check on her when she did not show up for her shift. Hamilton does not live with her mother.

After this incident, the Department took away a few hours of her regularly scheduled time off, which impaired her ability to attend the outside academy. Hamilton did not follow-up with Department regarding the May 25, 2016 incident, but instead contacted OCEA for assistance with the hours issue and spoke with a union representative named Schmidt, who did not testify.[3] Schmidt purportedly contacted the Department to inquire if the Department was aware that Hamilton had been off on approved vacation on May 25, and if the Department intentionally took away "comp" hours from Hamilton, to make it difficult for her to timely travel to San Bernardino for academy training. Hamilton was copied on e-mail communications between Schmidt and Department managers ultimately concluding that the removal of Hamilton's time off from the schedule was inadvertent and would be restored so

[3] Schmidt's first name is not included in the record.

that she could attend the outside academy. Hamilton believed at that point that these issues were resolved. They were not.

Hamilton's Communications with Employment Background Investigators in September 2016

In September 2016, Hamilton was applying for police officer positions with other employers. She was at the background investigation stage of the hiring process with the University of California Los Angeles police department (UCLA-PD) and the Santa Barbara County Sheriff's department (SBSD). The investigator for UCLA-PD called Hamilton while he was onsite at the Department. He told her that the Department had revealed to him that there was an ongoing personnel investigation about Hamilton's use of vacation time and failure to report to work on May 25, 2016.[4] This was the first time that Hamilton became aware that she was the subject of an investigation by the Department.

After speaking with the UCLA-PD investigator, Hamilton immediately called the SBSD investigator to notify him about what she had learned. The SBSD investigator was already aware of the personnel investigation. He told Hamilton that it also involved Hamilton's alleged failure to notify the Department of her correct home address, given that the Department had sent a police officer to an incorrect address to do a welfare check when she had not reported to work on May 25, 2016.[5] Hamilton protested that she had informed the Department of her address change, and as proof forwarded to the SBSD investigator a copy of a retirement account statement. Hamilton later learned that the Department had used an old address on her emergency contact card when it sent an officer to her mother's home.

[4] The UCLA-PD investigator did not testify at the hearing.

[5] The SBSD investigator did not testify at the hearing.

Hamilton Seeks Help from OCEA Regarding the Investigation

1. Grievance Preparation

Hamilton was concerned that the Department's investigation would negatively impact her employment opportunities.[6] She contacted OCEA to initiate a grievance. OCEA representative Michael Moore was assigned to assist her.[7] They communicated over the phone and met in person. Hamilton presented Moore with the Department's vacation schedule and list for the week of May 25, 2016, to show that she had approved time off when Sergeant Hibbs ordered her to work mandatory overtime.[8] Hamilton also told Moore that she had accused the Department of discrimination during her time in the internal academy and said she believed that the Department was retaliating against her because of that.

Moore prepared a grievance form and sent it to Hamilton via e-mail to approve, sign, and return to him, which she did on September 21, 2016. Under the heading, "Statement of Grievance clearly indicating how your wages, hours, or conditions of employment have been adversely affected," the grievance signed by Hamilton (hereafter, "Hamilton grievance") stated:

> After applying for…employment from outside agencies, while they were conducting their background investigation they disclosed to me that an investigation [by the Department] is pending. [T]his information should have been provided to me by my employer. The investigation is stemming from me using my approved vacation day and the dept. scheduling mandatory overtime on the same day. The dept. is well aware that I filed a

[6] The concern turned out to be well founded. Both investigators eventually notified her that the pending personnel investigation by the Department prevented her from being considered for employment by their agencies.

[7] Moore did not testify at the hearing.

[8] This document was not entered into the hearing record.

> lawsuit for against them for racial discrimination for treatment against me while I was attending their Peace Officer academy.

Under the heading, "Section of Memorandum of Understanding (MOU) or Personnel and Salary Resolution (PSR) which you believe to have been violated," the Hamilton grievance stated:[9]

> Abuse of Management Rights, Article XV, OCEA and employee rights, section one, employee rights. The County shall not hinder [or] discipline an employee for exercising any rights or benefits provided in the Memorandum of Understanding. [Article III] Section 3. Contents of Personnel File, A. Adverse statements.

Under the heading, "Suggested Solution," Hamilton requested: (1) that she be made whole; (2) that *all materials related to the investigation be removed from her personnel records*; and (3) that the Department write a letter of recommendation. (Emphasis added.) May 25, 2016, was identified as the "Date of Occurrence which gave rise to the problem." A section of the form that inquired, "Are you alleging discrimination in the application of the cited MOU or PSR provisions" had the boxes checked for race and gender.[10] It is noted on the form that a separate statement describing the alleged discriminatory application of MOU provisions is required under that circumstance.

Moore instructed Hamilton to write a statement explaining why she was alleging racial and gender discrimination and give it to him to include with the grievance. Hamilton wrote such a statement, and provided it to Moore via e-mail, also on September 21, 2016. It stated

[9] This section of the form was typed in extremely small font making it difficult to read. During the hearing, consensus was reached by both parties and the administrative law judge over the quoted content.

[10] MOU Article XVIII, "Nondiscrimination," states at Section 1: "The County and the Orange County Employees Association agree that the provisions of this Memorandum of Understanding shall be applied to employees without discrimination as required by state and federal law." If a grievant alleges discrimination, that action also triggers the initiation of a claim with the Equal Employment Opportunity Commission (EEOC), according to OCEA.

that she is the only African-American female working in the Women's Jail, and that during the week in question, a male Caucasian employee had his vacation extended twice, creating a staff deficit. She complained that she was the only CSA on vacation that was called up for mandatory overtime duty during that week, and that another male Caucasian employee was allowed to take "Comp" time off during the same period. The Department also allowed two other employees to remain on loan to other divisions during the time that she was scheduled for mandatory overtime during her vacation. Hamilton named the other employees in her statement, but those names have been omitted here to protect their privacy. Hamilton confirmed with Moore a couple of days later that the grievance had been filed with the Department. A "Step 1" grievance meeting was scheduled for October 18, 2016.[11]

2. Moore's Representation of Hamilton Through October 2016

On or about October 7, 2016, Hamilton was notified by the Department that she was being investigated and was required to attend an investigatory meeting with officers from the Internal Affairs division on October 17, which was the day before the scheduled Step 1 grievance meeting. Moore represented Hamilton with Internal Affairs. Moore and Hamilton had arranged to meet in the lobby before the grievance meeting to discuss strategy. On the morning of October 18, Hamilton received a call from Department Human Resources to let her know that the grievance meeting was cancelled because Moore was no longer employed by OCEA. Hamilton was advised to contact OCEA representative Charles Barfield for further information. She did so, and Barfield confirmed that Moore was gone and he would be handling her case going forward.

[11] The grievance procedure between OCEA and the County (MOU Article X) has three levels. "Step 1" is decided by the "Agency/Department Head." "Step 2" is decided by the "Chief of Employee Relations." The final level is binding arbitration.

3. Delays In Rescheduling the Step 1 Meeting

Over the next several weeks, Hamilton repeatedly asked Barfield if he had obtained a date from the Department to reschedule the Step 1 meeting. Barfield always responded that he was "working on it." By late November, Hamilton had become frustrated with Barfield's failure to get a meeting date. She then contacted Human Resources official Richard Sanchez. Hamilton told Sanchez that she had decided to represent herself in the grievance and requested a date to reschedule the Step 1 meeting. Sanchez urged her to keep Barfield as her representative, saying that he and Barfield had been discussing the matter.[12] Hamilton ultimately arranged a meeting date in early December. After she got the date, Hamilton complained to the OCEA general manager about Barfield's handling of the case, and explained how she had quickly obtained a date from the Department herself when Barfield was unable to do so without explanation for weeks. Hamilton asked for OCEA to resume handing the matter but to assign a new representative. Bridgette Washington was assigned to handle the grievance thereafter.

4. Hamilton's Discovery That OCEA Did Not File the Grievance She Signed

Hamilton and Washington attended the Step 1 meeting with Sanchez on December 1, 2016. According to Hamilton, when she attempted to discuss the matter of the Department's retaliation against her through its personnel investigation into use of her vacation time, Sanchez said that issue could not be raised because it was not presented in the grievance. Hamilton asked to see a copy of the grievance. Sanchez presented a grievance form that did not bear her signature. Hamilton told Sanchez that was not the grievance that she had signed and approved and she had never seen it before. Sanchez asked Hamilton to show him the

[12] Sanchez did not testify at the hearing

correct grievance. Hamilton tried without success to retrieve it from her e-mail account accessed from her phone. Washington promised to look into the issue when she returned to her office. After doing so, Washington confirmed that the grievance that Sanchez had shown them during the meeting was the same as the one in OCEA's files.

The grievance on file with the Department (hereafter, "OCEA grievance") differed from the Hamilton grievance in several ways. First, the "Date of Occurrence giving rise to the problem," was identified as September 19, 2016, rather than May 25, 2016. Hamilton testified that the May 25 date referred to the underlying cause over which she was complaining in the grievance, namely that the Department had initiated a retaliatory investigation against her for her use of vacation time under the MOU and for her earlier claims of discrimination against the Department. The MOU grievance article (Article X, Section 7) requires a Step 1 grievance to be filed "within fourteen (14) days calendar days from the occurrence which gives rise to the problem." Hamilton clarified that she did not become aware of the Department's investigation until a few days before she signed the grievance on September 21, 2016, so timeliness was not an issue. The OCEA grievance was dated September 22, 2016 and a cover page acknowledged that it was received by Human Resources on September 23, 2016. It was assigned a grievance number of GR16-74 by the Department.

Second, an OCEA secretary, Heather Sutherland, signed the OCEA grievance "for" Hamilton. Sutherland did not testify at the hearing. Washington was OCEA's only witness. Washington identified the signature on the document as belonging to Sutherland, but she did not testify regarding that document's preparation or filing. Moore was identified on the form as the OCEA representative handling the matter. It is reasonable to infer because Sutherland

signed the grievance form that she was at least partially responsible for its content. But since no one with actual knowledge of that fact testified it is not clear.

Third, the "Statement of Grievance" in the OCEA grievance omitted all of the material facts that were included in that section of the Hamilton grievance regarding the Department's investigation into Hamilton's use of pre-approved vacation time on a day that she was ordered to report for mandatory overtime, Hamilton learning of this fact from outside employment background investigators, and her history of accusing the Department of racial discrimination. Instead, the grievance statement in the OCEA grievance stated without elaboration, "I learned that adverse statements have been placed in my personnel file without my knowledge."

Fourth, the OCEA grievance identified the same MOU sections that the Hamilton grievance had alleged to be violated but also added, "and any other relevant section(s) of the MOU." Fifth, the remedies sought in the OCEA grievance were similar to those in the Hamilton grievance, with the exception that the OCEA grievance omitted the request for a letter of recommendation and asked that "all adverse statements" be removed from the personnel file instead of "all materials related to the investigation."

Finally and notably, the OCEA grievance specifically checked the "No" box on the section of the form inquiring whether discrimination was alleged in the application of the cited MOU provisions. This is in contrast to the Hamilton grievance form that had the boxes checked alleging discrimination on the bases of race and gender. It also did not include the separate discrimination statement that Hamilton had prepared and submitted to Moore for inclusion with the filing.

After the Step 1 meeting, Hamilton was able to locate a copy of the grievance form and discrimination statement that she had originally submitted to Moore on September 21, 2016. She forwarded those to Washington. Hamilton asked Washington whether the OCEA grievance could be amended to include all of the information she had supplied in the Hamilton grievance, or if her grievance could be substituted for the one that had been filed by OCEA. Washington responded that "it's better to have something on file now than not to have anything." There is no indication in the record that Washington inquired at that time whether the Department would be willing to consider Hamilton's request or that she ever provided the Department with a copy of the Hamilton grievance. Washington asked Hamilton to prepare another discrimination statement and sign and date it so that it could be included in subsequent filings. Hamilton did so on December 5, 2016. The new statement included the same underlying facts from the statement that Hamilton had submitted to Moore in September, but added that the Department racially discriminated against her while attending the academy and alleged that it continued to retaliate against her by removing her previously approved time off on Tuesdays. It omitted, however, any facts related to gender discrimination.

5. The Department's Step 1 Grievance Denial

Sanchez issued a detailed written decision denying the Step 1 grievance on December 15, 2016. He acknowledged that Hamilton had provided "background information on a scenario" during the meeting that had ultimately resulted in a personnel investigation against her that she was not aware of until being informed of such by background investigators from outside police agencies. Sanchez described three types of employee files maintained by the Department: (1) a copy of the official personnel file that is identical to the one kept by the County's Human Resources office; (2) a background file that was compiled when the

employee initially sought employment with the Department; and (3) personnel investigation files maintained by Internal Affairs. In the "Findings" section of the document, Sanchez concluded:

> [I]t is not customary for the Department to notify an employee of a pending [personnel investigation], nor is there a requirement to do so, until it is determined that an investigatory meeting will need to be held. It's also important to note Ms. Hamilton is willingly providing potential employers access to her employment records by signing their "Release Waiver(s)."
>
> Furthermore, Ms. Hamilton's grievance is based on her belief that adverse statements were placed in her personnel file. Mr. Sanchez had reviewed the contents of Ms. Hamilton's Official Personnel and Department Personnel (green) files on December 1, 2016 and again on December 15, 2016 and could not identify any adverse statements or documents reference [*sic*] her pending [personnel investigation], or otherwise. Therefore, there are no adverse statements to be removed.

6. The Step 2 Grievance

Hamilton requested that Washington appeal the grievance denial by filing a Step 2 grievance with the County. The Step 2 grievance form was dated December 19, 2016 and was again signed by Sutherland on Hamilton's behalf. Washington confirmed that she instructed Sutherland to complete the form. The substance of it was unchanged from the Step 1 except that it newly alleged discrimination. Only the box for race discrimination was checked. The discrimination statement authored by Hamilton on December 5, 2016 was attached to the Step 2 form.

Employee and Labor Relations Manager Shawn Weiske denied the grievance at Step 2 via e-mail to Washington on December 22, 2016. No meeting was held between Hamilton, OCEA, and the County before this decision issued. Weiske stated:

> [I]t does not appear that the grievance articulates facts that are within the scope of the grievance process. According to our records, *there has been no action taken against Ms. Hamilton and nothing has been placed in her personnel file.* It would appear that this grievance is based on a pending personnel investigation that has yet to conclude, *and has thus been filed prematurely*.
>
> Additionally, the Step 2 grievance claims discrimination on the basis of race; however, the Step 1 grievance did not claim discrimination. Although Ms. Hamilton may file a claim with the County Equal Employment Opportunity Access Office, *the timeline to file a discrimination claim through the grievance process has since passed and is not timely.*
>
> [¶…¶]
>
> If you would like to pursue this grievance *please amend the grievance to articulate facts sufficient to state a valid claim within the scope of the grievance process.* If you have any questions please let me know.

(Emphasis added.)[13] Weiske also noted that even though the MOU discrimination claim was untimely, that matter would still be referred to the County's Equal Employment Opportunity (EEO) office.

Shortly after the Step 2 denial, Washington asked Weiske if the County would agree to hold the grievance in abeyance until the conclusion of the Department's personnel investigation, assuming Hamilton also agreed to that plan. Washington testified that the intention was to preserve the timeline for arbitration, which was the next step in the grievance process. Washington told Hamilton that, given the County's previous responses regarding nothing adverse currently resting in her personnel file, if they pursued arbitration at that time they were not likely to win. Washington also said if the grievance was held in abeyance until after the personnel investigation concluded, they could grieve any adverse decision resulting from the investigation. Hamilton responded to Washington on December 27, 2016, stating that

[13] Weiske did not testify at the hearing.

she did not mind putting the current (OCEA) grievance on hold, but she really wanted her original (Hamilton) grievance to be submitted. Hamilton again asked Washington to clarify whether that could happen. Weiske ultimately agreed to hold the Step 2 in abeyance.

Hamilton did not receive a response from Washington regarding her question about whether the Hamilton grievance could be substituted in lieu of the OCEA grievance. Thereafter, Hamilton wrote to Washington on February 15, 2017. She asked:

> Could you please reach out to Richard Sanchez [or] whoever needs to be notified and let them know that there was a discrepancy with the grievance on file which was discovered at our December 1, 2016 meeting and that I would like to void the grievance on file and refile the correct grievance from step 1.
>
> The reason being is that the grievance I had signed and submitted with Michael Moore was switchout [*sic*] and replaced after my signing. *I am not grieving adverse statements that are in my file. I am grieving the adverse actions that were taken against me because of the use of my vacation.*
>
> Please let me know.

(Emphasis added.) There is nothing in the record showing that Washington answered Hamilton's question or that Washington ever submitted the question to Department and/or County Human Resources officials.

7. The Department Notifies Hamilton of Its Findings and Intent to Terminate Employment

On or around May 24, 2017, Hamilton was served with a document entitled, "Notice of Intent to Dismiss," describing the Department's findings from the personnel investigation and notifying of its proposed decision to terminate her employment. It was a 12-page report that contained summaries of multiple employee interviews, including Hamilton's. In brief, the Department's version of the events that started in May 2016 and ultimately led to an investigation and decision to terminate Hamilton's employment is as follows. The mandatory

overtime shift that Hamilton was ordered to work on May 25, 2016, was due to the Department's preparations for a rally to be held by then-presidential candidate Donald Trump, which was anticipated would require increased staffing due to the potential for violent confrontations between supporters and opponents of the candidate. Hamilton and Sergeant Hibbs exchanged various e-mails over the issue. Hamilton stated that she could not work that shift because of school commitments that day. Sergeant Hibbs told Hamilton that she needed to provide her school schedule to excuse her attendance, and he would then schedule her for a different shift to substitute for the missed mandatory overtime. Hamilton refused to provide her school schedule and refused to work on May 25. Hamilton also attended a meeting with Sergeant Hibbs and other supervising officers two days before the scheduled overtime shift, where she was verbally ordered to appear for work on May 25 or she would be considered insubordinate.

During the investigatory interview with Internal Affairs, Hamilton contended that she did not believe she had to work on May 25 because she was on approved vacation time that day, but also admitted that she did not tell her supervisors that she could not work because of being on vacation and never raised the vacation issue until she learned that she was under investigation. Hamilton also admitted that she had asked Sergeant Hibbs to cancel her vacation days on May 23 and 24, and in fact worked those days, and that she did not actually recall during the time of the events that she had scheduled a vacation day on May 25. Hamilton volunteered multiple times that she attended school on May 25, but when the Internal Affairs officer asked that question directly, she refused to say whether she attended school and asserted she was on vacation. An Internal Affairs investigator later independently determined that Hamilton did not have classes on May 25. In the "Findings and Determinations" area of

the report, the Department concluded that even if Hamilton had been under the impression that she had a previously scheduled and approved vacation day on May 25, she was still insubordinate by not reporting to work because the Department has the authority to cancel vacation in the event of an emergency under the MOU, and she had been amply notified of her required attendance due to such an emergency. Hamilton disputes the Department's factual findings and conclusions. She was placed on administrative leave by the Department on January 18, 2017.

A "*Skelly* hearing" was held in mid-June 2017, where Washington appeared with Hamilton.[14] On June 22, 2017, Hamilton was served with the Department's Notice of Dismissal, noting that the hearing officer had determined to uphold the proposed dismissal action, effective immediately. It stated in part:

> This action to terminate your employment is based on sustained allegations that; (1) you were untruthful to your supervisors and during the Internal Affairs investigation; (2) you were absent from duty on May 25, 2016 without authorization; (3) you engaged in multiple instances of insubordination both to your supervisors and during the Internal Affairs investigation; (4) and refused to display the spirit of cooperation expected by the department.

On June 23, 2017, Washington filed a grievance for Hamilton over the termination action, alleging as a violation that Hamilton received a "Notice of Dismissal without reasonable cause" and identifying sections of MOU Articles IX and X as the ones implicated.[15] Discrimination was not alleged. The employment termination grievance was assigned the number GR17-50 by the County. On June 28 and 29, 2017, Hamilton and Washington

[14] See *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 215, which governs procedural due process rights for permanent public employees.

[15] MOU Article IX involves disciplinary procedures; Article X is the grievance procedure.

exchanged a number of e-mails in response to Hamilton's questions about the arbitration level of the grievance procedure. In response to those questions, Washington told Hamilton that arbitration under the MOU is binding and provided the relevant MOU section regarding disciplinary appeals, describing that the arbitrator in employment termination cases is empowered to decide if the termination action should be modified or rescinded. Hamilton also asked Washington whether arbitration was voluntary or mandatory, and stated that if voluntary, she preferred to use her "right to sue" instead. The record does not reflect that Washington answered the voluntary versus mandatory question, but she noted to Hamilton, "By way of your email, I will withdraw the request submitted to advance to arbitration. The matter is now closed." Hamilton testified that she decided not to pursue the termination grievance (GR17-50) to arbitration because she believed that OCEA had mishandled her previous grievance (GR16-74), and so she did not trust OCEA to properly represent her in this important matter.

8. The County Notifies Hamilton that the OCEA Grievance (GR16-74) is Denied

On June 29, 2017, Weiske issued a letter to Hamilton stating:

> At the request of your OCEA representative, the County agreed to hold your grievance (GR16-74) in abeyance do [*sic*] to a failure to state a valid claim under which relief may be sought. Given that you have now resigned your position with the County the grievance will no longer be held in abeyance.
>
> Therefore, your grievance is DENIED.
>
> In accordance with Article X of the General Unit Memorandum of Understanding this grievance is deemed resolved and no further appeal may be made.

Washington also received a copy of this letter. Washington testified that it was her first notification from the County that the OCEA grievance was deemed denied. Hamilton

contacted Washington to let her know that the County had made a mistake in the letter by stating that she had resigned her position with the County. Washington then let Weiske know about that error. The County issued another letter on July 6, 2017, correctly noting that Hamilton's employment had been terminated by the Department, but otherwise identical to its letter dated June 29, 2017. By this time, Hamilton had retained an attorney to pursue discrimination claims. The EEOC had issued Hamilton a "right to sue letter."

In response to being asked why OCEA did not remove GR16-74 from abeyance and proceed to arbitration after the Department had completed its personnel investigation and made adverse findings against Hamilton in the "Notice of Intent to Dismiss," Washington testified, "The employment was terminated." It is noted however, that the Department issued its "Notice of Intent to Dismiss" on May 24, 2017, but Hamilton's employment dismissal was not effective until around one month later, on June 22, 2017. Hamilton also had been on administrative leave since January 2017. It is not clear whether that fact had been noted in her personnel file before the issuance of the dismissal notice, however. In a later exchange, Washington explained:

> A Your recourse at that point, once you received your termination notice, your recourse in moving forward was to arbitration, at which point we could have argued, and I believe I spoke to you about that on the phone, that in arbitration was the opportunity to discuss any outstanding matters, to include the filing of the grievance…. However, it was through your notification to me, I want to say via email, that you elected to withdraw the grievance in its -- Let me stand corrected. The arbitration in its entirety, which would have been inclusive of arguing any outstanding matters that you would have had going on. And I know that there were a number of concerns you had, to include the discrimination matter.

ISSUE

Did OCEA violate its duty of fair representation by its grievance handling?

CONCLUSIONS OF LAW

Although the MMBA does not expressly impose a statutory fair representation duty on unions, nevertheless PERB and courts have followed federal precedent concluding that unions owe a duty of fair representation to the members of their bargaining unit, and this requires them to refrain from representing those members "arbitrarily, discriminatorily, or in bad faith." (*International Association of Machinists (Attard)* (2002) PERB Decision No. 1474-M, p. 4; *Hussey v. Operating Engineers* (1995) 35 Cal.App.4th 1213, 1219; *Vaca v. Sipes* (1967) 386 U.S. 171, 191-192[16].) It is well-settled that the duty of fair representation applies to grievance handling. *Coalition of University Employees (Buxton)* (2003) PERB Decision No. 1517-H, p. 6 (*Buxton*), citing *Fremont Unified District Teachers Association, CTA/NEA (King)* (1980) PERB Decision No. 125.) In *United Teachers of Los Angeles (Collins)* (1982) PERB Decision No. 258, the Board stated:

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

(*Id.*, adopting notice of dismissal, p. 5; emphasis added.)

[16] When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 616.)

A charging party must show how a union's "action or inaction was without a rational basis or devoid of honest judgment" in order to establish that it acted arbitrarily. (*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 *Buxton*, the Board looked to federal cases for determining when "mere negligence" may rise to the level of arbitrary conduct that breaches the duty of fair representation, stating that it occurs "in cases in which the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim." (*Buxton, supra*, PERB Decision No. 1517-H, p. 10 quoting *Dutrisac v. Caterpillar Tractor Co.* (9th Cir. 1983) 749 F.2d 1270, 1274 (*Dutrisac*).) The Board further noted that:

> Acts of omission by union officials not intended to harm members may be so egregious, so far short of minimum standards of fairness to the employee and so unrelated to legitimate business interests as to be arbitrary.

(*Buxton* at p. 10, quoting *Robesky v. Qantas Empire Airways Limited* (9th Cir. 1978) 573 F.2d 1082, 1090 (*Robesky*).)

In *Robesky*, an employee was discharged after the employer determined that she was medically unable to perform the duties of her job. The union pursued a grievance on the employee's behalf that was denied by the employer at the initial stages of the grievance procedure. The employee believed the grievance to be advancing to the arbitration level, but union officials did not timely file that request. They did not inform the employee, however. Instead, they struck a deal with the employer for an offer of reinstatement minus back pay and a new probationary period, in exchange for their withdrawing the grievance. The union presented the employer's offer, but still neglected to tell the employee that the grievance had been withdrawn. The employee rejected it believing that she could attain a better outcome in

arbitration. The union then wrote to the employee explaining that it would take no further action on her behalf, and the employer also declined to allow the employee an opportunity to reconsider its offer of reemployment. The court considered two theories, either of which it concluded showed arbitrary conduct that amounted to a breach of the union's duty. First, the court found if the union deliberately did not disclose to the employee that it failed to advance the grievance to arbitration, then that decision was "without rational basis" and therefore arbitrary. (*Robesky*, *supra*, 573 F.2d 1082, 1089.) Second, even if the union withheld critical information from the employee unintentionally, the court found that "unintentional acts or omissions by union officials may be arbitrary if they reflect reckless disregard for the rights of the individual employee." (*Id*. at p. 1090.)

After concluding that that the union's failure to disclose in that instance had worked severe prejudice on the employee's rights, the court stated:

> The policies underlying the duty of fair representation would be served by affording appellant a remedy for the grave injury resulting from the egregious conduct of her collective bargaining agent. The countervailing policies which counsel in favor of limiting a union's liability to the members do not argue against affording appellant a remedy in the circumstances of this case. The Union's ability to screen meritless grievances from the arbitration process, [citation] would not have been impaired by disclosure to appellant. The collective strength of the Union and its ability to allocate group resources, [citation] would not have been undermined. Telling appellant her grievance had been withdrawn from arbitration would not have impaired the interests of other workers, cost the Union money, or dissipated the Union's bargaining power.

(*Robesky*, *supra*, 573 F.2d 1082, 1091.)

In *Dutrisac*, a union pursued what it considered to be a meritorious grievance challenging an employee's termination action as racially motivated. The union filed a request for arbitration, but by mistake it was filed two weeks late. The arbitrator found the grievance

untimely and therefore not arbitrable. The union argued that it was guilty at most of simple negligence, which did not breach the duty of fair representation. The union argued further that, even if there was a breach, it did not harm the employee's rights because the district court did not find merit to the underlying claims against the employer. The court discussed decisions where simple negligence was deemed insufficient to establish a breach of a union's duty:

> Most of the decisions…involve alleged errors in the union's evaluation of the merits of a grievance [citation], in its interpretation of the collective bargaining agreement [citation], or in its decisions concerning presentation of the grievance at the arbitration hearing [citation]. When the challenged conduct is not an erroneous decision by the union but its failure to perform a ministerial act required to carry out the decision, courts have been more willing to impose liability for merely negligent conduct [citations].

(*Dutrisac*, *supra*, 749 F.2d 1270, 1273.) The court further opined, "We conclude that the union should be responsible for a total failure to act that is unexplained and unexcused." (*Ibid*.)

Mindful of the union's argument against broadening the duty of fair representation as potentially increasing the number of lawsuits, which may diminish the financial stability of unions and impair their ability to function effectively, the court limited its holding over a union's negligence breaching the duty of fair representation to occasions where the employee's interest was strong and the union's failure to perform a ministerial act completely extinguished the employee's right to pursue the claim. (*Dutrisac*, *supra*, 749 F.2d 1270, 1274.) The court concluded that those standards were met in the case before it, finding the union's conduct was arbitrary and therefore it breached the fair representation duty. (*Ibid*.) Regarding the union's argument that any breach of the duty of fair representation did not prejudice the employee

since the district court dismissed the underlying claim against the employer for lack of merit, the court noted:

> Indeed we agree and would find that there was no breach of [the union's] duty of fair representation *were the claim so meritless as to be frivolous* for there is no duty to represent a member in respect to a frivolous claim [citation]. However, rejection of the claim by the district court does not necessarily mean the arbitrator would have rejected it had [the union] timely submitted it to arbitration. Courts and labor arbitrators do not always consider the same factors when deciding whether a contract has been breached [citation]. *Moreover, a less than ironclad grievance may be settled* [citation]. If [the union] had not extinguished [the employee's] right to pursue his claim, the employer might have offered to settle it before arbitration. Thus, only if [the employee's] claim on the merits was frivolous could we conclude that the extinguishment of the right to pursue the claim did not prejudice him.

(*Id.* at p. 1275; emphasis added.) The court then concluded that since the union had advocated on the employee's behalf and had determined after a discussion among union officials to elevate the grievance to arbitration, although the underlying theory proved ultimately unsuccessful, it was not frivolous. (*Ibid.*)

Another example of negligence equating to arbitrary conduct occurred in *Ruzicka v. General Motors Corporation* (6th Cir. 1975) 523 F.2d 306 (*Ruzicka*). There, a union had sought and received two extensions of time from the employer to file at the third stage of the grievance procedure but failed to do so or request a further extension of time. The union also failed to inform either the employee or the employer that it had decided to stop processing the employee's grievance. The court concluded:

> Such negligent handling of the grievance, unrelated as it was to the merits of Appellant's case, amounts to unfair representation. It is a clear example of arbitrary and perfunctory handling of a grievance.

(*Id.* at p. 310.)

It is appropriate in these cases to consider the cumulative actions by a union, rather than piecemeal or individual acts, to determine if the there is a "pattern" of arbitrary failure to represent the employee. (*Mount Diablo Education Association (Scott)* (2010) PERB Decision No. 2127, p. 10 (*Scott*); *American Federation of State, County and Municipal Employees, International, Council 57 (Dehler)* (1996) PERB Decision No. 1152-H, p. 8 (partially overruled on other grounds); *San Francisco Classroom Teachers Association, CTA/NEA (Bramell)* (1984) PERB Decision No. 430, p. 9.) However, the exclusive representative's failure to take certain actions does not establish a violation if the overall pattern of conduct was one in which the union assisted the employee. (*California School Employees Association (Hansen)* (2000) PERB Decision No. 1379, adopting proposed dec. p. 13 (*Hansen*).) In *Hansen*, the union assisted an employee on four of the five occasions alleged in the complaint, but failed twice to follow-up on certain issues for the employee. The administrative law judge concluded and the Board agreed that when considered in its entirety, the union's pattern of conduct was one of assistance. (*Id.* at pp. 13-14.) The employee also had failed to show she had ever asked the union to file a grievance or that the union had arbitrarily ignored or mishandled a meritorious grievance; thus, a breach of the duty of fair representation was not demonstrated. (*Ibid*.)

1. Allegations in the PERB Complaint and Unalleged Claims

Returning to these facts, in sum the PERB Complaint alleges as a breach of the duty of fair representation that on or about December 1, 2016, Hamilton learned that OCEA filed a grievance with the Department that had omitted all of the claims contained in the grievance that she had signed and submitted to OCEA representative Moore on September 21, 2016, and instead alleged merely that the employer had placed adverse statements in her personnel file

without her knowledge. In her brief, Hamilton argues that other conduct by OCEA that was not described in the PERB Complaint also violated its duty to fairly represent her, specifically, (1) that OCEA failed to timely secure representation for the Step 1 meeting on October 18, 2016, which resulted in the meeting being cancelled; (2) that OCEA failed to timely reschedule the Step 1 meeting with the Department; (3) that OCEA failed to notify the Department of the discrepancies between the OCEA grievance and the Hamilton grievance; (4) that even after being notified that the claims alleged in the OCEA grievance did not address the actual controversy, OCEA failed to submit a grievance that corrected the claims or to seek leave from the Department to do so; and (5) that OCEA failed to remove the OCEA grievance from abeyance and proceed to arbitration after adverse statements were in fact placed in Hamilton's personnel file before her employment termination became effective. All but the last of these additional claims were raised by Hamilton in the unfair practice charge. In its defense, OCEA argues that when the totality of its conduct is examined, it is clear that it never failed to represent Hamilton. OCEA points to the fact that it advanced two grievances on her behalf, and that Hamilton voluntarily abandoned the termination grievance (GR17-50) at the arbitration level.[17]

PERB may only consider an unalleged violation when: "(1) adequate notice and opportunity to defend has been provided the respondent; (2) the acts are intimately related to the subject matter of the complaint and are part of the same course of conduct; (3) the unalleged violation has been fully litigated; and (4) the parties have had the opportunity to

[17] Hamilton made clear during the hearing that she does not allege OCEA's handling of the termination grievance (GR17-50) violated the duty of fair representation. Hamilton objected to OCEA's introduction of evidence regarding that grievance as being outside the scope of the proceedings. The evidence was received over objection.

examine and be cross-examined on this issue." (*City of Roseville* (2016) PERB Decision No. 2505-M, p. 25.) Each part of this test must be satisfied. In addition, the unalleged violation must have occurred within the applicable statute of limitations period. (*Ibid*.)

To begin with, all of the above unalleged violations are intimately related to the subject matter of the PERB Complaint and are part of the same course of conduct, as they all directly pertain to OCEA's handling of the first grievance (GR16-74). Both parties raised these issues in their briefs, introduced documentary evidence about them, and examined and cross-examined witnesses regarding the claims. All of the allegations are within the applicable statute of limitations.

It is important to note that except the failure to remove the OCEA grievance (GR16-74) from abeyance and proceed to arbitration, all of the other unalleged violations were addressed in the unfair practice charge, providing adequate notice and opportunity to defend against those claims to OCEA. Regarding the claim that was not discussed in the charge, to consider the totality of OCEA's representation conduct is not only consistent with PERB's approach to the analysis in duty of fair representation cases (e.g., see *Scott*, *supra*, PERB Decision No. 2127, p. 10), but such approach was specifically urged by OCEA in its opening statement and in its brief. In its opening statement, OCEA stated, "Respondent is also prepared to demonstrate to this hearing that *the overall fact pattern of representation* goes beyond this one isolated incident [in the PERB Complaint]." (Emphasis added.) After discussing the breadth of its representational activity on Hamilton's behalf, including pursuing a second grievance alleging termination without cause, OCEA argued in its brief, "[the] [e]vidence presented, and testimony at the hearing, clearly demonstrated that Respondent's representation of Charging Party *throughout this entire matter* was not arbitrary, discriminatory or in bad faith."

(Emphasis added.) Thus, the lack of formal notice by Charging Party regarding the final unalleged claim does not present an issue of surprise or undue prejudice to OCEA under these circumstances. Since all of the elements for considering unalleged violations have been met in this instance, it is appropriate to consider OCEA's entire course of representational conduct to determine whether it breached its duty to Hamilton.

2. OCEA's Negligence Constituted Arbitrary Conduct

Hamilton does not allege that OCEA acted in a manner toward her that was discriminatory or in bad faith, nor does review of the record reveal any such conduct. Rather, like the situations in *Robesky*, *Dutrisac*, and *Ruzicka*, this case involves grievance handling by a union that was not intended to harm the employee, but can be fairly characterized as negligent. It must be determined if that negligent handling can be considered so arbitrary that it breached the fair representation duty. Even though the entire course of OCEA's conduct is being considered, not all of the examples of grievance mishandling alleged by Hamilton show conduct that approaches a breach of the duty of fair representation. For example, although Hamilton may have been exasperated by Moore's abrupt departure and OCEA's failure to provide a new representative in time to salvage the Step 1 meeting on October 18, 2016, the delay of that meeting did not appear to harm Hamilton's rights in any way. Similarly, although Hamilton was frustrated by Barfield's failure to reschedule the meeting for many weeks, again, at most that caused a delay in the process. There is no evidence that such delay caused a procedural defect or influenced the Department's or County Human Resources' decision-making regarding the merits of the grievance. Thus, these actions by OCEA had no effect on the outcome of the matter. By that point in time, OCEA had already filed, without explanation or notice to Hamilton, a different grievance than the one Hamilton had prepared with Moore's

assistance. As explained below, it was that earlier act and the failure to correct it which ultimately harmed Hamilton.

A. The Filing of the Grievance was a "Ministerial Act"

Although OCEA argues that it changed the Hamilton grievance to avoid it being rejected as untimely given that the "date of occurrence" was outside of the 14-day period allowed under the procedure, there is actually no evidence in the record explaining the reason for the substitution. No one with first-hand knowledge of the preparation or filing of the OCEA grievance at Step 1 testified. Washington testified, but not about that. There was also no documentary evidence that explained the circumstances of the substitution. Even if one agrees that OCEA's argument about the grievance needing to be modified to correct the occurrence date provides a rational basis for that particular action, there are still no facts in the record to explain why the "Statement of Grievance" (the facts section) and "Suggested Solution" (the requested remedy section) were adjusted to omit all of the pertinent information underlying Hamilton's claims. If the occurrence date caused concern for OCEA, that date could simply have been stricken and replaced without the substantive content of the grievance also needing to be re-written. There are no facts in the record to explain why OCEA took more drastic action than was necessary to correct the timeliness problem.

Likewise, there are no facts in the record to explain why OCEA failed to allege racial and gender discrimination on the Step 1 grievance form, as had been indicated on the Hamilton grievance form, and to include Hamilton's discrimination statement with the filing, which she had prepared under Moore's direction. Without citing to the record, OCEA claims in its brief that "The Step 1 grievance filed by Respondent did not include an allegation of discrimination because Charging Party's Statement of Discrimination *had not been provided and therefore*

was not available at the time of filing." (Emphasis added.) OCEA's assertion significantly misrepresents the record. Hamilton provided unchallenged testimony that Moore e-mailed her on September 21, 2016, asking for her to return a discrimination statement to him, and that she did so on the same day. This was a day before the OCEA grievance was prepared and two days before it was filed with the employer. Thus, the omission of the discrimination claims was not because Hamilton had not provided the requested information to her OCEA representative. The reason that OCEA failed to include those allegations in the grievance is just as unexplained as the reason that it changed the other substantive content.

After Hamilton signed the Hamilton grievance form and provided her discrimination statement to Moore, all that was left for OCEA to do was file the grievance with the employer, which is a ministerial act. (*Dutrisac*, *supra*, 749 F.2d 1270, 1273; *Ruzicka*, *supra*, 523 F.2d 306, 310.) There are no facts suggesting that the changes made to the grievance that was actually filed, the OCEA grievance, were due to an evaluation by OCEA over its merits. Thus, similar to the situations in *Dutrisac* and *Ruzicka*, OCEA's grievance handling errors were not related to the union's evaluation over the merits of the case and were not explained to the employee at the time that they occurred or on the record at hearing. As the court noted, "the union should be responsible for a total failure to act that is unexplained and unexcused." (*Dutrisac*, *supra*, 749 F.2d 1270, 1273.) There are no facts showing that OCEA had a rational basis for its substitution of the OCEA grievance for the Hamilton grievance.

B. Hamilton's Interests Were Strong and OCEA's Actions "Completely Extinguished" Her Claims

a. The Discrimination Claims

In the Hamilton grievance and in the separate discrimination statement, Hamilton alleged that the Department engaged in racial and gender discrimination by assigning her to

mandatory overtime on her scheduled vacation day while named employees of different races and gender than Hamilton were not similarly treated during the same time period. Hamilton also alleged that the Department's pattern of discriminatory treatment began when she was a student in the internal academy. Although OCEA admits that the Step 1 grievance it filed did not include Hamilton's racial and gender discrimination claims, it argues in its brief that "during the processing of the grievance Respondent successfully introduced the discrimination claim and made it part of the grievance process, with the result that Charging Party was able to pursue that claim without any prejudice whatsoever." But that is not exactly true. It is correct that OCEA attempted to incorporate the racial discrimination claim in the Step 2 filing, but it is not correct that Hamilton was then able to pursue that claim through the grievance procedure without any resulting prejudice.[18]

In fact, the County denied the discrimination claim in the Step 2 grievance because it had not been raised at Step 1, concluding "the timeline to file a discrimination claim through the grievance process has since passed and is not timely."[19] Accordingly, similar to the

[18] It is not clear why the gender discrimination claim was not included in the Step 2 filing along with the racial discrimination claim.

[19] No representatives of the employer testified during the hearing, and therefore their out of court statements are hearsay, which alone cannot be relied upon for a factual finding unless an exception to the hearsay rule applies. (See PERB Reg. 32176.) The official record exception to the hearsay rule applies where (1) the writing was made by and within the scope of duty of a public employee; (2) the writing was made at or near the time of the act, condition or event; and (3) the sources of information and the method and time of preparation were such as to indicate its trustworthiness. (Evid. Code, § 1280.) The Board found such conditions met as to an action item report of a school board, and the statements contained therein were considered reliable. (*Bellflower Unified School District* (2014) PERB Decision No. 2385, pp. 9-10.) Likewise, those standards are met here with respect to the employer's grievance responses and reports as the writings were made by and within the scope of duties of public employees, during the period of grievance processing, and there were no objections to the authenticity of those documents. Thus, the employer's grievance responses and reports are deemed reliable and fall within the official record exception.

situation in *Dutrisac*, where a union's late filing of a grievance precluded arbitration and was considered an arbitrary failure to fairly represent the employee's interests, OCEA's failure to allege Hamilton's discrimination claim at the outset of the grievance procedure resulted in a procedural rejection of the claim without the underlying merits ever being considered by the employer or by an arbitrator.

Washington implied in her testimony that because Hamilton elected to withdraw the termination grievance (GR17-50) before arbitration, Hamilton forfeited her right to have an arbitrator consider all of her outstanding claims against the County, including those involving discrimination. However, the termination grievance did not allege discrimination. By the time GR17-50 was withdrawn the County had already taken action to remove the OCEA grievance (GR16-74) from abeyance and deny it without proceeding to arbitration and "with no further appeal rights," because Hamilton's employment had been terminated. There are no facts in the record from which it can be reasonably concluded that had Hamilton chosen to proceed to arbitration in GR17-50, she also would have been able to revive claims from a previous grievance that had been rejected and closed by the County without further right to appeal, and incorporate them into a separate grievance that was moving forward. Such a possibility is speculative and unlikely. The record demonstrates, however, that because of OCEA's substitution of its grievance for the one Hamilton had approved, Hamilton was deprived of the opportunity to present facts to a neutral arbitrator showing that the Department's mandatory overtime assignment in May 2016 and resulting investigation against her were discriminatory in violation of the MOU's anti-discrimination clause.

b. Other Omitted Claims

In addition to deleting the discrimination claims from the Hamilton grievance, the OCEA grievance also neglected to include other relevant information that Hamilton and Moore had originally entered on the form. For example, the OCEA grievance did not include any of the facts from the Hamilton grievance regarding Hamilton first learning from outside employment background investigators that the Department had launched a personnel investigation over her failing to report to work for a mandatory overtime shift despite the fact that she had been approved for and was taking a vacation day off that day. Instead, the OCEA grievance's facts section said only that Hamilton had learned adverse statements had been placed into her personnel file without her knowledge. The OCEA grievance also significantly changed the requested remedy from removing "any and all materials related *to investigations*," to removing "all adverse *statements* from my personnel file." (Emphasis added.) Of course, as the employer pointed out, since nothing adverse had been placed in Hamilton's personnel records at that point in time, the grievance filed by OCEA was ineffectual from the outset. The original remedy sought was broader because it was not confined to documents in the personnel file but extended to the whole investigation process.

Hamilton provided uncontested testimony that, when she tried to discuss during the Step 1 meeting the claims in the Hamilton grievance regarding her being scheduled for mandatory overtime despite being on an approved vacation day, and then being penalized for taking that vacation day and not reporting to work, Sanchez refused to engage in a substantive discussion. Sanchez gave as a reason for the refusal that this information "was not presented in the [OCEA] grievance."

Hamilton's assertion is also supported by Sanchez's Step 1 grievance denial. The

Step 1 denial only addresses one facet of Hamilton's original allegations, namely that Hamilton first discovered the fact of the Department's personnel investigation against her from outside employment background investigators. According to the Department, that particular fact did not present an MOU violation because the Department does not typically disclose to the target of an investigation that one is being conducted until the investigatory meeting stage and Hamilton necessarily acquiesced to the disclosure of all personnel information to outside investigators by signing a general release. However, the Step 1 denial describes the rest of Hamilton's original allegations only as "background information," without specifically identifying them or reaching any conclusion thereon. Thus, because the OCEA grievance did not include all of the relevant claims, the employer did not consider whether the scheduling of Hamilton for mandatory overtime without canceling her previously-approved vacation day was retaliatory action for her exercising her right to take time off under the MOU. The employer also did not consider whether the initiation of the personnel investigation under the circumstances presented an MOU violation. In turn, the omissions also prevented Hamilton from presenting these facts for evaluation by a neutral arbitrator as the grievance was wholly denied without appeal rights by the employer upon her dismissal from employment.

c. OCEA Failed to Take Corrective Action

OCEA also did not take any steps to correct these omissions, despite being repeatedly asked to do so by Hamilton. Without ever taking action on Hamilton's multiple requests over several months to amend the grievance or at least ask the employer to consider her original claims, Washington brushed off Hamilton's concerns by saying that "it's better to have something on file now than not to have anything." In this case, having a place-holder grievance on file did not adequately preserve Hamilton's rights. It is notable that the Step 2

grievance denial by Weiske invited OCEA to provide additional information. After concluding that the discrimination claim was untimely and the grievance did not provide facts within the scope of the grievance process, since nothing adverse had been placed in the personnel file, Weiske stated, "If you would like to pursue this grievance *please amend the grievance to articulate facts sufficient to state a valid claim within the scope of the grievance process*." (Emphasis added.) That statement implies that the employer would not have opposed an attempt by OCEA to augment the grievance with additional facts. The record does not indicate, however, that OCEA ever tried to amend the grievance to include the missing facts regarding the vacation day issue. Again, there is no explanation for OCEA's failure to act. Instead, OCEA secured the employer's agreement to hold the grievance in abeyance pending some action by the employer against Hamilton. But, even after Hamilton was placed on involuntary leave and the Department had issued its findings against her, OCEA inexplicably did not take action to proceed to arbitration on GR16-74 before Hamilton was fired. Despite Washington's testimony to the contrary, there was around one full month between the adverse findings and the termination, and no cogent explanation from OCEA either at the time or during hearing why it did not proceed to arbitration.

d. <u>The Overall Pattern Shows An Arbitrary Failure to Fairly Represent</u>

The unexplained initial substitution of the OCEA grievance for the Hamilton grievance, and the later unexplained failure by OCEA to amend the grievance after learning of the significant omissions, shows a pattern of grievance mishandling that was arbitrary, similar to the situations in *Robesky*, *Dutrisac*, and *Ruzicka*. OCEA argues that because it never failed to represent Hamilton when she asked, including pursuing the termination grievance (GR17-50) up until Hamilton elected to withdraw it before arbitration, its overall pattern of representation

assisted Hamilton and therefore did not breach its duty. This situation is distinguished from that in *Hansen*, however. In that case, the two failures to follow-up on issues for the employee did not disqualify the overall pattern of assistance by the union, especially as the charging party had not shown that the union "arbitrarily ignored or otherwise mishandled a meritorious grievance." (*Hansen*, *supra*, PERB Decision No. 1379, adopting proposed dec., p. 13.) Not so here, where there are several instances of arbitrary conduct in grievance handling and no indication that OCEA ever questioned that the grievance had merit. Under the circumstances, OCEA's providing representation for Hamilton when she asked for it in GR17-50 does not excuse the careless handling of GR16-74.

The Hamilton grievance sought to scrub the personnel investigation over her use of vacation time on May 25, 2016, from her employment record by showing that it was discriminatory and/or retaliatory in violation of the MOU. In contrast, the OCEA grievance sought to remove documents that did not yet exist from Hamilton's personnel file. Given that the outcome of the personnel investigation led to Hamilton's firing from the Department, a successful grievance result, i.e., a finding that the investigation itself violated the MOU, may have ultimately salvaged Hamilton's employment. As noted by the court in *Robesky*, "discharge [is] the industrial equivalent of capital punishment." (*Robesky*, *supra*, 573 F.2d 1082, 1091; citation omitted.) There is no question that Hamilton's interest in preserving her employment was strong.

It is important to note that there is no showing that OCEA ever questioned the strength of the grievance and no other reasons to conclude the claims were frivolous or insubstantial. Some of the employer's facts may have proved challenging to overcome in arbitration. For example, its contention that there is no contractual duty to inform an employee of a pending personnel

investigation until the investigatory interview stage, which apparently had not yet occurred at the time of Hamilton's applications for employment with outside agencies. However, that does not imply that the claims as a whole were frivolous, or that OCEA considered the case weak. As noted by the court in *Dutrisac*, even dismissal by a court of certain claims does not indicate that a labor arbitrator would take the same view in determining a contract violation. (*Dutrisac*, *supra*, 749 F.2d 1270, 1275.) The court opined, even "a less than ironclad grievance may be settled [citation]. If [the union] had not extinguished [the employee's] right to pursue his claim, the employer might have offered to settle it before arbitration." (*Ibid*.) The situation is similar here. If OCEA had not extinguished Hamilton's right to pursue her claims, any number of outcomes may have occurred, including an offer of settlement short of an arbitrator's decision, or a win on the merits.

Finally, as in *Robesky*, this is not a situation that implicates the countervailing policies against finding liability, such as where a union exercises its discretion over whether to abandon a grievance that has little chance of success or decides how to best allocate its limited resources. Rather, as in that case, this is a situation where a union's perfunctory grievance handling caused severe prejudice to the rights of its member. OCEA's unexplained substitution of its grievance for the one that had been signed and approved by Hamilton, which omitted material claims from consideration, and its unexplained failure to amend the grievance to correct the omissions, after being asked to do so by Hamilton and invited to do so by the employer, showed a "reckless disregard" for Hamilton's rights that was arbitrary. (*Robesky*, *supra*, 573 F.2d 1082, 1090.) Thus, OCEA's handling of the grievance in question breached the duty of fair representation owed to Hamilton.

REMEDY

MMBA section 3509, subdivision (b), grants exclusive jurisdiction in PERB to determine "the appropriate remedy necessary to effectuate the purposes of this chapter[.]" A remedial order should restore the situation as nearly as possible to that which it would have been but for the unfair practice. (*Modesto City Schools* (1983) PERB Decision No. 291, pp. 67-68; citations omitted.)

It has been found that OCEA failed to fairly represent Hamilton by substituting a different grievance for one that Hamilton and a union representative had prepared, and which Hamilton had signed and approved. The grievance substituted by OCEA omitted material claims and changed the requested remedy. OCEA also failed to fairly represent Hamilton by not amending the grievance to correct the material omissions after being asked to do so several times by Hamilton and invited to do so by the employer. These unexplained actions by OCEA ultimately resulted in the grievance being dismissed, without right to further appeal, by the employer because the grievance was deemed premature and as failing to articulate facts within the scope of the grievance process. It is therefore appropriate that OCEA be ordered to cease and desist from such arbitrary and perfunctory grievance handling.

An ordinary remedy in a duty of fair representation case is an order that the respondent union properly represent the aggrieved employee. (*California Union of Safety Employees (Baima)* (1993) PERB Decision No. 967-S, adopting proposed dec., p. 16 (*Baima*).) Such a remedy is hollow and insufficient in this case, where the employee has been fired and the grievance denied without right to further appeal by the employer. Even if OCEA were ordered to request that the County agree to reopen a long-closed grievance for a fired employee and

proceed to arbitration, it is not only speculative, but unlikely, that the County without any stake in these proceedings would ever agree to that. I therefore decline to order such a remedy here.

Hamilton seeks back pay for the roughly five-month period that she was on administrative leave before her employment was ultimately terminated and GR16-74 was closed by the County. It is not exactly clear how she arrived at that limited timeframe, but it may be because she contends that GR16-74 could have and should have proceeded to arbitration during that time but for OCEA's failure to act. PERB has been reluctant to award this kind of compensatory damage in duty of fair representation cases unless it is shown that "the grievant would have prevailed if the grievance had been properly processed by the union." (*United Teachers of Los Angeles (Valadez, et al.)* (2001) PERB Decision No. 1453, quoting *Iron Workers Local Union 377* (1998) 326 NLRB 375, 377; see also *Amalgamated Transit Union, Local 1704 (Buck)* (2007) PERB Decision No. 1898-M, adopting proposed dec., p. 16.)

Here, although Hamilton stated her general disagreement with the County's factual findings over the events that led up to the personnel investigation, the facts that the County would have presented on that topic to an arbitrator are set forth in the record. Hamilton asserts that she has documentation showing that the Department never cancelled her vacation day on May 25, 2016, despite ordering her to work. That documentation is not in the record. Moreover, given that the employer likely warned Hamilton that her failure to show up for work on the day in question would be considered insubordinate, coupled with its assertion that it would have been within its right under the MOU to cancel any pre-approved vacation under the circumstances, it is not clear how an arbitrator would rule on that particular issue. Given that it is Hamilton's burden to show likelihood of success on the merits, I cannot conclude that she has met that burden. Even if Hamilton were able to produce her documentation, I find the

evidence rather evenly balanced on that point, which does not support the award of the back pay she seeks.

However, Hamilton's facts regarding the County's alleged gender and racial discrimination in summoning her for mandatory overtime are unchallenged in the record, as the County never substantively addressed those issues other than a general denial by two of the assigning sergeants that Hamilton's race had no bearing on their decision. The record does not reflect that the County ever specifically confronted Hamilton's allegations over named employees that she alleged were treated differently because they are of different races and gender than her. Based on this record, it can be concluded that she may have prevailed on this issue in front of an arbitrator.

Relying on federal precedent, PERB has ordered a union to pay outside counsel of the employee's choosing to represent an employee in arbitration where it was found that the union had shown bad faith in the processing of the employee's grievances and therefore could not be relied on to undertake itself any further representation of the employee. (*Baima, supra*, PERB Decision No. 967-S, adopting proposed dec., pp. 16-17; citations omitted.) In *Dutrisac*, the court concluded that the employee was entitled to recover the amount of attorney's fees he had incurred in court proceedings challenging the employer's alleged wrongful termination, since the union failed to fairly represent him in contractual proceedings contesting the employer's actions. The court concluded that in such a circumstance, the attorney's fees represented the employee's damages:

> [T]he expense [the employee] incurred in obtaining legal representation in the district court in his contractual grievance against [the employer] is not merely a result of the harm that [the union] did him; *it is the harm itself.*

(*Dutrisac, supra*, 749 F.2d 1270, 1275; emphasis added.)

The situation here is analogous to both *Baima* and *Dutrisac*. Because of OCEA's wrongful handling of her grievance, Hamilton's only avenue of redress for her discrimination claims against the County was outside of the grievance procedure. The record shows that Hamilton hired an attorney to represent her in extra-contractual forums over those claims. But for OCEA's unfair practice, Hamilton could have proceeded to arbitration with representation by her exclusive representative. Hamilton is therefore entitled to recover her costs for representation by an attorney regarding her discrimination claims.

Finally, it is appropriate to direct OCEA to post a notice of this order, signed by an authorized representative. It effectuates the purposes of the MMBA to inform employees that OCEA has acted in an unlawful manner, is required to cease and desist from such conduct, and will comply with the order. (*City of Selma* (2014) PERB Decision No. 2380-M, adopting proposed dec., pp. 14-15.) The notice posting shall include both a physical posting of paper notices at all places where members of OCEA are customarily placed, as well as a posting by "electronic message, intranet, internet site, and other electronic means customarily used by the [respondent] to communicate with its employees in the bargaining unit." (*Centinela Valley Union High School District* (2014) PERB Decision No. 2378, pp. 11-12, citing *City of Sacramento* (2013) PERB Decision No. 2351-M.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is found that the Orange County Employees Association (OCEA) violated the Meyers-Milias-Brown Act section 3506 by violating its duty of fair representation owed to Vanessa K. Hamilton. OCEA failed to fairly represent Hamilton by substituting a different grievance for one that Hamilton and a union representative had prepared, and which Hamilton had signed

and approved. The grievance substituted by OCEA omitted material claims and changed the requested remedy. OCEA also failed to fairly represent Hamilton by not amending the grievance to correct the material omissions after being asked to do so several times by Hamilton and invited to do so by the County of Orange. These unexplained actions by OCEA ultimately resulted in the grievance being dismissed without right to further appeal by the County of Orange because the grievance was deemed premature and as failing to articulate facts within the scope of the grievance process.

Pursuant to MMBA section 3509, subdivision (b), it is hereby ORDERED that OCEA and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing its duty of fair representation owed to employees by processing grievances in an arbitrary and perfunctory manner.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE PURPOSES OF THE MMBA:

1. Reimburse Hamilton for the amount of any reasonable attorney's fees and costs that are associated with her pursuit in extra-contractual forums of discrimination claims, which were described in her original grievance and discrimination statement dated September 21, 2016, against the County of Orange.

2. Within 10 workdays of a final decision in this matter, post at all work locations where notices to bargaining unit employees are customarily posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of OCEA, indicating that OCEA will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that this Notice is not reduced in size, altered, defaced, or covered with any other

material. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by OCEA to communicate with bargaining unit employees.

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. OCEA shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on Hamilton.

Right to Appeal

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 Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960
E-FILE: PERBe-file.Appeals@perb.ca.gov

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. (Cal. Code Regs., tit. 8, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before

the close of business, which meets the requirements of PERB Regulation 32135, subdivision (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. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32091 and 32130.)

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, §§ 32300, 32305, 32140, and 32135, subd. (c).)