STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ALEXANDER V. POMERANTSEV, Charging Party, v. CALIFORNIA FACULTY ASSOCIATION, Respondent.	)	Case No. LA-CO-17-H PERB Decision No. 698-H September 26, 1988

Appearance; Alexander V. Pomerantsev, on his own behalf.

Before Hesse, Chairperson; Porter, Craib and Shank, Members.

DECISION AND ORDER

This case is before the Public Employment Relations Board (Board) on appeal by Charging Party of a Board agent's dismissal, attached hereto, of his charge that the California Faculty Association violated section 3571.l(e) of the Higher Education Employer-Employee Relations Act (codified at Gov. Code sec. 3560 et seq.). We have reviewed the dismissal and, finding it free from prejudicial error, we adopt it as the Decision of the Board itself.

The unfair practice charge in Case No. LA-CO-17-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

By the BOARD

STATE Of CALIFORNIA

GEORGE DEUKMEJIAN, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Boulevard, Suite 650
Los Angeles, CA 90010-2334
(213)736-3127

May 27, 1988

Alexander V. Pomerantsev
15 New Chardon
Laguna Niguel, California **92677**

Re: LA-C0-17-H; Alexander Pomerantsev v. California Faculty Association, DISMISSAL OF UNFAIR PRACTICE CHARGE

Dear Mr. Pomerantsev:

The above-referenced unfair practice charge, filed on March 4, 1988, alleges that the California Faculty Association (Association) failed to properly represent Charging Party in his attempt to challenge his termination of employment at the California State University at Fullerton (University). This conduct is alleged to violate Government Code section 3571.1 of the Higher Education Employer-Employee Relations Act (HEERA).

I indicated to you in my attached letter dated May 19, 1988 that the above-referenced charge did not state a prima facie case. You were advised that if there were **any** factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge accordingly. You were further advised that unless you amended the charge to state a prima facie case, or withdrew it prior to May 27, 1988, it would be dismissed.

I received your letter dated May 22, 1988 in response to my letter of May 19, 1988. You contend in the letter that I committed a large number mistakes in setting forth my summary of the factual allegations underlying the charge. However, the only specific instance cited was that I stated that you communicated in writing with Bonnie Bogue, the arbitrator in your case against the University, by the letter dated March 3, 1988, attached to the charge. You indicate now that the document attached to the charge was prepared for the arbitration on March 3, 1988, but was never delivered to the arbitrator. Even if this document was not delivered to the arbitrator, the charge still fails to state a prima facie violation of the HEERA. The reasons for the Association's withdrawal are stated in its correspondence to Charging Party. The Association's decision to withdraw the arbitration because of a disagreement about the scope and manner of presenting the case has not been shown to be arbitrary, discriminatory or in bad faith.

Your letter also contends that my letter of May 19, 1988 contained "ungrounded denial of the facts," and "frivolous

interpretation" of documents. Since your letter lacks specifics, there are insufficient grounds for issuing a complaint. I am therefore dismissing the charge based on the facts and reasons contained in my letter of May 22, 1988, as amended herein.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal (California Administrative Code, title 8, section 32635(a)). To be timely filed, the original and five copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.), or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing. Code of Civil Procedure section 1013 shall apply. (See section 32135.) The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty calendar days following the date of service of the appeal (section 32635(b)).

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See section 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail postage paid and properly addressed.

Extension of Time

A request for an extension of time in which to file a document with the Board itself must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three calendar days before the

expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party (section 32132).

Final Date

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

Sincerely,

JOHN SPITTLER
Acting General Counsel

By _____
DONN GINOZA
Regional Attorney

Attachment

cc: Glenn Rothner, Esq.

STATE Of CALIFORNIA

GEORGE DEUKMEJIAN, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Boulevard, Suite 650
Los Angeles. CA 90010-2334
(213) 736-3127

May 19, 1988

Alexander V. Pomerantsev
15 New Chardon
Laguna Niguel, California 92677

Re: LA-C0-17-H; Alexander Pomerantsev v. California Faculty Association

Dear Mr. Pomerantsev:

The above-referenced unfair practice charge, filed on March 4, 1988, alleges that the California Faculty Association (Association) failed to properly represent Charging Party in his attempt to challenge his termination of employment at the California State University at Fullerton (University). This conduct is alleged to violate Government Code section 3571.1 of the Higher Education Employer-Employee Relations. Act (HEERA).

My investigation revealed the following facts. Charging Party was employed as an Associate Professor of Mechanical Engineering at the California State University at Fullerton from approximately 1981 through September 1987. During the 1985-86 academic year, the Faculty Personnel Committee reviewed Pomerantsev's record for a decision to grant tenure. Its recommendation was forwarded to the University President, Jewell Cobb, who issued a negative decision on tenure. In thine 1986, Pomerantsev filed a grievance challenging this decision. In October 1986, the Association notified Pomerantsev that the Faculty Personnel Committee was not properly constituted during the 1985-86 academic year and that the University Senate would restructure the Committee. In November 1986, Pomerantsev was notified by the Association that as a result of settlement negotiations the newly constituted Faculty Personnel Committee would reevaluate all candidates reviewed for tenure during the 1985-86 academic year, including Pomerantsev.

According to the past practice of the University, professors receiving negative decisions on tenure are granted a terminal year in the year following the President's decision. Notwithstanding the fact that Pomerantsev was to be reevaluated for tenure, the University notified him that should the President announce a second decision in 1986-87 against tenure, Pomerantsev's terminal year would still be the 1986-87 academic year. In approximately January 1987, the President issued a second negative decision on tenure. This decision went contrary to the departmental recommendation for an additional probationary year. Pomerantsev filed a grievance challenging this decision in February 1987. Pomerantsev alleges that the

Association failed to take prompt action to pursue the grievance and that he was compelled to file a civil action in the Superior Court on May 29, 1987 seeking an injunction to bar his termination as of June 4, 1987. The court denied the injunction. The court's decision holds that the settlement agreement negotiated between the Association and the University was ambiguous as to the granting of an additional terminal year and that a University memorandum indicated that the University's interpretation of the agreement did not assume an additional terminal year. As noted in the written decision, the court held against Pomerantsev because there was no evidence provided that the Association rebutted the University's interpretation as set forth in the memorandum.

By its letter dated June 3, 1987, the Association, through Paul B. Worthman, Association General Manager, notified Pomerantsev that it would pursue his grievance in arbitration. This letter indicated that the Association would limit its representation in the arbitration to challenging the decision not to award an additional probationary year of employment. The rationale was explained as follows:

> My review of the file, however, indicates that the issue in the arbitration case should not concern the denial of tenure and promotion, but the decision to award a terminal year, rather than an additional probationary year, as recommended by the Department Chair and Dean. This perception of the case is based upon the existing contract language, which requires an arbitrator to find not only a lack of "reasoned judgment" on the part of the president, but also to be able to state "with certainty" that but for the lack of reasoned judgment, tenure and/or promotion would have been granted. It is also based on the numerous prior arbitral precedents interpreting and applying this language in cases where no faculty peer review committee recommended tenure/promotion. Finally it is based on my preliminary assessment of the evidence to sustain our case that we have in your file.
>
> Before making any final determination how to proceed in presenting the case, however, I am, of course, prepared to discuss the matter further with you, your personal attorney (should you wish to have him present and give input to CFA), and Robin

> Whelan, who would be handling the case for CFA.

Charging Party alleges that he was harmed by the Association's delay in notifying him of its decision to proceed with the arbitration. He contends that CFA's silence for nearly four months and waiting, until one day before the hearing on the motion for a permanent injunction, to agree to arbitrate his grievance assisted the University's efforts to defeat his court action.

In the ensuing weeks, the Association and the University negotiated towards a settlement of Pomerantsev's grievance. In its letter dated July 28, 1987, the Association, through Worthman, notified Pomerantsev that the Association had agreed to a settlement with the University. The letter listed seven points to the agreement: (1) the University's offer of an appointment for the academic year 1987-88, (2) Pomerantsev's submission of a resignation from the University effective May 1987, (3) the University's agreement to seal files containing material pertaining to the denial of tenure and barring its availability to prospective employers, (4) the University's agreement not to give a negative recommendation from any official and Pomerantsev's right to seek positive recommendations from any colleague without rebuttal by the University, (5) Pomerantsev's agreement that the 1987-88 academic year would be his final year of employment at the University and his agreement not to apply for any teaching vacancy in the future, (6) Pomerantsev's agreement to drop any other legal action connected with his termination, and (7) Pomerantsev's right to accept the offer of settlement until August 7, 1987.

Northman's letter recommended that Pomerantsev accept the settlement offer and stated his understanding that Pomerantsev would accept the settlement based on an earlier telephone discussion. Worthman also stated why he believed the offer was fair and reasonable, as follows:

> In my judgment, the <u>best</u> the union could obtain in arbitration would be a back-pay award of one year, and an order from the arbitrator to have the Faculty Personnel Committee once more review your file without having discussions with lower-level committees for submission to President Cobb.
>
> As you know, based on my experience, I do not believe the union can prevail in getting an arbitrator to order the CU to award you

> tenure in this matter, nor to get you an additional probationary year, with a new review of the file.

Charging Party alleges that Worthman's signature on the letter was not his own.

In a letter dated August 5, 1987, Pomerantsev wrote to Worthman stating that he was amenable to the proposed settlement. The letter also refers to a demand on the University submitted by Pomerantsev's attorney, Grant Lynd, for an additional two years employment and the securing of Pomerantsev's pension. The Association forwarded a copy of the proposed settlement agreement to Pomerantsev in its letter dated August 6, 1987. The letter, again authored by Worthman, indicated that the Association had confirmed the securing of fringe benefits, including the retirement pension. It further stated that the University would not agree to the "other requests" submitted by Grant Lynd. Although the original settlement terms required acceptance of the offer by August 7, 1987, the Association obtained the University's assurances that the deadline for acceptance would remain open. Pomerantsev again alleges that Northman's signature on this letter was not his own.

According to documents attached to the charge, Pomerantsev acknowledged receipt of the proposed settlement agreement in a letter dated August 10, 1987, but stated that he had been required to make changes in the language in order to bring the agreement into compliance with the original proposal conveyed. by the University through the Association. The revised settlement agreement, including deletions and additions, was signed by Pomerantsev and returned to the Association with the August 10 cover letter.

On August 11, 1987, the Association forwarded the signed settlement agreement to the University with a letter indicating that it approved of Pomerantsev's changes. Pomerantsev's changes were incorporated in a revised settlement agreement, which was returned to the Association by the University. After reviewing it, the Association agreed to the new printed version and returned it to Pomerantsev. Its cover letter enclosing the revised agreement noted that the document incorporated many of the requested changes. It requested Pomerantsev's signature on the agreement. Again, Pomerantsev alleges that the cover letter, dated August 20, 1987, was not signed by Paul Worthman himself.

By letter dated August 24, 1987, Pomerantsev returned the revised settlement agreement with "a couple of minor corrections." A dispute subsequently arose over those changes made in paragraph 8 of the settlement agreement. Pomerantsev

revised paragraph 8 to read as follows:

> In consideration of the foregoing, Grievant and CFA agree to and hereby withdraw with prejudice as fully resolved the grievance and request for arbitration thereon dated March 24, 1987; Grievant agrees to drop all legal actions connected with his termination at CSU, Fullerton, and considers as hereby resolved all matters regarding his termination in dispute among the parties, through the date of this agreement.

The Association acknowledges in its response to the charge that in other litigation with the University it has disagreed with the University's use of language which seeks to obtain a release of related claims in the nature of a general release. The language appearing in the original settlement agreement forwarded to Pomerantsev on August 6, 1987 read as follows:

> In consideration of the foregoing, the Grievant and the CFA agree to release the CSU, its trustees and employees, from any and all claims and liabilities arising out of or related to the occurrences underlying grievance hereby resolved and all matters related to the Grievant's employment at CSU through the date of this Agreement.

The University did amend this original language but not to Pomerantsev's complete satisfaction. CFA takes the position that the University agreed to revise this language so as to limit Pomerantsev's waiver to only those matters underlying his grievance. Pomerantsev refused to sign the final version because he wanted to retain the right to sue employees who had given him false, negative evaluations.

Pomerantsev alleges that on September 1, 1987, he appeared at the University to resume his classroom instruction for the 1987-88 academic year, which would have been his terminal year under the settlement agreement. He alleges that Robin Whelan attempted to obtain his signature on a newly revised version of the settlement agreement which did not contain the language he desired regarding the release of legal claims. This confrontation occurred in the presence of his students. According to Pomerantsev, Whelan informed him that the new version had been cleared with his attorney. However, Whelan allegedly also refused to give him a copy of the new version when he demanded to speak to his attorney directly. Whelan refused to answer questions Pomerantsev raised because she claimed not to have the answers. Whelan allegedly then told

Pomerantsev ". . . I am here not to discuss anything, either you sign it or you are not going to teach." Pomerantsev refused to sign the agreement and was not permitted by the University to begin instruction. Pomerantsev contends that this incident caused him to suffer humiliation in front of his students. Pomerantsev did not return to the University for teaching duties during the 1987-88 academic year.

By letter dated October 16, 1987, Pomerantsev confirmed that his attorney requested that the Association proceed to arbitrate his grievance. In the Meantime, the Association agreed to pursue the natter in arbitration, and accordingly, Pomerantsev requested a meeting to discuss the scope of the arbitration hearing. His letter indicated that he desired to litigate the issues of tenure and promotion.

Worthman responded in a letter dated December 9, 1987. After chastizing Pomerantsev for refusing to sign the settlement agreement, Worthman indicates that he is prepared to discuss all aspects of the arbitration case with Pomerantsev and his attorney and to hear views on what evidence and witnesses should be called. Worthman also stated that it was the Association's position that the issue in the arbitration concerns "solely prejudicial procedural errors that affected your right to proper consideration by President Jewel Cobb. . . [and] that CFA will in the end make the decisions on all matters concerned with the arbitration case, although we will, as we have previously, consider carefully and investigate anything you or your attorney bring to our attention." Lastly, the letter criticizes Pomerantsev for contacting the arbitrator directly and providing certain materials concerning his case. Again, Pomerantsev alleges Worthman's signature was not his own. Pomerantsev responded with a rebuttal to this letter in his own dated December 11, 1987.

Worthman and Pomerantsev met on December 18, 1987 to discuss preparations for the arbitration hearing, scheduled for March 3 and 4, 1988. In a follow-up letter dated December 24, 1987, Pomerantsev provides Worthman with a list of desired witnesses and reiterates his disagreement with the Association concerning the scope of the hearing. He insists that the proper scope for the hearing should be:

> Wrongful, unlawful considerations and recommendations, and prejudicial procedural errors inflicted by the purposely falsified and distorted evaluation of Dr. A. Pomerantsev's performance by incompetent and dishonest people, in order to preclude him from being awarded with tenure and promoted, i.e. - tenure and promotion.

During January and February 1988, Pomerantsev complained about delays in being contacted by the Regional Service Coordinator, Lydia Bacca, to prepare for the arbitration and other failures to keep him fully informed of developments in his case. For example, on February 10, 1988, the Association advised Pomerantsev not to sign a new settlement agreement offered by the University because it believed it to be unacceptable.[1] However, Pomerantsev alleges that the Association failed to include a copy of the agreement with the cover letter. He further alleges that Northman's signature was not his own. Lydia Bacca did contact Pomerantsev later in February and scheduled a meeting with him on February 22, 1988 to discuss the arbitration. Following this Meeting, Bacca prepared a letter dated February 22, 1988, confirming the issues discussed at their meeting on that date. The letter states in pertinent part:

> CFA will proceed with your arbitration scheduled for March 3 and 4. During the hearing the Union will seek as a remedy an additional probationary year rather than tenure and promotion. The rationale for this decision was explained in a letter to you dated June 3, 1987 and was discussed during your subsequent meeting with Associate General Manager Paul Northman.
>
> CFA will make every effort to get you restored to your position. Although it is the Union's considered opinion that the best chance of prevailing in your case is to argue for an additional probationary year, let me assure you that we will give you the opportunity to fully state your case as you see it. We will put you on the witness stand and you may tell the arbitrator whatever you wish to tell her.
>
> The Union's initial investigation has not revealed any evidence of the conspiracy

[1]The settlement agreement which the Association recommended Pomerantsev reject included an offer by CSU to remand Pomerantsev's file to the President for a review, conditioned upon Pomerantsev's waiver of back pay for 1987-88, and no further right of review of the President's decision. The Association contends that it explained its reasons for objecting to the proposal and that Pomerantsev did not voice any objection to proceeding with the arbitration.

> which you believe exists. However, we will continue to investigate this issue. All leads will be investigated and considered in good faith as will be the question of whether undue influence was exerted in your case. He have also subpoenaed comparative records of other faculty who were also undergoing the retention, tenure and promotion process.
>
> Both CFA and the arbitrator herself have already explained to you that it is the Union which makes the presentation in the hearing. If you wished to represent yourself or to have someone else represent you, you could have gone through the peer review process. Alternately you are free to pursue the matter in civil court. Arbitration of the case is based upon your willingness to cooperate with us. If at any point you do not wish to or cannot cooperate, CFA will not pursue the case further.
>
> Let me reiterate that it is in your best interest not to let the arbitrator think there is any division between you and the organization that is representing you at the cost of thousands of dollars and many staff hours. Any behavior on your part displaying division or conflict between us will only serve to damage your case to the arbitrator and possibly jeopardize continuation of the case itself.

Pomerantsev responded to Bacca's letter in his own dated March 12, 1988, stating that the Association had no right to collaborate with the University in presenting the case to the arbitrator by imposing on him its version of the case and its remedy for the problem. He also states that he would not "blindly" follow the Association's instructions and decisions and would resist any attempt to prevent his witnesses from testifying.

By letter dated March 3, 1988, Pomerantsev communicated with Bonnie Bogue, the arbitrator for the case. In the letter he blames the Association for refusing to argue for tenure and promotion and indicates that he is prepared to present evidence included in documents attached to his letter.

According to the Association, when the arbitration commenced,

Pomerantsev requested the right to make a statement. At this time he informed the arbitrator of his objections to the Association's controlling the presentation of his case. Upon the request of the parties, the arbitrator granted a continuance for the purposes of allowing the Association and Pomerantsev to resolve their differences. On March 7, 1988, the Association notified Charging Party that it intended to withdraw its demand for arbitration due to his lack of his cooperation in seeking only reinstatement for another probationary year. This letter solicited a response from Pomerantsev. Pomerantsev responded in two letters dated March 11 and 12, 1988, objecting to the Association's collusion with the University and the Association's refusal to present a case for tenure or to allow his witnesses to testify. In a third letter, dated March 13, 1988, he objects to the Association's previous letter of June 3, 1987 on the grounds that he was not properly consulted before the decision was made on the scope of the hearing and that the Association lacked sufficient knowledge of his case. He also objected to the Association's refusal to allow his witnesses to testify on March 3, 1988 and that witnesses concerning the alleged conspiracy were interviewed too late. He further objected to CFA's failure to subpoena the original tenure review records of other professors rather than the comparative records he alleges were specially fabricated for the hearing by the University. The Association wrote a second to Pomerantsev stating that it had made a final decision to withdraw the arbitration demand.

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

A labor organization breaches its duty of fair representation by engaging in conduct towards a member of its bargaining unit that is arbitrary, discriminatory or in bad faith. Rocklin Teachers Professional Association (Romero) (1978) PERB Decision No. 124; United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258.

This charge focuses on the Association's conduct in processing or failing to process a grievance. PERB has enunciated the standard applied to the Association's conduct in this context. In United Teachers of Los Angeles (Collins), supra, the Board stated:

> 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 chances for success **are** minimal.

Applying these principles to this **case reveals** that Charging Party has failed to allege sufficient facts to demonstrate arbitrary, discriminatory or bad faith conduct on **the** part of **the Association** in **their** handling of **his grievance.** Charging Party lists several types of conduct which he contends establishes a breach of duty of **representation.**

Charging Party **claims that** the **Association cooperated with the University in attempts to deceive** him and **to prevent arbitration of his grievance and/or an adjudication** of his rights in the civil action **against the University. In support** of this contention, the charge alleges that Robin Whelan, Regional Service Coordinator, was directed to carry out such **a plan as** evidenced by her humiliating **Charging Party** in front of **his students in September 1987. However, the chronology of events derived from the documentation submitted by Charging Party, reveals that the Association did not withdraw the arbitration after Charging Party refused to sign the revised settlement agreement on September 1, 1987, but in fact, agreed to go forward with the arbitration scheduled** for **March 3, 1988. Charging Party has failed to allege sufficient facts to demonstrate how Whelan's conduct in September 1987 caused his case not to be heard in arbitration. There are no facts** to **demonstrate** collusion by the **Association** with **the University** or **that such alleged** collusion **was the cause** for the **Association withdrawing from the arbitration in March 1988. Although the Association believed the final revised settlement agreement** in September 1987 **was acceptable,** it did **not withdraw after** Charging Party refused to sign it but **rather agreed** to go forward with arbitration. If the claim is that the Association cooperated with the University by refusing to litigate the tenure issue, no facts are alleged to evidence such cooperation.

Charging Party alleges that the Association has mishandled, mistreated and defiled his case. These allegations are conclusory. They are not supported by facts demonstrating how or in what manner the Association's actions were without a rational basis or devoid of honest judgment. Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Decision No. 332. The Association was entitled to reject Charging Party's claim for tenure based on its lack of merit. There are no facts demonstrating that this judgment was made in bad faith. In fact, it was first communicated to Charging Party in June 1987, before nearly all of the conduct occurred which he alleges to have been improper. Still, in March 1988, after further consultation with Charging Party, the Association was prepared to go forward with the more limited issues.

Charging Party alleges that the Association distorted and misrepresented his case to the arbitrator. There are no facts to support this allegation. Although Charging Party alleges that the Association suppressed his claims for tenure and promotion, the correspondence submitted with the charge reveals that the Association communicated to him that the reason for failing to present such claims was based on its belief that it could not prevail on such claims. No facts are alleged to indicate that the Association "misrepresented" his case merely by failing to present issues it deemed to lack merit. In addition, the Association's refusal to call witnesses desired by Charging Party does not constitute a violation absent evidence of arbitrary, discriminatory or bad faith conduct. United Teachers of Los Angeles (Collins), supra.

Charging Party further alleges that the Association was unwilling to answer his letters and provided misleading answers which included mistakes, errors and lies. There are no facts alleged in the charge identifying to which, if any, letters the Association failed to respond. Even if such facts were alleged, the mere assertion that the Association failed to respond to letters does not state a violation involving a breach of the duty of fair representation. Reed District Teachers Association CTA/MEA (Reyes), supra. Charging Party also contends that the Association's responses were purposely delayed in order to give the University necessary time for cheating. The charge fails to allege the facts from which it can be concluded that any University cheating was caused by or facilitated by these delays. #

The charge fails to allege any facts demonstrating mistakes or lies, or willful errors, and fails to indicate how it can be inferred that any of this alleged conduct resulted in Charging Party's failure to prevail in the arbitration. The only allegation of University cheating concerned the comparative reviews of other professors. Mo evidence is alleged to indicate that the Association's failure to subpoena the original records was in bad faith. The Association's delay in responding to his request for assistance in the spring of 1987 is not shown to have prejudiced his rights. The Association's delays in preparing his case and failing to keep him informed in January and February 1988 are also not shown to have deprived him of fair representation. In sum, the charge fails to indicate how Charging Party's inability to arbitrate his grievance was the result of any arbitrary, discriminatory or bad faith conduct by the Association.

Charging Party alleges that the Association has refused to compensate him for the losses that resulted from the Association's mishandling of his case. Such conduct does not itself evidence arbitrary, discriminatory or bad faith

conduct. **Although damages for lost wages might have been an appropriate remedy** for **the arbitrator to award, no facts are alleged to demonstrate that the Association breached its duty of fair representation in refusing to proceed with the arbitration.**

Charging Party also alleges that the Association prevented him from prevailing in his court action against the University. The memorandum of the decision of the Superior Court indicates that the injunction was denied because the settlement agreement was ambiguous as to the granting of an additional terminal year of employment. The Association is not obligated to represent Charging Party in civil litigation. There is no duty of fair representation owed to a unit **member unless the exclusive representative possesses the exclusive means by which such an employee can obtain a particular remedy. San Francisco Classroom Teachers Association, CTA/NEA (Chestangue) (1985) PERB Decision No. 544. Moreover, there are no facts alleged to demonstrate that the Association representative's failure to testify in the matter was based on arbitrary, discriminatory or bad faith reasons. Mere negligence does not demonstrate a breach of the duty of representation. United Teachers of Los Angeles (Collins), supra. In any event, such conduct occurred more than six months prior to the filing of this charge and therefore is untimely. Government Code section 3563.2(a).**

Charging Party alleges that the Association intentionally delayed the arbitration hearing. The documentation provided by Charging Party indicates that the Association notified Charging Party in October 1987 that the arbitration had been scheduled for March 1988. No facts are alleged to indicate that this scheduling was in bad faith or that the delay was the cause of Charging Party's failing to prevail in the arbitration.

Lastly, Charging Party alleges that the Association forged the signature of Paul Worthman on nearly "90 percent" of the correspondence he received from the Association. There are no facts from which it can be concluded that **even** if the signatures were not authentic, that such action contributed to a breach in the duty of fair representation.

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

be filed with PERB. If I do not receive an amended charge or withdrawal from you before May 27, 1988, I shall dismiss your charge. If you have any questions on how to proceed, please call me at (213) 736-3127.

Sincerely,

DONN GIÑOZA
Regional Attorney