STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

LEROY JESSIE MARTINEZ, Charging Party, v. FONTANA UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-5266-E PERB Decision No. 2147 December 10, 2010

Appearance: Law Offices of John R. Setlich by John R. Setlich, Attorney, for Leroy Jessie Martinez.

Before Dowdin Calvillo, Chair; McKeag and Wesley, Members.

DECISION

McKEAG, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by Leroy Jessie Martinez (Martinez) of a Board agent's dismissal (attached) of his unfair practice charge. The charge alleged that the Fontana Unified School District (District) violated the Educational Employment Relations Act (EERA) [1] by retaliating against Martinez for engaging in protected conduct, unlawfully maintaining personnel records regarding Martinez; negotiating in bad faith; and breaching an unwritten settlement agreement for an undisclosed amount of backpay.

The Board agent found Martinez failed to plead sufficient facts to demonstrate the District violated its obligations under EERA. Accordingly, the Board agent dismissed the charge for failure to establish a prima facie case.

[1] EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

We have reviewed the entire record in this matter and find the warning and dismissal letters well-reasoned, adequately supported by the record and in accordance with applicable law. Consequently, the Board hereby adopts the warning and dismissal letters as a decision of the Board itself, subject to the following brief discussion regarding the lack of nexus between the District's alleged adverse actions and Martinez' protected conduct.[2]

DISCUSSION

In his appeal, Martinez argues that there was a clear nexus between the District's denial of his backpay benefits and his "grievance victory." For the reasons set forth below, we find no such nexus exists.

One of the four elements that must be proved in a retaliation case is that the employer took an adverse action against its employee because the employee exercised his rights under EERA. (*Novato.*) With regard to this element, although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (*North Sacramento School District* (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (*Moreland Elementary School District* (1982) PERB Decision No. 227.) Thus, in addition to timing, a charging party must also establish at least one additional factor. Relevant to this discussion, one such additional factor acknowledged by the Board is an employer's departure from established procedures and standards when dealing with the employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104.)

[2] The Board does not adopt the references to *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416 and *San Leandro Police Officers Assn. v. City of San Leandro* (1976) 55 Cal.App.3d 553 at p.3 dismissal letter and pp. 3-4 warning letter, as support for the well-established discrimination test set forth in *Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).

In the instant case, the alleged oral grievance settlement and the discontinuation of backpay benefits are in relatively close proximity. Accordingly, the timing element is met.

With regard to the nexus factors, Martinez appears to argue that the District's failure to follow the terms of a 2001 grievance in an different involuntary transfer case constitutes a departure from established procedures capable of supporting a finding of nexus. However, as discussed in the dismissal letter, Martinez offers no support regarding why an arbitrator's award on August 1, 2001, entitled Martinez to a similar remedy in June 2007. Further, the arbitrator's award does not state that Martinez should be entitled to a similar award in later transfers. Last, Martinez did not provide facts demonstrating that the District agreed to provide Martinez with terms similar to those in the arbitrator's award. Accordingly, Martinez failed to establish that the District departed from established procedures when it allegedly discontinued the payment of backpay benefits.

Martinez offers no further analysis regarding the remaining nexus factors. Consequently, we find Martinez failed to establish a nexus between his protected activity and the District's alleged adverse actions and, therefore, find the charge was properly dismissed for failure to establish a prima facie case.

ORDER

The unfair practice charge in Case No. LA-CE-5266-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Dowdin Calvillo and Member Wesley joined in this Decision.

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Blvd., Suite 1435
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Telephone: (213) 736-2907
Fax: (213) 736-4901

February 9, 2009

John Setlich, Esq.
Law Offices of Setlich
12592 Central Ave.
Chino, CA 91710-3507

Re: Leroy Jessie Martinez v. Fontana Unified School District
Unfair Practice Charge No. LA-CE-5266-E
DISMISSAL LETTER

Dear Mr. Setlich:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on October 21, 2008. Leroy Jessie Martinez (Martinez or Charging Party) alleges that the Fontana Unified School District (District or Respondent) violated section 3543.5 of the Educational Employment Relations Act (EERA or Act)[1] by interfering with his protected rights.

Charging Party was informed in the attached Warning Letter dated January 13, 2009, that the above-referenced charge did not state a prima facie case. Martinez was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, he should amend the charge. Martinez was further advised that, unless he amended the charge to state a prima facie case or withdrew it prior to January 23, 2009, the charge would be dismissed. On January 21, 2009, you requested and received, on Martinez's behalf, an extension of time to file the amended charge until February 4, 2009. On that day, Martinez filed an amended charge.

In the amended charge, Martinez clarifies the basis for his charge. Martinez alleges that the District refused to comply with the terms of an alleged June 6, 2008 agreement in retaliation for Martinez's conduct of engaging in protected activities. Thus, Martinez's allegations that the District negotiated with Martinez in bad faith, breached an agreement, and improperly maintained an alternate personnel file will not be addressed further.

Martinez alleges that he was employed by the District as a teacher since September 1986. During his employment at the District, Martinez received several evaluations with positive comments. Martinez also served in various capacities with his Union, the Fontana Teachers Association (Union) from 1991 through 2002. For instance, Martinez worked as a crisis committee member, middle school representative, bargaining team member, and building

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

representative. Martinez played an active role in negotiating the 2001 Memorandum of Understanding (MOU) in place between the Union and the District.

Shortly after MOU negotiations concluded in 2000, on June 30, 2000, the District informed Martinez that he was being transferred to another school site. Martinez filed a timely grievance over the transfer in 2001. On August 1, 2001, an arbitrator sustained Martinez's grievance and ordered the District to reinstate Martinez to his former position as well as compensate him for lost wages. This included a $1500 Site Monitor stipend.

On June 14, 2007, the District transferred Martinez a second time. This transfer occurred shortly after Martinez complained that the District had requested that a police officer observe his classroom in January 2007. In addition, Martinez complained that the District improperly had certain students exercise in their regular school clothes.

On October 1, 2007, Martinez filed a grievance over the June 14, 2007 transfer. On May 28, 2008, the parties settled Martinez's grievance by returning him to his former position, making him eligible for the District's supplemental retirement program if he chose to retire on or before June 3, 2008, and placing him on paid administrative leave if he agreed to retire on January 1, 2009 (May 28, 2008 Agreement).

On June 6, 2008, Martinez and his wife met with District Superintendent Jane Smith to discuss compensating Martinez in a fashion similar to the arbitrator's August 1, 2001 order (June 6, 2008 meeting). However, Martinez does not specify whether this meeting was held to supplement the May 28, 2008 Agreement or whether it was meant to address another dispute between Martinez and the District.

On June 9, 2008, Martinez and Smith executed a document entitled "General Release and Settlement Agreement With Resignation" (June 9, 2008 Agreement). According to the June 9, 2008 Agreement, Martinez would retire on June 10, 2008, but effective December 31, 2008; Martinez would be made eligible for the District's supplemental retirement plan; Martinez would be placed on paid administrative leave until December 31, 2008; the District would remove reference to Martinez's 2007 transfer and seal the contents of all files kept on Martinez. The parties further agreed that the June 9, 2008 Agreement constituted a "full and complete settlement of Martinez's claims against the District and release of all claims therein[.]" The parties further agreed that Martinez would release the District from "any and all claims or causes of action arising out of Martinez's employment with the District[.]" The terms of the agreement did not include any provision entitling Martinez to a $1500 site monitor stipend or the provision of a letter of recommendation.

Discussion:

As stated in the January 13, 2009 Warning Letter, to state a prima facie case for unlawful retaliation, the charging party must show: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of

those rights. (Novato Unified School District (1982) PERB Decision No. 210 (Novato); Campbell Municipal Employees Assn. v. City of Campbell (1982) 131 Cal.App.3d 416 (Campbell); San Leandro Police Officers Assn. v. City of San Leandro (1976) 55 Cal.App.3d 553 (San Leandro).) In determining whether evidence of adverse action is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (Palo Verde Unified School District (1988) PERB Decision No. 689.) In a later decision, the Board further explained that:

> The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment.

(Newark Unified School District (1991) PERB Decision No. 864; emphasis added; footnote omitted.)

In the present case, Martinez does not establish that the District's failure to adhere to an unwritten agreement reached on June 6, 2008 constitutes an adverse employment action for several reasons. First, Martinez does not demonstrate that the June 6, 2008 Meeting culminated in an agreement. Martinez contends that "[t]he record shows that Mr. Martinez' transfer of 2001 had set a pre-established financial remedy and that his second 2007 transfer because of this past practice precedent was entitled to the same back pay remedies." However, Martinez offers no support as to the reasons an arbitrator's award on August 1, 2001 entitled Martinez to a similar remedy in June 2007. The arbitrator's award does not state that Martinez should be entitled to a similar award in later transfers. Nor does Martinez provide facts demonstrating that the District agreed to provide Martinez with terms similar to those in the arbitrator's award. Because Martinez does not demonstrate that he and the District reached an agreement, he does not demonstrate that a reasonable person would find the District's actions to be adverse to employment.[2]

Second, even assuming that the parties reached an agreement during the June 6, 2008 Meeting, Martinez does not specify the terms of that agreement. Martinez appears to allege that Martinez was entitled to an unspecified number of $1500 payments and a letter of recommendation from the District. However, because this has not been made clear, Martinez has not provided "a clear and concise statement of facts" supporting this claim. (PERB

[2] To the extent that Martinez alleges that the District unilaterally changed a policy established by the arbitrator on August 1, 2001, as explained in the January 13, 2009 Warning Letter, Martinez does not establish that he, as an individual employee, has standing to allege a violation of the duty to negotiate in good faith. (See State of California (Department of Corrections & Rehabilitation) (2007) PERB Decision No. 1923-S.)

Regulation 32615(a)(5).[3]) Without knowing the terms of the alleged agreement, PERB is unable to determine whether a reasonable person would find the violation of those terms to be adverse to employment.

Third, Martinez does not demonstrate that the terms of the alleged June 6, 2008 agreement were not superseded by the June 9, 2008 agreement, of which there is no dispute over the District's compliance. Martinez does not specify why he and the District entered into the alleged June 6, 2008 agreement. However, because the terms of the alleged agreement appear to include compensation for a position Martinez believed he was entitled to, it is reasonable to believe that the agreement concerned Martinez's employment with the District. To the extent that this agreement was reached concerning "any and all claims or causes of action arising out of Martinez's employment with the District[,]" the alleged June 6, 2008 agreement is superseded by the later June 9, 2008 Agreement. Accordingly, Martinez does not demonstrate that it was improper for the District to not comply with the terms of the earlier June 6, 2008 agreement.

Martinez also appears to contend that the District provided "adverse documents" containing "confidential materials" about Martinez to the police. Martinez does not specify when this disclosure takes place but it appears to have occurred prior to his 2007 transfer. As explained in the January 13, 2009 Warning Letter, PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (Coachella Valley Mosquito Vector Control District v. PERB (2005) 35 Cal.App.4th 1072.) In the present case, the charge was filed on October 21, 2008. This means that the statutory period extends back until April 21, 2008. Thus, Martinez does not establish that the District's alleged provision of adverse information, or any other allegation of wrongdoing by the District occurring prior to April 21, 2008, occurred within the statutory period. Moreover, because Martinez describes neither the nature of the documents or materials shared nor the context in which the District provided the documents or materials to the police department, there is insufficient information to determine whether a reasonable employee would consider this to be an adverse employment action.

Right to Appeal

Pursuant to PERB Regulations, Charging Party 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. (Cal. Code Regs, tit. 8, sec. 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs, tit. 8, secs. 32135(a) and 32130; see also Gov. Code, sec. 11020(a).) A document is also considered "filed" when received by facsimile transmission before the close

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

of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs, tit. 8, secs. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

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

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code Regs, tit. 8, sec. 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 Cal. Code Regs., tit. 8, sec. 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs, tit. 8, sec. 32135(c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs, tit. 8, sec. 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,

TAMI R. BOGERT
General Counsel

By _____
Eric J. Gu
Regional Attorney

Attachment

cc: Leroy Martinez;
Marvin T. Sawyer

PUBLIC EMPLOYMENT RELATIONS BOARD

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January 13, 2009

Leroy Jessie Martinez

Re: Leroy Jessie Martinez v. Fontana Unified School District
Unfair Practice Charge No. LA-CE-5266-E
WARNING LETTER

Dear Mr. Martinez:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on October 21, 2008. Leroy Jessie Martinez (Martinez or Charging Party) alleges that the Fontana Unified School District (District or Respondent) violated section 3543.5 of the Educational Employment Relations Act (EERA or Act)[1] by interfering with his protected rights.

Martinez is employed as a teacher in the District. Martinez is a member of the certificated bargaining unit that is exclusively represented by Fontana Teachers' Association (Union). The District and the Union are parties to a Collective Bargaining Agreement (CBA) that was in effect at all relevant times. The CBA contains a grievance procedure that culminates in binding arbitration.

On June 30, 2000, the District transferred Martinez from Adler Middle School to Fontana Middle School. Martinez filed a grievance over his transfer on July 12, 2000. On April 12 and May 18, 2001, the District and the Union presented Martinez's grievance to an arbitrator for final determination. On August 1, 2001, the arbitrator determined that the District violated the CBA when it transferred Martinez and ordered that the District reinstate Martinez to his previous position and reimburse him for any wages lost as a result of the transfer.

On June 14, 2007, the District transferred Martinez from Adler Middle School to one of the District's satellite campuses used for independent study. On October 1, 2007, Martinez filed a grievance over the transfer. On May 28, 2008, the parties drafted a settlement agreement. According to the terms of the draft agreement, the District agreed to make Martinez eligible for its Supplemental Retirement Plan and place him on paid administrative leave from June 9, 2008 until December 31, 2008, if Martinez agreed to retire on or before June 9, 2008. The District also agreed to grant Martinez all retirement benefits under the CBA, remove all references to the June 14, 2007 transfer from Martinez's personnel file, and seal all files

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

concerning Martinez, except when ordered to pursuant to a valid court order or when necessary to cooperate with a United States Department of Education Office of Civil Rights (OCR) investigation. The draft agreement included language whereby Martinez agreed to release the District for "any and all claims or causes of action arising out of Martinez's employment with the District." The draft agreement further stated that it contained "the sole and entire agreement and understanding of the parties with respect to the entire subject matter hereof, and any and all prior discussions, negotiations, commitments and understandings related hereto are hereby merged herein. No representations, oral or otherwise, express or implied, other than those contained herein have made by any party hereto."

On June 6, 2008, Martinez met with District representatives to discuss settling his grievance. District Superintendent Jane Smith informed Martinez that "the issue of lost wages was going to be remedied as before and that the District's settlement offer was outside the purview of these lost wages." On June 9, 2008, both parties executed the May 28, 2008 draft settlement agreement, without making any additional modifications.

Martinez "was paid a portion of that settlement on [his] July 2008 check but then abruptly stopped on [his] August 2008 check."[2] Martinez does not specify either the amount he was already paid in July 2008 or the remaining amount he still believes he is still owed by the District.

At a time not disclosed by the parties, Martinez filed a complaint with the OCR, alleging that the District discriminated against students at Adler Middle School based on national origin and gender. On July 29, 2008, OCR concluded that the District was in compliance with all relevant civil rights laws and further concluded that Martinez's allegations that the District retaliated against him for initiating the OCR investigation were made moot by the June 9, 2008 settlement agreement.

Discussion:

A. Charging Party's Burden of Proof

PERB Regulation 32615(a)(5)[3] requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice."

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[2] It is not clear from the charge whether the payment in Martinez's July 2008 paycheck was made by the District pursuant to the July 9, 2008 settlement agreement, or whether it was made pursuant to an alleged unwritten agreement between Martinez and the District, discussed in more detail below.

[3] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. Copies of the Regulations may be purchased from PERB's Publications Coordinator, 1031 18th Street, Sacramento, CA, 95811-4124, and the text is available at www.perb.ca.gov.

The charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (State of California (Department of Food and Agriculture) (1994) PERB Decision No. 1071-S, citing United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (Ibid.; Charter Oak Unified School District (1991) PERB Decision No. 873.)

The charging party's burden also includes alleging facts showing that the unfair practice charge was timely filed; i.e., that the alleged unfair practice occurred no more than six months prior to the filing of the charge. (Los Angeles Unified School District (2007) PERB Decision No. 1929; City of Santa Barbara (2004) PERB Decision No. 1628-M.) PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board (2005) 35 Cal.4th 1072.) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.)

B. Charging Party's Allegations

While not clear from the charge as written, Martinez appears to allege that the District interfered with his EERA protected rights in four ways: (1) the District initiated the June 14, 2007 transfer in retaliation for Martinez's filing the OCR complaint; (2) the District unlawfully maintained its personnel records on Martinez; (3) the District negotiated with Martinez in bad faith; and (4) the District breached an unwritten settlement agreement for an undisclosed amount of back pay. Each of these allegations will be addressed separately below.

1. Retaliation

To demonstrate that an employer discriminated or retaliated against an employee in violation of EERA section 3543.5(a), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210 (Novato); Campbell Municipal Employees Assn. v. City of Campbell (1982) 131 Cal.App.3d 416 (Campbell); San Leandro Police Officers Assn. v. City of San Leandro (1976) 55 Cal.App.3d 553 (San Leandro).) In determining whether evidence of adverse action is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (Palo Verde Unified School District (1988) PERB Decision No. 689.) In a later decision, the Board further explained that:

> The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment.

(Newark Unified School District (1991) PERB Decision No. 864; emphasis added; footnote omitted.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (North Sacramento School District (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S; Campbell, supra, 131 Cal.App.3d 416); (2) the employer's departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District (1979) PERB Decision No. 104; San Leandro, supra, 55 Cal.App.3d 553); (3) the employer's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S; San Leandro, supra, 55 Cal.App.3d 553); (4) the employer's cursory investigation of the employee's misconduct (City of Torrance (2008) PERB Decision No. 1971-M; Coast Community College District (2003) PERB Decision No. 1560); (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons (County of San Joaquin (Health Care Service) (2001) PERB Order No. IR-55-M); (6) employer animosity towards union activists (Jurupa Community Services District (2007) PERB Decision No. 1920-M; Cupertino Union Elementary School District (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive. (North Sacramento School District, supra, PERB Decision No. 264; Novato, supra, PERB Decision No. 210.)

Martinez does not establish the first element of a retaliation claim, that filing the OCR complaint is protected by EERA. EERA section 3543 protects employees' "right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations." Martinez does not demonstrate that the OCR complaint qualifies as protected activity.

PERB has consistently held that filing complaints with outside agencies and regarding issues such as race or gender based discrimination does not qualify as protected activity. (City of Long Beach (2008) PERB Decision No. 1977-M, citing San Diego Unified School District (1991) PERB Decision No. 885 (holding filing claims with the Equal Employment Opportunity Commission is not protected activity); Regents of the University of California (1987) PERB Decision No. 615-H (filing claims with the Department of Fair Employment and Housing is not protected activity).) This is because outside agencies often have rules and regulations in place to prevent unlawful retaliation for filing complaints. (See Regents of the University of California, supra, PERB Decision No. 615-H.) Moreover, PERB does not have the authority to address race or gender based discrimination claims. (Antelope Valley College Federation of Teachers (Stryker) (2004) PERB Decision No. 1624.) In the present case, Martinez's OCR complaint concerns the District's alleged discrimination based on race and gender. Martinez does not establish that PERB has the authority to address these issues. In addition, the OCR

explained that it had the authority to address the District's alleged retaliation against Martinez for his filing of the OCR complaint.

Martinez also does not demonstrate that the OCR complaint concerns "matters of employer-employee relations." (EERA, § 3543.) The OCR complaint concerns allegedly discriminatory practices by the District against students. Martinez does not demonstrate how such practices, even if true, affect the terms and conditions of employment for certificated personnel. For these reasons, Martinez does not demonstrate that these activities qualify as protected activities under EERA and therefore, he does not state a prima facie case for unlawful retaliation.

2. Personnel File

Martinez next alleges "that district administration, outside of the Personnel Office, kept a separate undisclosed personnel file on [him.]" Martinez does not specify how the District's alleged maintenance of this file constitutes a violation of EERA. Accordingly, this investigation will consider whether the District's actions interfered with Martinez's protected rights.[4] The test for whether a respondent has interfered with the rights of employees under the EERA does not require that unlawful motive be established, only that at least slight harm to employee rights results from the conduct. In State of California (Department of Developmental Services) (1983) PERB Decision No. 344-S, citing Carlsbad Unified School District (1979) PERB Decision No. 89 and Service Employees International Union, Local 99 (Kimmett) (1979) PERB Decision No. 106, the Board described the standard as follows:

> [I]n order to establish a prima facie case of unlawful interference, the charging party must establish that the respondent's conduct tends to or does result in some harm to employee rights granted under EERA.

Under the above-described test, a violation may only be found if EERA provides the claimed rights. In Clovis Unified School District (1984) PERB Decision No. 389, the Board held that a finding of coercion does not require evidence that the employee actually felt threatened or intimidated or was in fact discouraged from participating in protected activity.

In this case, Martinez does not provide a "clear and concise statement of facts" demonstrating that the District's alleged maintenance of a separate personnel file caused at least "slight harm" to any of his EERA protected rights. (See PERB Regulation 32615(a)(5); State of California (Department of Developmental Services), supra, PERB Decision No. 344-S, other citations omitted.) Martinez does not allege what the contents of this file nor does he demonstrate that the District's maintenance of the file affected his employment in any way. Accordingly, this allegation does not state a prima facie case.

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[4] Where the charging party does not specify a particular section or theory in the charge, the investigating agent may determine under what section the charge should be analyzed. (Los Angeles County Office of Education (1999) PERB Decision No. 1360.)

3. Negotiation in Bad Faith

Martinez also alleges that the District engaged in "bad faith bargaining." Under EERA, public school employers and exclusive representatives owe a mutual duty to meet and confer with one another in good faith concerning issues within the scope of representation. (See EERA, §§ 3543.2, 3543.5(c), 3543.6(c).) "Thus, the employer's duty to negotiate in good faith is owed only to the exclusive representative employee organization." (Oxnard School District (Gorcey and Tripp) (1988) PERB Decision No. 667, emphasis in original.) In other words, "individual employees lack standing to allege that an employer has failed to bargain in good faith." (State of California (Department of Corrections & Rehabilitation) (2007) PERB Decision No. 1923-S.) In addition, individual employees also lack standing "to pursue violations of the rights of an employee organization." (Ibid.) In this case, Martinez is the only charging party identified on the charge form. Martinez does not demonstrate that the District has a duty to negotiate in good faith with him as an individual employee. Nor does Martinez demonstrate that he has standing to raise this claim on behalf of the Union. Accordingly, this allegation does not state a prima facie case.

4. Breach of Contract

Martinez also appears to allege that the District breached an unwritten agreement reached on June 6, 2008 in settlement of his October 1, 2007 grievance. EERA section 3541.5(b) states:

> The board shall not have the authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of any agreement that would not also constitute an unfair practice under this chapter.

(See also Oxnard School District (Gorcey and Tripp), supra, PERB Decision No. 667.) In the present case, for the reasons discussed above, Martinez does not establish that the District violated EERA. Accordingly, PERB does not have the authority to address these alleged violations of this agreement.

Even if PERB had the authority to address this issue, Martinez does not provide "a clear and concise statement of facts" to determine that the District violated an agreement. (See PERB Regulation 32615(a)(5).) Martinez does not allege what the terms of the June 6, 2008 agreement were, nor does he discuss whether the agreement was superseded by the later agreement, signed June 9, 2008. For these reasons, there is insufficient information to find a violation.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case

number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before January 23, 2009, PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Eric J. Cu
Regional Attorney

EC