

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



ROBERT O. AUNE,)
)
 Charging Party,) Case No. SF-CE-1842
)
 v.) PERB Decision No. 1161
)
 SANTA ROSA JUNIOR COLLEGE,) June 26, 1996
)
 Respondent.)
 _____)

Appearances: Robert O. Aune, on his own behalf; School and College Legal Services by Noel J. Shumway, Attorney, for Santa Rosa Junior College.

Before Caffrey, Chairman; Garcia and Dyer, Members.

DECISION

DYER, Member: This case comes before the Public Employment Relations Board (Board) on appeal from a Board agent's dismissal (attached) of Robert O. Aune's (Aune) unfair practice charge. As amended, the charge alleged that the Santa Rosa Junior College (Santa Rosa JC) violated section 3543.5 of the Educational Employment Relations Act (EERA)¹ by negligently misrepresenting

¹**EERA** is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. EERA section 3543.5 provides:

It shall be unlawful for a public school employer to do any of the following:

- (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

Aune's options for early retirement.

The Board has reviewed the entire record in this case, including Aune's original and amended unfair practice charge, the warning and dismissal letters, Aune's appeal, and the Santa Rosa JC's response thereto. The Board finds the Board agent's warning and dismissal letters to be free from prejudicial error and adopts them as the decision of the Board itself in accordance with the following discussion.

DISCUSSION

Aune alleges that the Santa Rosa JC negligently misinformed him regarding the effect that early retirement would have on retirement benefits. The Board agent correctly found that the Santa Rosa JC's alleged conduct did not violate the EERA. Absent a violation of the EERA, the Board cannot exercise any authority regarding the amount of Aune's retirement benefits. As noted by the Board agent, Aune's claim is better suited to another forum.

We note, however, that we cannot reach the merits of Aune's

(b) Deny to employee organizations rights guaranteed to them by this chapter.

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

(e) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).

charge. The Board has no authority to issue a complaint on any-
unfair practice charge filed more than six months after the
events giving rise to the charge. (EERA section 3541.5(a)(1);
Los Angeles Unified School District (1983) PERB Decision
No. 311 at p. 6.)² Aune's allegations concern events occurring
more than six months before he filed the charge. The Board
therefore lacks jurisdiction to issue a complaint on those
allegations.

ORDER

The unfair practice charge in Case No. SF-CE-1842 is hereby
DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Caffrey and Member Garcia joined in this Decision.

²Section 3541.5 states, in relevant part:

[T]he board shall not do either of the
following:

(1) Issue a complaint in respect of any
charge based upon an alleged unfair practice
occurring more than six months prior to the
filing of the charge.

PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415) 557-1350



December 26, 1995

Robert O. Aune

Re: **DISMISSAL OF UNFAIR PRACTICE CHARGE/REFUSAL TO ISSUE
COMPLAINT**

Robert O. Aune v. Santa Rosa Junior College
Unfair Practice Charge No. SF-CE-1842

Dear Mr. Aune:

The above-referenced unfair practice charge, filed on October 2, and amended on December 14, 1995, alleges that the Santa Rosa Junior College District (District) unlawfully induced Robert O. Aune to accept an early retirement without informing of conditions that adversely affected his retirement credit. This conduct is alleged to violate Government Code section 3543.5 of the Educational Employment Relations Act (EERA).

I indicated to you, in my attached letter dated December 6, 1995, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to December 15, 1995, the charge would be dismissed.

On December 14, 1995, Charging Party filed a first amended charge. Aune alleges that the misinformation provided to him about the effect of his early retirement on his retirement benefits, came from District administrators who did not understand the District's own policies on early retirement. Aune reasonably relied on the misrepresentations from the District administrators because they originated with the person in charge of District personnel policies. Moreover, Aune alleges that he was justified in relying on these misrepresentations to his detriment. He would not have retired at the time he did if the information given to him had been correct. Aune further alleges that his attempt to address the issue of his retirement benefits through the grievance procedure was futile because the procedure does not culminate in binding arbitration and because his union representatives lacked the conviction to carry his grievance forward. Finally, Aune questions the undersigned's citation of

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Education Code sections in the December 6, 1995 letter to the effect that such provisions prohibit mid-year retirements.

The new allegations fail to state a prima facie violation or cure the deficiencies stated in the December 6, 1995 letter. The thrust of the new allegations is the contention that the District can be held liable for the negligent misrepresentations upon which Aune reasonably relied to his detriment. While these facts may state a valid theory for a contract or tort claim, the Public Employment Relations Board (PERB) has no jurisdiction over such claims, as noted in the undersigned's December 6, 1995 letter. (Gov. Code, sec. 3541.5(b); Oxnard School District (1988) PERB Dec. No. 667 [no jurisdiction to enforce contracts or Education Code provisions, since such jurisdiction lies with the trial courts of California].) The undersigned's assertions as to the legal effect of the Education Code, even if incorrect, have no bearing on the instant case.¹ The undersigned's duty is to determine whether the facts alleged state a prima facie violation only of those statutes which PERB has the duty to enforce; with respect to the instant case, the EERA. (Id.) For the reasons previously stated, there appears to be no unfair practice over which PERB has jurisdiction. Aune's allegations that the grievance procedure was a futile process do not cure any of the deficiencies of the charge, including the charge's lack of timeliness and PERB's lack of jurisdiction over the subject matter of the charge.

Therefore, I am dismissing the charge based on the facts and reasons stated above and those contained in my December 6, 1995 letter.

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. (Cal. Code of Regs., tit. 8, sec. 32635(a).) To be timely filed, the original and five copies

¹ The undersigned intended to convey the thought that the Education Code provisions apparently were the cause of Aune not receiving the full retirement service credit to which he would otherwise have been entitled had he retired in accordance with those provisions.

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of such appeal must be actually received by the Board itself before the close of business (5 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing. (Cal. Code of Regs., tit. 8, sec. 32135.) Code of Civil Procedure section 1013 shall apply. 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 (20) calendar days following the date of service of the appeal. (Cal. Code of 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 of Regs., tit. 8, sec. 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 (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 of Regs., tit. 8, sec. 32132.)

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Final Date

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

Sincerely,

ROBERT THOMPSON
Deputy General Counsel

DONN GINOZA
Regional Attorney

Attachment

cc: Noel Shumway

PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415)557-1350



December 6, 1995

Robert O. Aune

Re: **WARNING LETTER**
Robert O. Aune v. Santa Rosa Junior College
Unfair Practice Charge No. SF-CE-1842

Dear Mr. Aune:

The above-referenced unfair practice charge, filed on October 2, 1995, alleges that the Santa Rosa Junior College District (District) unlawfully induced Robert O. Aune to accept an early retirement without informing of conditions that adversely affected his retirement credit. This conduct is alleged to violate Government Code section 3543.5 of the Educational Employment Relations Act (EERA).

Investigation of the charge revealed the following. Robert O. Aune had been employed by the College as a member of the faculty prior to his retirement in the spring of 1994. He is a member of the bargaining unit exclusively represented by the All Faculty Association (Association). The District and the Association are parties to a collective bargaining agreement which contains an early retirement option. An employee choosing early retirement receives full fringe benefits until their 65th birthday, which then converts to the same package received by employees retiring at 65.

Article 24, section 24.1.A.3 states:

It is the responsibility of each potential early retiree to carefully evaluate his/her personal economic situation with respect to the State Teachers Retirement System and other retirement income prior to applying for early retirement. Once the signed Application and Agreement Form(s) are approved by the President and the Board of Trustees, the decision to resign and retire may not be rescinded. Candidates for early retirement are encouraged to consult an STRS advisor and pursue all other advisory sources that will clarify their personal financial situation upon retirement.

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The District also maintains a policy allowing for a reduced workload whereby the District contributes to State Teachers Retirement System (STRS) an amount based upon a salary that would have been paid had the employee been employed full time. The District recites in its agreements with employees to comply with the provisions of Education Code section 22724 and 87483.

In September 1993, Aune approached the District personnel office to discuss a mid-year retirement in connection with his reduced workload agreement. Aune wanted to retire at the end of January because he did not turn 60 until February 11, 1994. Aune wanted to receive full STRS benefits based on retirement at age 60. Aune was told that he could work on a special project through January and retire on February 1, 1994. Relying on this information, Aune attempted to retire as of February 1, 1994. However, four months later, he was told that his mid-year retirement was not authorized by the reduced workload agreement and that he had violated his contract with the District. As a result, Aune lost retirement credit and other benefits under the reduced workload agreement. Mid-year retirements are apparently prohibited by Education Code section 22724 and 87483 and/or District policies.

Aune filed a grievance challenging the forfeiture of his retirement benefits on September 16, 1994. The District rejected the grievance on March 22, 1995. Aune's exclusive representative declined to take the matter to arbitration, explaining its reasons in a letter to Aune dated April 28, 1995.

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

Government Code section 3541.5(a) states that the Public Employment Relations Board (PERB) "shall not . . . issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge."

PERB has held that the six month period commences to run when the charging party knew or should have known of the conduct giving rise to the alleged unfair practice. (Regents of the University of California (1983) PERB Dec. No. 359-H.)

The charge was filed on October 2, 1995. Therefore, the charge would not be timely, if Aune knew or should have known of the alleged violation before April 2, 1995. In determining whether to issue a complaint, the undersigned is required to accept the

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charging party's allegations as being true. (San Juan Unified School District (1977) PERB Dec. No. 12.)

The charge alleges that in the last week in May 1994, Aune was informed by the District that since he retired in mid-year he had violated his contract and would not be eligible for full retirement benefits. The charge further alleges that Aune filed a grievance over the dispute on September 16, 1994, which the District rejected on March 22, 1995. The Association notified Aune by letter dated April 28, 1995 that it would not arbitrate the matter. The EERA does permit the statute of limitations period to be tolled during the time in which a grievance on the matter is being pursued under the grievance machinery of the applicable collective bargaining agreement. (Gov. Code, sec. 3541.5(a).)

The charge appears to be untimely. At least three months passed between the time Aune discovered that the District was claiming that he had violated his early retirement contract. The charge was filed on October 2, 1995, or more than four months, after Aune was informed that his grievance would no longer be processed. Therefore, more than seven months passed during which Aune's grievance was not being tolled and thus more than the six months permitted by EERA's statute of limitations.

Even assuming the charge were timely filed, the allegations of the fail to state a prima facie violation of the EERA. Aune alleges that the District breached its implied covenant of good faith and fair dealing and that it is barred by promissory estoppel from asserting that Aune forfeited his full retirement benefits because Aune relied in good faith on the erroneous information he received that led him to believe that a mid-year retirement was permissible. However, this type of claim is in essence an attempt to enforce a contractual agreement with the District. The jurisdiction provisions of the EERA prohibit actions brought before PERB to enforce such agreements, which do not involve unfair practices as defined by the EERA. (Gov. Code, sec. 3541.5(b).)

Aune does allege that the District refused to mediate or arbitrate the matter. However, this does not demonstrate a violation of the EERA. The exclusive representative has the exclusive right to determine whether to elevate a grievance to arbitration. (Castro Valley Unified School District (1980) PERB Dec. 149.) If the exclusive representative does not arbitrate the matter, the employer cannot be compelled to arbitrate the grievance.

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Mediation is not a process statutorily guaranteed to individual employees. Mediation under the EERA's impasse procedures is a right only available to the exclusive representative as bargaining agent for employees in an appropriate bargaining unit. Violations of the duty to bargain may not be raised by individual employees. (Oxnard School District (1988) PERB Dec. No. 667.)

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 which would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must 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 **December 15, 1995**. I shall dismiss your charge. If you have any questions, please call me at (415) 557-1350.

Sincerely,

DONN GINOZA
Regional Attorney