

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

MARILEE DELAUER,

Charging Party,

v.

SANTA ROSA JUNIOR COLLEGE,

Respondent.

Case No. SF-CE-2258-E

PERB Decision No. 1511

March 5, 2003

Appearance: Marilee DeLauer, on her own behalf.

Before Baker, Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case comes before the Public Employment Relations (PERB or Board) on appeal by Marilee DeLauer (DeLauer) of a Board agent's dismissal (attached) of her unfair practice charge. The charge alleged that the Santa Rosa Junior College District (SJRC) violated the Educational Employment Relations Act (EERA)¹ by discriminating against her. DeLauer alleged that this conduct constituted a violation of EERA section 3543.5(a) and (c).²

¹ EERA is codified at Government Code section 3540 et seq. The text of EERA may be found on the Internet at www.perb.ca.gov.

² EERA section 3543.5 provides, in pertinent part:

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

DeLauer was a student at the SJRC. She was employed by the Sonoma Valley Unified School District (SVUSD) as a substitute bus driver.

The Board agent dismissed DeLauer's charge on grounds that most of her charge was untimely and she failed to present any arguably timely allegations stating a prima facie case against SJRC.

DELAUER'S APPEAL

On appeal, DeLauer submitted a letter with detailed personal information, containing new allegations regarding her status as a student at SJRC, three allegations regarding ostensibly employment-related incidents at SVUSD³, and allegations of Occupational Health and Safety Administration regulation violations at SJRC. Attached to her letter, DeLauer also submitted a copy of correspondence to a state agency regarding alleged health and safety violations at SJRC and a computer printout apparently recording attempts by others to access her computer via the Internet.

PERB Regulation 32635(b)⁴ provides, "Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." DeLauer has

of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

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

³ A declaration submitted by DeLauer in support of her charge also appears to address issues related to her employment at SVUSD. However, SVUSD was not the charged party and the Board agent correctly found that there was no showing of a sufficient relationship between SVUSD and SRJC to justify attributing actions at SVUSD to SJRC. Nothing DeLauer offers on appeal cures this problem.

⁴ PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

failed to demonstrate good cause to allow presentation of her additional allegations and documents on appeal because none of those materials contain information that she could not have obtained, through reasonable diligence, prior to issuance of the Board agent's dismissal letter. Accordingly, the Board has not considered them in resolving DeLauer's appeal.

Having reviewed the charge and attached documents, amended charge and attached documents, the warning and dismissal letters, and DeLauer's appeal, the Board finds that the warning and dismissal letters are free of prejudicial error and adopts them as the decision of the Board itself, but only insofar as they dismiss the charge as untimely and for failure to state a prima facie case. The Board does not adopt the discussion of the merits of the charge or amended charge in the warning and dismissal letters.

ORDER

The unfair practice charge in Case No. SF-CE-2258-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Baker and Whitehead joined in this Decision.

Dismissal Letter

May 10, 2002

Marilee DeLauer
19357 Apple Valley Road
Sonoma, CA 95476

Robert Henry, General Counsel
School & College Legal Services
5340 Skylane Boulevard
Santa Rosa, CA 95403

Re: Marilee DeLauer v. Santa Rosa Junior College
Unfair Practice Charge No. SF-CE-2258-E, First Amended Charge
DISMISSAL LETTER

Dear Ms. DeLauer:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on April 18, 2002. Marilee DeLauer alleges that the Santa Rosa Junior College violated the Educational Employment Relations Act (EERA)¹.

I indicated to you in my attached letter dated April 23, 2002, 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 April 30, 2002, the charge would be dismissed. On April 30, 2002, I received your first amended charge. My investigation revealed the following information.

DeLauer is employed by the Sonoma Valley Unified School District (SVUSD) and is a student at the Santa Rosa Junior College District (District). On April 15, 2002, I spoke with the Charging Party regarding unfair practice charge SF-CO-609 and the fact that she was not employed by the Santa Rosa Junior College or represented by the faculty union there. On April 22, 2001, I left the Charging Party a message indicating that much of our discussion regarding SF-CO-609 was also applicable to SF-CE-2258-E as the Respondent is not her employer. The warning letter explained the charge was untimely filed and failed to state a prima facie violation because it did not demonstrate how DeLauer as a student is protected under the EERA from District retaliation.

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.

The first amended charge did not address the statute of limitations issue, nor did it demonstrate how DeLauer as a student is protected under the EERA from District retaliation. To address the latter issue the first amended charge provides:

SVUSD conducts classes under the umbrella of SRJC District. My paychecks come from the Sonoma County School Administration. My employment with SVUSD also includes students that I am responsible for which is subsidized by Sonoma County Office of Education. My school bus certification and any advance education for school bus training is governed by codes California Department of Education. The courses that I take through SRJC also directly affect and do assist me in my own tax paying businesses and my volunteer assistance to SVUSD Adele Harrison Middle School track team and UC Berkeley Extension, Challenge Sonoma Ropes Courses. SRJC District teachers conduct the Advance Placement classes for high school student at SVUSD. AP books are required from SRJC bookstores. Extension courses through SRJC are held in Sonoma Valley Unified School District. Adult education classes are held through SRJC District in Sonoma Valley Unified School District. [sic]

In the first amended charge, DeLauer indicates she has the following issues with the District:

(1) education policies – no support at the campus level to maximize education; (2) no level security; (3) health conditions poor and dangerous; (4) not preparing for a transfer to a four year institution; (5) unable to write or speak freely without papers, documents destroyed/hidden/graded low; (6) threats; and (7) interfering with community support.

DeLauer took a physiology course at the District. On November 21, 2001, DeLauer filed a complaint with the Division of Occupational Safety and Health regarding the handling of blood in a physiology lab. DeLauer alleges the District indicated the unsafe conditions were fixed, but they were not.

The original and first amended charge fail to state a prima facie violation for the reasons stated in the warning letter and those that follow.

EERA section 3541.5(a)(1) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.) The charging party bears the burden of demonstrating that the charge is timely filed. (Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.)

DeLauer filed this charge on April 18, 2001, thus the statute of limitations period extends back to include events occurring on and after October 18, 2001. The original charge indicates DeLauer wants retroactive pay and benefits dating back to May 8, 2001. To the extent that the charge is alleging the District violated the act prior to October 18, 2001 it is untimely filed and must be dismissed.

Even if the charge is timely filed, it fails to state a prima facie violation for the reasons that follow.

A charging party should allege the "who, what, when, where, and how" of an unfair practice. (United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision 944.) Mere legal conclusions are insufficient. (See State of California (Department of Food and Agriculture) (1994) PERB Decision No. 1071-S.) The charge fails to include this requisite information.

To demonstrate a 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; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.)

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); (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.); (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; (4) the employer's cursory investigation of the employee's misconduct; (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; (6) employer animosity towards union activists (Cupertino Union Elementary School District) (1986) PERB Decision No. 572.); or (7) any other facts which might demonstrate the employer's unlawful motive. (Novato; North Sacramento School District, supra, PERB Decision No. 264.)

Evidence of adverse action is also required to support a claim of discrimination or reprisal under the Novato standard. (Palo Verde Unified School District (1988) PERB Decision No. 689.) In determining whether such evidence is established, the Board uses an objective test

and will not rely upon the subjective reactions of the employee. (Ibid.) 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 there is some connection between the SVUSD where DeLauer is employed and the District where DeLauer is a student, that connection is tenuous. The charge does not demonstrate DeLauer's actions as a student at the District were related to her employment at the SVUSD or are protected under the EERA. Nor does the charge explain how the District's actions adversely effected DeLauer's employment as a bus driver for SVUSD. Even if DeLauer's activities are considered protected and the charge demonstrates the District implemented some adverse action against her, the charge fails to demonstrate the requisite nexus. Thus, the charge must be dismissed.

Right to Appeal

Pursuant to PERB Regulations,² you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Regulations 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

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

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Regulation 32635(b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Regulation 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Regulation 32132.)

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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
General Counsel

By _____
Tammy Samsel
Regional Attorney

Attachment

cc: Robert J. Henry

Warning Letter

April 23, 2002

Marilee DeLauer
19357 Apple Valley Road
Sonoma, CA 95476

Re: Marilee DeLauer v. Santa Rosa Junior College
Unfair Practice Charge No. SF-CE-2258-E
WARNING LETTER

Dear Ms. DeLauer:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on April 18, 2002. Marilee DeLauer alleges that the Santa Rosa Junior College violated the Educational Employment Relations Act (EERA)¹. The charge consists of a five-page letter of questions, and a two-page "declaration."

DeLauer also filed SF-CO-609 against the faculty union at the Santa Rosa Junior College, and SF-CO-608 against the classified union at the Sonoma Valley Unified School District. On April 15, 2002, I spoke with the Charging Party regarding the fact that she was not employed by the Santa Rosa Junior College or represented by the faculty union there. On April 22, 2001, I left the Charging Party a message indicating that much of our discussion regarding SF-CO-609 was also applicable to SF-CE-2258-E as the Respondent is not her employer. I also indicated I would be sending this letter. My investigation revealed the following information.

The Sonoma Valley Unified School District (SVUSD) employs DeLauer as a substitute bus driver. DeLauer is a student at the Santa Rosa Junior College District (District).

The charge states, in part:

How can you get a non-passing grade on an extra credit essay?

How can you be the only one that did a semester long star track of Mar's assignment, and be told that the only other person that you gave the information to got a better grade?

Why did I get a non passing grade on a science essay, with rude comments, red slash marks and unkind words; and a student

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.

visiting from another country and could not speak nor write the language get an A, with the only comment, "a little bumpy."

The charge also states:

I would like to eliminate any trace of harassment, hostile working environment, including subliminal harassment over FCC two-way radio and otherwise, that I will set before you in these words. The most recent veils of harassment at my work place immediately started when I further updated Rita Hensic, President CSEA Chapter 376, and other fellow employees, of more frustrating and damaging news as to why I was struggling with a retaliating and hostile environment while enrolled with the Santa Rosa Junior College, fall semester 2001.

The SVUSD employed DeLauer as a permanent bus driver, but she is now a substitute bus driver for the SVUSD. DeLauer would like to regain her position as a permanent bus driver and believes CSEA, the exclusive representative of the bus drivers at SVUSD, failed to represent her regarding this dispute and others. DeLauer seeks retroactive restoration of pay and benefits from May 8, 2001.

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

EERA section 3541.5(a)(1) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.) The charging party bears the burden of demonstrating that the charge is timely filed. (Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.)

DeLauer filed this charge on April 18, 2001, thus the statute of limitations period extends back to include events occurring on and after October 18, 2001. The charge indicates DeLauer wants retroactive pay and benefits dating back to May 8, 2001. To the extent that the charge is alleging the District violated the act prior to October 18, 2001 it is untimely filed and must be dismissed.

Even if the charge is timely filed, it fails to state a prima facie violation for the reasons that follow.

A charging party should allege the "who, what, when, where, and how" of an unfair practice. (United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision 944.) Mere legal conclusions are insufficient. (See State of California (Department of Food and Agriculture) (1994) PERB Decision No. 1071-S.) The charge fails to include this requisite information.

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The charge seeks to stop District harassment, but fails to demonstrate how DeLauer as a student is protected under the EERA from District retaliation. Thus, the charge must be dismissed.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before April 30, 2002, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Tammy Samsel
Regional Attorney