

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

ABDULLAH MALIK,

Charging Party,

v.

COMPTON COMMUNITY COLLEGE
DISTRICT,

Respondent.

Case No. LA-CE-4734-E

PERB Decision No. 1653

June 30, 2004

Appearances: Abdullah Malik, on his own behalf; Jones & Matson by Urrea C. Jones, Jr., Attorney, for Compton Community College District.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Abdullah Malik (Malik) of a Board agent's dismissal (attached) of his unfair practice charge. The charge alleged that the Compton Community College District (District) violated the Educational Employment Relations Act (EERA)¹ by reclassifying employees.

The Board has reviewed the entire record in this matter, including the original charge and response, the warning and dismissal letters of the Board agent, Malik's appeal and the District's response.

The Board finds the warning and dismissal letters to be free from prejudicial error and adopts them as the decision of the Board itself, subject to the discussion below.

¹EERA is codified at Government Code section 3540, et seq.

DISCUSSION

Malik states in one sentence that he is appealing the dismissal to keep pursuing his case. He has provided no facts related to the who, what, when or how of his underlying charge was dismissed because he did not provide any facts as to dates, or conduct giving rise to his charge, even after the warning letter was issued.

PERB Regulation 32635(a)² requires, in relevant part, that:

The Appeal shall:

- (1) State the specific issues of procedure, fact, law or rationale to which the appeal is taken;
- (2) Identify the page or part of the dismissal to which each appeal is taken;
- (3) State the grounds for each issue stated.

None of the requirements set forth in this regulation have been met. The appeal must be denied.

ORDER

The unfair practice charge in Case No. LA-CE-4734-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Whitehead and Neima joined in this Decision.

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

Dismissal Letter

April 27, 2004

Abdullah Malik
4800 Clair Del Avenue
Long Beach, CA 90807

Re: Abdullah Malik v. Compton Community College District
Unfair Practice Charge No. LA-CE-4734-E
DISMISSAL LETTER

Dear Mr. Malik:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 23, 2004. Abdullah Malik alleges that the Compton Community College District violated the Educational Employment Relations Act (EERA)¹ by reclassifying employees.

I indicated to you in my attached letter dated April 19, 2004, 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 26, 2004, the charge would be dismissed.

I have not received either an amended charge or a request for withdrawal. Therefore, I am dismissing the charge based on the facts and reasons contained in my April 19 letter.

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.

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.

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

A document is considered "filed" when actually received before the close of business (5 p.m.) on 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.)

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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April 27, 2004
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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 _____
Bernard McMonigle
Regional Attorney

Attachment

cc: Urrea C. Jones

Warning Letter

April 19, 2004

Abdullah Malik
4800 Clair Del Avenue
Long Beach, CA 90807

Re: Abdullah Malik v. Compton Community College District
Unfair Practice Charge No. LA-CE-4734-E
WARNING LETTER

Dear Mr. Malik:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 23, 2004. Abdullah Malik alleges that the Compton Community College District violated the Educational Employment Relations Act (EERA)¹ by reclassifying employees.

Your charge states that the District agreed with the union to a reclassification for "certain unwanted union members". It is further alleged that this agreement deprives these employees of seniority and vacation and that the union took this action to favor employees hired through nepotism. No dates or facts are provided to support these allegations.

PERB Regulation 32615(a)(5) 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." Thus, 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.)

Without dates of the alleged employer violation it cannot be determined whether your charge is timely filed. 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 statute of limitations is an affirmative defense which has been raised by the respondent in this case. (Long Beach Community College District (2003) PERB Decision No. 1564.) Therefore, charging party now

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.

bears the burden of demonstrating that the charge is timely filed. (cf. Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.)

Additionally, it is not a per se violation for an employer to reclassify employees. There are insufficient facts to determine whether you are alleging employer interference with your rights under EERA. 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. 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. (State of California (Department of Developmental Services) (1983) PERB Decision No. 344-S, citing Carlsbad Unified School District (1979) PERB Decision No. 89; Service Employees International Union, Local 99 (Kimmett) (1979) PERB Decision No. 106.)

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.

Nor are there sufficient facts to determine whether you are alleging an illegal reprisal under EERA. 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.]

Your charge does not include sufficient facts to demonstrate that the employer took the action to reclassify you in reprisal for your protected activity under EERA.

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 26, 2004, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Bernard McMonigle
Regional Attorney

BMC