STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

FRANK COVERSON, Charging Party, v. UNITED EDUCATORS OF SAN FRANCISCO, Respondent.	Case No. SF-CO-652-E PERB Decision No. 1726 December 15, 2004

Appearance: Frank Coverson, on his own behalf.

Before Duncan, Chairman; Whitehead and Shek, Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Frank Coverson (Coverson) of a Board agent's dismissal (attached) of his unfair practice charge. The charge alleged that the United Educators of San Francisco (UESF) breached its duty of fair representation by not representing Coverson in relation to his termination from the San Francisco Unified School District. This is an alleged violation of Educational Employment Relations Act (EERA)[1] sections 3544.9 and 3543.6(b).

The Board has reviewed the entire record in this matter, including the unfair practice charge, the warning and dismissal letters and Coverson's appeal. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself, subject to the brief discussion below.

DISCUSSION

The charge in this case, filed in September 2004, related to Coverson's termination in 1998 and his belief that UESF did not represent him with regard to the termination.

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

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, the charging party now 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.)

In this case, more than six years have passed since the conduct in question occurred. Coverson has provided no information indicating why the charge should be considered timely filed. He has not met his burden and the charge must be dismissed.

ORDER

The unfair practice charge in Case No. SF-CO-652-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Whitehead and Shek joined in this Decision.

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1022
Fax: (510) 622-1027

September 29, 2004

Frank Coverson

Re: Frank Coverson v. United Educators of San Francisco
Unfair Practice Charge No. SF-CO-652-E
DISMISSAL LETTER

Dear Mr. Coverson:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on September 9, 2004. Frank Coverson alleges that the United Educators of San Francisco violated the Educational Employment Relations Act (EERA)[1] by breaching its duty of fair representation.

I indicated to you in my attached letter dated September 20, 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 September 27, 2004, the charge would be dismissed.

On September 22, 2004, I spoke with you at length about the statute of limitations under the EERA. More specifically, I noted that your charge was filed six (6) years after you were terminated and at least four (4) years after you knew the union would not assist you.

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 September 20, 2004 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

[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.

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. (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.)

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
Kristin L. Rosi
Regional Attorney

Attachment

cc: UESF

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

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1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1022
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September 20, 2004

Frank Coverson

Re: Frank Coverson v. United Educators of San Francisco
Unfair Practice Charge No. SF-CO-652-E
WARNING LETTER

Dear Mr. Coverson:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on September 9, 2004. Frank Coverson alleges that the United Educators of San Francisco violated the Educational Employment Relations Act (EERA)[1] by breaching its duty of fair representation.

Investigation of the charge revealed the following. In February 1998, you were hired by the San Francisco Unified School District as a Security Guard. As such, you were exclusively represented by the United Educators.

In November 1995, you received a performance evaluation rating you as "Needs Improvement." On April 15, 1996 and April 15, 1997, you received two additional "Needs Improvement" evaluations. On November 30, 1997, you received an "Unsatisfactory" rating.

In January 1998, the District held a hearing to determine whether to suspend you for excessive tardiness and attempted deceit. While the District felt your conduct warranted a five day suspension, your Principal convinced the District to issue you a letter of reprimand without a suspension.

On March 12, 1998, you were injured while on duty at Visitacion Valley Middle School. This injury required medical attention, but did you did not file a Worker's Compensation claim at that time.

In May 1998, the District recommended terminating your employment. On June 2, 1998, you and your UESF representative Peggy Gash, met with District administrators in an attempt to retain your employment. On June 12, 1998, Senior Personal Analyst Elaine Lee upheld your termination.

[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.

In July 1999, one year after your termination, you retained an attorney to file a Worker's Compensation claim against the District. It is unclear what the outcome of that claim was.

In August 2004, you sent a letter to UESF requesting they represent you in seeking reinstatement with the District. As your termination was effective six (6) years earlier, it is unclear what action you wished UESF to take. On August 16, 2004, UESF denied your request for representation, indicating you had not been a bargaining unit member since June 1998.

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

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 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.) In cases alleging a breach of the duty of fair representation, the six month statutory limitations period begins to run on the date when the charging party, in the exercise of reasonable diligence, knew or should have known that further assistance from the union was unlikely. (Los Rios College Federation of Teachers, CFT/AFT (1991) PERB Decision No. 889; United Teachers of Los Angeles (2001) PERB Decision No. 1441.) Repeated union refusals to process a grievance over a recurring issue do not start the limitations period anew. (California State Employees Association (1985) PERB Decision No. 497-S.)

Herein, it is clear that Charging Party knew in June 1998 that UESF would not further assist him in seeking reinstatement with the District. As Charging Party knew that further assistance was unlikely more than six (6) years ago, this charge is untimely filed and must be dismissed.

Even assuming the charge was timely filed, the charge still fails to state a prima facie violation. Charging Party has alleged that the exclusive representative denied Charging Party the right to fair representation guaranteed by EERA section 3544.9 and thereby violated section 3543.6(b). In United Teachers of Los Angeles (Collins), the Public Employment Relations Board stated:

> Absent bad faith, discrimination, or arbitrary conduct, mere negligence or poor judgment in handling a grievance does not constitute a breach of the union's duty. [Citations omitted.]
>
> A union may exercise its discretion to determine how far to pursue a grievance in the employee's behalf as long as it does not arbitrarily ignore a meritorious grievance or process a grievance

> in a perfunctory fashion. A union is also not required to process an employee's grievance if the chances for success are minimal.

In order to state a prima facie case of arbitrary conduct violating the duty of fair representation, a Charging Party:

> ". . . must at a minimum include an assertion of sufficient facts from which it becomes apparent how or in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment. (Emphasis added.)" [Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Decision No. 332, p. 9, citing Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124.]

With regard to when "mere negligence" might constitute arbitrary conduct, the Board observed in Coalition of University Employees (Buxton) (2003) PERB Decision No. 1517-H that, under federal precedent, a union's negligence breaches the duty of fair representation "in cases in which the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim." (Quoting Dutrisac v. Caterpillar Tractor Co. (9th Cir. 1983) 749 F.2d 1270 [113 LRRM 3532], at p. 1274; see also, Robesky v. Quantas Empire Airways Limited (9th Cir. 1978) 573 F.2d 1082 [98 LRRM 2090].)

Assuming your request in August 2004 somehow revives UESF's duty of fair representation, UESF gave you an adequate and accurate response to your request for representation. As such, this 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 September 27, 2004, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Kristin L. Rosi
Regional Attorney