STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

UNITED EDUCATORS OF SAN FRANCISCO, Charging Party, v. SAN FRANCISCO UNIFIED SCHOOL DISTRICT, Respondent.	Case No. SF-CE-2383-E PERB Decision No. 1730 December 27, 2004

Appearances: Weinberg, Roger & Rosenfeld by Stewart Weinberg, Attorney, for United Educators of San Francisco; Lozano Smith by Namita S. Brown, Attorney, for San Francisco Unified School District.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the United Educators of San Francisco (UESF) of a Board agent's dismissal (attached) of its unfair practice charge. The unfair practice charge alleged that the San Francisco Unified School District (District) violated the Educational Employment Relations Act (EERA)[1] by unilaterally transferring a bargaining unit position from UESF to the United Administrator's (UA) bargaining unit.

The Board has reviewed the unfair practice charge in this matter, the District's response, the warning and dismissal letters, UESF's appeal and the District's response to UESF's appeal. Pursuant to our review, the Board dismisses the charge consistent with the discussion below.

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

BACKGROUND

UESF and the District were parties to a collective bargaining agreement (CBA), which was in effect until June 30, 2004. The agreement provides for binding arbitration of grievances.

During the 2002-2003 school year, unit member Robert Fisher (Fisher) served as a teacher on special assignment as liaison for the "African-American Scholastic Program," which helps high school students gain access and admission to the city college. On March 11, 2003, the District eliminated several programs to reduce a $9 million deficit, including 12 teachers in special assignment positions, one of whom was Fisher. On May 21, 2003, the District told Fisher that his position had been eliminated and consolidated pursuant to Article 15 of the CBA, pertaining to procedures for consolidation of positions and transfer of employees, and that he was being placed back in the classroom. On June 17, 2003, Fisher learned that his position was not "consolidated," but rather transferred to another employee.

On July 1, 2003, UESF Representative Sandra Mack filed a Level 1 grievance alleging that the transfer of Fisher's position to another employee violated CBA Article 15.1.4[2] covering consolidation/involuntary transfer. In a December 30, 2003 letter, the District denied the grievance at Level 2 and notified UESF that it had transferred the liaison position from the teachers' unit to an employee in UA's unit. On February 25, 2004, UESF filed the unfair practice charge. In its response, the District indicated that the charge was untimely because UESF was aware of the transfer as early as July 1, 2003; and that in any event, it was scheduled for arbitration on August 12, 2004. In its response filed March 30, 2004, the District argues that if the charge is not found to be untimely, then it should be deferred and has waived procedural defenses.

[2]Neither party provided a copy or summary of this provision of the CBA.

BOARD AGENT'S DISMISSAL

The Board agent found the charge to be untimely, i.e., 45 days late. Even assuming the charge is timely filed, the Board agent stated that the charge should be deferred to arbitration. These findings were provided in the warning letter. UESF did not file an amended charge.

DISCUSSION

District's Late-filed Response

The District filed its response to the appeal late, explaining that it did not learn of the appeal until it received notice that the case was docketed and that it did not receive a copy of the appeal. The District alleges that although the appeal's proof of service indicates service on the District, the District's address on the proof of service was incorrect and presumably sent to the wrong address. The District filed its response to the appeal six days after it received the letter from the PERB Appeal's Office regarding the date the case was docketed.

PERB Regulation 32136[3] provides:

> A late filing may be excused in the discretion of the Board for good cause only. A late filing which has been excused becomes a timely filing under these regulations.

The Board will generally excuse a late filing "where a non-prejudicial delay of short duration resulted from circumstances beyond the control of the filing party or from excusable misinformation and where the filing party's explanation was either credible on its face or was corroborated by other facts or testimony." (United Teachers of Los Angeles (Kestin) (2003) PERB Order No. Ad-325, citing numerous Board decisions on this issue.) We find that the District's response was late due to circumstances beyond the District's control. It is true that the proof of service attached to the appeal contained an incorrect address for the District. It is

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

therefore plausible that the District did not learn of the appeal until receiving the letter from the Appeals Office docketing this case. In addition, the response was filed within a week after the District learned of the appeal. We therefore find good cause to excuse the late-filed response.

Timeliness of the Charge

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.)

UESF stated that it learned of the transfer to a different bargaining unit through the District's response on December 30, 2003. The District argues that UESF knew when it filed the grievance on July 1, 2003. The grievance language states that Fisher's position was not consolidated "but transferred to another party." The District construes this language to show UESF's knowledge that the position was transferred outside the bargaining unit. For the first time on appeal, UESF states that the July 1 grievance language did not evidence its knowledge of the nature of the transfer, but rather indicated a transfer to some unknown individual. According to UESF, the unlawful effect of the transfer was not known by UESF until the

District's December 30 Level 2 response when the District provided this specific information.[4] The Level 1 grievance is attached to the District's response to the charge. The record does not include a copy of the December 30 response.

Under PERB Regulation 32635(b), a charging party may not present new charge allegations or new evidence on appeal without good cause. The allegation that UESF was unaware of the District's unlawful conduct until December 30 was known to UESF at the time it filed its charge. The District, through its response, notified UESF that it believed the charge to be untimely. The Board agent also informed UESF in the warning letter that it could file an amended charge if it disagreed with the Board agent's findings and analysis. However, UESF chose not to provide this information until filing its appeal. Therefore, we find that UESF has not provided good cause to raise this new evidence on appeal and thus sustain the Board agent's finding of untimeliness.

Deferral to Arbitration

Even if a charge is untimely, under certain circumstances, the statute of limitations is tolled. For example, section 3541.5(a)(2) of the EERA states, in pertinent part, that PERB shall not:

> Issue a complaint against conduct also prohibited by the provisions of the [collective bargaining] agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration.

In Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81a,[5] the Board explained that:

[4]UESF alleges that the unlawful conduct is the transfer of Fisher's position outside of the bargaining unit. However, the Board has held that a unilateral transfer of duties within the same bargaining unit without notice or opportunity to bargain also violates EERA. (See Desert Sands Unified School District (2001) PERB Decision No. 1468.)

> While there is no statutory deferral requirement imposed on the National Labor Relations Board (hereafter NLRB), that agency has voluntarily adopted such a policy both with regard to post-arbitral and pre-arbitral award situations. EERA section 3541.5(a) essentially codifies the policy developed by the NLRB regarding deferral to arbitration proceedings and awards. It is appropriate, therefore, to look for guidance to the private sector.[6] [Fn. 2 omitted.]

In Collyer Insulated Wire (1971) 192 NLRB 837 [77 LRRM 1931] (Collyer) and subsequent cases, the National Labor Relations Board articulated standards under which deferral to the contractual grievance procedure is appropriate in prearbitral situations. These requirements are: (1) the dispute must arise within a stable collective bargaining relationship where there is no enmity by the respondent toward the charging party; (2) the respondent must be ready and willing to proceed to arbitration and must waive contract-based procedural defenses; and (3) the contract and its meaning must lie at the center of the dispute.

In this case, a grievance covering CBA Article 15.1.4 is proceeding to arbitration. In its response dated March 30, the District requests that the Board defer the charge and has waived procedural defenses. However, for the first time on appeal, UESF states that the grievance and the charge cover different issues and so deferral is not appropriate. For the reasons stated in the previous discussion of PERB Regulation 32635(b), we find that there is no good cause to accept UESF's new argument.

The Board notes that neither party has summarized or attached a copy of the pertinent CBA provision so that it is impossible to determine whether the case should be deferred or whether UESF's contention is valid. PERB Regulation 32615(a)(5) requires that a charge contain "[a] clear and concise statement of the facts and conduct alleged to constitute an unfair

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[5]See also State of California (Department of Food and Agriculture) (2002) PERB Decision No. 1473-S.

[6]Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608.

practice." Similarly, a respondent who asserts deferral as an affirmative defense defers processing of the charge and must allege facts that evidence the three prongs required by Collyer. In this case, therefore, there is insufficient information in the record to determine whether the first Collyer prong is met. Therefore, we find that deferral is not warranted in this matter.

Accordingly, the Board dismisses the charge solely on the basis of untimely filing.

ORDER

The unfair practice charge in Case No. SF-CE-2383-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Neima joined in this Decision.

STATE OF CALIFORNIA NOLD 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

May 5, 2004

Stewart Weinberg, Attorney
Weinberg, Roger & Rosenfeld
180 Grand Avenue, Suite 1400
Oakland, CA 94612

Re: United Educators of San Francisco v. San Francisco Unified School District
Unfair Practice Charge No. SF-CE-2383-E
DISMISSAL LETTER

Dear Mr. Weinberg:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 25, 2004. United Educators of San Francisco alleges that the San Francisco Unified School District violated the Educational Employment Relations Act (EERA)[1] by transferring a bargaining unit position from the UESF unit to the Administrator's bargaining unit.

I indicated to you in my attached letter dated April 26, 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 May 3, 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 [***] 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.

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[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.)

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: Namita Brown

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

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April 26, 2004

Stewart Weinberg, Attorney
Weinberg, Roger & Rosenfeld
180 Grand Avenue, Suite 1400
Oakland, CA 94612

Re: United Educators of San Francisco v. San Francisco Unified School District
Unfair Practice Charge No. SF-CE-2383-E
WARNING LETTER

Dear Mr. Weinberg:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 25, 2004. United Educators of San Francisco alleges that the San Francisco Unified School District violated the Educational Employment Relations Act (EERA)[1] by transferring a bargaining unit position from the UESF unit to the Administrator's bargaining unit.

Investigation of the charge revealed the following. UESF is the exclusive bargaining representative for the District's certificated employees. Included within the UESF bargaining unit is the classification of "teachers on special assignment." The District and UESF are parties to a collective bargaining agreement that expires on June 30, 2004. Article 19.8.3.1 of the Agreement provides for the binding arbitration of grievances. Article 15 of the Agreement provides the procedures for consolidation of positions and the transfer of employees.

During the 2002-2003 school year, bargaining unit member Robert Fisher served as a teacher on special assignment. Mr. Fischer's assignment was as the liaison for the "African-American Scholastic Program" which helps high school students gain access and admission to the City College.

On March 11, 2003, the District eliminated many programs and many positions in order to reduce a $9 million dollar deficit. Included in the elimination were 12 "teachers on special assignment" positions, including Mr. Fisher's position.

On May 21, 2003, the District informed Mr. Fisher that his position had been eliminated and he would be consolidated, as required by Article 15, and placed back in the classroom. On

[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.

June 17, 2003, Mr. Fisher learned that his position was not "consolidated" but instead transferred to another employee in the United Administrators bargaining unit.

On July 1, 2003, UESF representative Sandra Mack filed a level one grievance alleging as follows:

> On or about May 21, 2003, Mr. Fisher received from the District a Notice of Consolidation that stated his position would be consolidated due to a reduction in the available budget. On or about June 17, 2003, Mr. Fisher became aware that his position was not being consolidated but transferred to another party.
>
> The contract was violated, including, but not limited to the following: Article 15.1.4 and any other articles which may pertain to this case. . . .
>
> United Educators of San Francisco wants Robert Fisher to be made whole by having his notice of consolidation rescinded and his being confirmed in the position he held in the 2002-2003 school year.

On February 25, 2004, UESF filed this unfair practice charge alleging Mr. Fisher's position was transferred to another bargaining unit.

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.)

Herein, it is clear that UESF and Mr. Fisher were aware that his position was allegedly transferred to another employee on July 1, 2003, when they filed the level one grievance. Since the charge was filed on February 25, 2004, the charge is untimely by 45 days, and therefore must be dismissed.

Moreover, even assuming the charge is timely filed, the charge still fails to state a prima facie case, as the charge is subject to deferral.

Section 3541.5(a) of the EERA states, in pertinent part, that PERB shall not:

> Issue a complaint against conduct also prohibited by the provisions of the [collective bargaining] agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration.

In Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81a,[2] the Board explained that:

> While there is no statutory deferral requirement imposed on the National Labor Relations Board (hereafter NLRB), that agency has voluntarily adopted such a policy both with regard to post-arbitral and pre-arbitral award situations.[2] EERA section 3541.5(a) essentially codifies the policy developed by the NLRB regarding deferral to arbitration proceedings and awards. It is appropriate, therefore, to look for guidance to the private sector.[3] [Fn. 2 omitted; fn. 3 to Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608.]

In Collyer Insulated Wire (1971) 192 NLRB 837 [77 LRRM 1931] and subsequent cases, the National Labor Relations Board articulated standards under which deferral to the contractual grievance procedure is appropriate in prearbitral situations. These requirements are: (1) the dispute must arise within a stable collective bargaining relationship where there is no enmity by the respondent toward the charging party; (2) the respondent must be ready and willing to proceed to arbitration and must waive contract-based procedural defenses; and (3) the contract and its meaning must lie at the center of the dispute.

These standards are met with respect to this case. First, no evidence has been produced to indicate that the parties are not operating within a stable collective bargaining relationship. Second, by the attached letter from its representative, Namita Brown, dated March 30, 2004, the Respondent has indicated its willingness to proceed to arbitration and to waive all procedural defenses. Finally, the issue raised by this charge that the District violated the contract by consolidating Mr. Fisher directly involves an interpretation of Article 15 of the collective bargaining agreement.

Accordingly, this charge must be deferred to arbitration and will be dismissed. Following the arbitration of this matter, the Charging Party may seek a repugnancy review by PERB of the arbitrator's decision under the Dry Creek criteria. (See Regulation 32661; Los Angeles Unified

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[2] See also State of California (Department of Food and Agriculture) (2002) PERB Decision No. 1473-S.

School District (1982) PERB Decision No. 218; Dry Creek Joint Elementary School District, supra.)[3]

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 May 3, 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

KLR

[3] Pursuant to Government Code section 3541.5(a), the six-month limitation on the filing of a charge is tolled during the time required to exhaust the grievance machinery where that procedure ends in binding arbitration.