

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



MITCHELL K. DORFMAN,
Charging Party,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT,
Respondent.

Case No. LA-CE-4810-E

PERB Decision No. 1754

February 17, 2005

Appearances: United Teachers Los Angeles Adult and Occupational Education Committee by Ernest Kettenring, Representative, on behalf of Mitchell K. Dorfman.

Before Duncan, Chairman; Whitehead and Shek, Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on appeal of a Board agent's dismissal (attached) of Mitchell K. Dorfman's (Dorfman) unfair practice charge. The unfair practice charge alleged that the Los Angeles Unified School District (District) violated the Educational Employment Relations Act (EERA)¹ by the non-granting of tenure to and termination of Dorfman.

We have reviewed the entire record, including the original unfair practice charge, the first and second amended charges, the Board agent's warning and dismissal letters, and the appeal filed by Dorfman. We find the warning and dismissal letters to be free of prejudicial error and adopt them as the decision of the Board itself, pursuant to the following discussion.

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

BACKGROUND

The charge filed by Dorfman stated:

Gloria Martinez, a recently fired administrator, vindictively sabotaged my tenure application. As well, the district's tenure procedure is amorphous and arbitrary, violating Amendment XIV of the U.S. Constitution requiring due process and equal protection under the law. My union has exhausted its options for redress.

On November 8, 2004, Dorfman was sent a warning letter by the Board agent. In the letter the Board agent advised that the unfair practice charge, as written, failed to state a prima facie case as no facts were provided to support the violation.

Under PERB Regulation 32615(a)(5)² an unfair practice charge must include, “[a] clear and concise statement of the facts and conduct alleged to constitute an unfair practice.”

The warning letter also advised Dorfman that facts were needed to show the charge had been timely filed. The Board agent noted that “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.’”

Dorfman was further advised by the Board agent that PERB was not the correct forum for allegations that his constitutional rights had been violated. The Board agent also stated that if Dorfman made a claim of retaliation, that could be pursued as a violation of EERA section 3543.5(a).

On November 17 and December 3, 2004, Dorfman filed amended charges. The first continued to assert a violation of his constitutional rights. The second amended charge was filed on behalf of Dorfman by United Teachers Los Angeles and included the allegation of a violation of EERA sections 3543.5 and 3543.6.

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

The Board agent advised Dorfman in the warning letter that he must provide additional facts in a concise statement. He laid out the elements of the Novato³ test for Dorfman.

The charge was then amended two times. The constitutional claims were still plead even though the Board agent had advised him that PERB was not the correct forum.

³Novato Unified School District (1982) PERB Decision No. 210 (Novato). 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; 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 (North Sacramento)), 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.)

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; fn. omitted.]

The additional information that was provided indicated that the employer, through the principal and assistant principal at North Hollywood Community Adult School, terminated Dorfman's employment in September 2002 by altering his evaluation. Dorfman alleged he did not know until June 2004 that the employer also directed students not to enroll in his fall 2002 class.

The Board agent advised Dorfman in the warning letter that he must show his charge was timely filed. He also noted that the time begins to run when the charging party "knew or should have known of the conduct underlying the charge."⁴

The dismissal letter of December 10, 2004, noted that the Board has ruled in retaliation cases involving termination that the time begins to run on the actual date of termination. In this case, that would have been in 2002.⁵ The charge was not filed until October 2004, more than two years after the termination itself.

Under EERA, as indicated above, the statute of limitations is six months.

APPEAL

Dorfman's appeal alleges that "[w]hile there is the appearance that [his] actual termination was the unfair practice, it was also the underlying acts of unsubstantiated changes to Mr. Dorfman's application for tenure and the false manufacture of a reason for his dismissal."

The appeal also indicates Dorfman was told specifically that he was being terminated for failure to meet the criteria of Article XXI.70b of the collective bargaining agreement (CBA). This document, however, was not provided with the appeal and was not included with

⁴Gavilan Joint Community College District (1996) PERB Decision No. 1177 (Gavilan).

⁵Regents of the University of California (2004) PERB Decision No. 1585-H (UC Regents).

the original unfair practice charge or either of the two amended charges. We note that in the second amended charge Dorfman stated:

While not an explicit section of the [CBA], the district's practice was written, these practices were acknowledged by both the district and union, and had been practiced for a number of years, thus constituting a past practice and an implicit part of the contractual relationship between employees and employer.

This appears to contradict the allegation that this is covered by a specific section of the CBA.

Further, on appeal, Dorfman raises for the first time allegations that Gloria Martinez violated Section 32603(a), (f) and (g). We assume he is referring to PERB Regulation 32603⁶ which refers to matters under the Meyers-Milias-Brown Act (MMBA).⁷

Dorfman requests, in the alternative, that if the statute of limitations has run, that his charges be accepted as a late filing under (apparently) PERB Regulation 32136. This also is raised for the first time on appeal.

PERB Regulation 32136 allows for a late filing for good cause only at the discretion of the Board. While this is a flexible standard, it has generally been allowed when a late filing is

⁶PERB Regulation 32603(a), (f) and (g) states:

32603. Employer Unfair Practices under MMBA.

It shall be an unfair practice for a public agency to do any of the following:

(a) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

(f) Adopt or enforce a local rule that is not in conformance with MMBA.

(g) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.

⁷The MMBA is codified at Section 3500, et seq.

related to a time frame of very short duration with no prejudice to the other party or parties. An example of such is a one day delay in the documents being received at PERB but timely served on the other party. (Fullerton Elementary School District (2004) PERB Decision No. 1671.) That is not the situation in this case.

On appeal, Dorfman reiterates his argument that the statute of limitations has not run. He argues that he did not know the real reason for his 2002 dismissal until June of 2004 when he and another dismissed former employee were bemoaning their fates in a series of telephone calls and the former employee advised Dorfman of a conversation he allegedly overheard in which an unknown person made statements to another employee to stop registering students in Dorfman's classes. His argument then follows that the six-month time period of the statute should not have begun to run until June 2004, when this telephone conversation took place, rather than at the time of his termination.

TIMELINESS

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.) 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.)

On appeal, Dorfman challenges the application of Gavilan, stating that he did not know the real reason for his termination until June 2004. He ignores the applicability of UC Regents, cited by the Board agent in the dismissal letter.

In cases of termination the statute begins to run at the date of the actual termination, as the Board agent indicated in the warning and dismissal letters sent to Dorfman. (UC Regents.) At the time of his termination Dorfman should have investigated the reasons given to him.

We agree with the Board agent that this case was not timely filed.

NEW ISSUE ON APPEAL

Late Filing Under PERB Regulation 32136

On appeal, Dorfman raised for the first time that his unfair practice charge should be accepted as a late filing if the Board finds the statute of limitations has run.

This regulation refers to filings before the Board itself. The unfair practice charge itself is two years late under the six-month statute of limitations required under EERA section 3541.5.

Unless good cause is shown, a charging party may not present new charge allegations or new supporting evidence on appeal. (PERB Regulation 32635(b); Sonoma Valley Unified School District (2003) PERB Decision No. 1522.) Dorfman has not provided any information that shows good cause and has filed the charge untimely.

ORDER

The unfair practice charge in Case No. LA-CE-4801-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Whitehead and Shek joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8386
Fax: (916) 327-6377



December 10, 2004

Mitchell K. Dorfman

Ernest Kettering, UTLA Representative
Evans Adult School
717 N. Figueroa Street
Los Angeles, CA 90012

Re: Mitchell K. Dorfman v. Los Angeles Unified School District
Unfair Practice Charge No. LA-CE-4810-E
DISMISSAL LETTER

Dear Sirs:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on October 29, 2004. Mitchell K. Dorfman alleges that the Los Angeles Unified School District violated the Educational Employment Relations Act (EERA)¹ by denying him tenure.

I indicated to you in my attached letter dated November 8, 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 November 15, 2004, the charge would be dismissed.

I received Mr. Dorfman's amended charge on November 17 and a second amended charge from Mr. Kettering on November 30, 2004.

In the first amended charge, you continue to assert that Mr. Dorfman's constitutional rights have been violated. As discussed in my letter of November 8, redress for such a violation will need to be sought in another forum.

In both amended charges it is also asserted that the employer, through the Principal and Assistant Principal at North Hollywood Community Adult School, took a reprisal against Mr. Dorfman by terminating his employment in September 2002. They did so by altering his

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.

evaluation and, as Mr. Dorfman learned from a colleague in June 2004, directing staff to not enroll students in his fall 2002 class.

However, as stated in my prior letter,

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 Board has ruled that in retaliation cases involving termination, the actual date of termination triggers the running of the statutory limitations period. Regents of the University of California (2004) PERB Decision No. 1585-H. The original charge in this matter was filed in October 2004; Mr. Dorfman's employment was terminated in 2002. Accordingly, this allegation is untimely.

I am dismissing the charge based on the facts and reasons contained herein and in my November 8 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.

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

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

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 _____
Bernard McMonigle
Regional Attorney

Attachment

cc: Betty Morin

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8386
Fax: (916) 327-6377



November 8, 2004

Mitchell K. Dorfman

Re: Mitchell K. Dorfman v. Los Angeles Unified School District
Unfair Practice Charge No. LA-CE-4810-E
WARNING LETTER

Dear Mr. Dorfman:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on October 29, 2004. Mitchell K. Dorfman alleges that the Los Angeles Unified School District violated the Educational Employment Relations Act (EERA)¹ by denying him tenure.

The factual statement of your charge, in its entirety, contains the following,

Gloria Martinez, a recently fired administrator, vindictively sabotaged my tenure application. As well, the district's tenure procedure is amorphous and arbitrary, violating Amendment XIV of the U.S. Constitution requiring due process and equal protection under the law. My union has exhausted its options for redress.

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.)

You do not provide the facts necessary to support your allegations.

Any additional facts which you provide must also demonstrate that your charge is timely filed. EERA section 3541.5(a)(1) prohibits PERB from issuing a complaint with respect to "any

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.

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.)

You allege that your constitutional rights have been violated. To pursue such a claim in the courts you may need to seek legal counsel. PERB's jurisdiction is limited to enforcing the labor laws entrusted to it. You may have a claim under EERA section 3543.5(a) if you are able to demonstrate illegal retaliation by your employer.

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.]

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 November 15, 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