

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



GWENDOLYN DIANE NELSON TROTTER,

Charging Party,

v.

SAN BERNARDINO CITY UNIFIED SCHOOL
DISTRICT,

Respondent.

Case No. LA-CE-5431-E

PERB Decision No. 2278

July 11, 2012

Appearances: Gwendolyn Diane Nelson Trotter, on her own behalf; Atkinson, Andelson, Loya, Ruud & Romo by David E. Robinett, Attorney, for San Bernardino City Unified School District.

Before Martinez, Chair; Dowdin Calvillo and Huguenin, Members.

DECISION

MARTINEZ, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Gwendolyn Diane Nelson Trotter (Trotter) of the Office of the General Counsel's dismissal (attached) of her unfair practice charge. The charge alleged that the San Bernardino City Unified School District (District) violated the Educational Employment Relations Act (EERA)¹ by failing to reclassify and pay Trotter according to correct placement on the certificated salary schedule based on her prior teaching experience at another school district. The Office of the General Counsel dismissed the charge as beyond PERB's jurisdiction, untimely and insufficient to state a prima facie case under EERA.

We have reviewed the entire record in this matter and given our full consideration to the appeal and the response thereto. Based on this review, the Board finds the warning and

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

dismissal letters to be well-reasoned, adequately supported by the record and in accordance with the applicable law. Accordingly, the Board hereby adopts the warning and dismissal letters as the decision of the Board itself.

DISCUSSION

Pursuant to PERB Regulation 32635, subdivision (a)² an appeal from dismissal of an unfair practice charge 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.

To satisfy the requirements of this regulation, the appeal must sufficiently place the Board and the respondent “on notice of the issues raised on appeal.” (*State Employees Trades Council United (Ventura, et al.)* (2009) PERB Decision No. 2069-H; *City & County of San Francisco* (2009) PERB Decision No. 2075-M.) An appeal that does not reference the substance of the Board agent’s dismissal fails to comply with PERB Regulation 32635, subdivision (a). (*United Teachers of Los Angeles (Pratt)* (2009) PERB Order No. Ad-381; *Lodi Education Association (Huddock)* (1995) PERB Decision No. 1124; *United Teachers – Glickberg* (1990) PERB Decision No. 846.) Likewise, an appeal that merely reiterates facts alleged in the unfair practice charge does not comply with PERB Regulation 32635, subdivision (a). (*Contra Costa Health Services Department* (2005) PERB Decision No. 1752-M; *County of Solano (Human Resources Department)* (2004) PERB Decision No. 1598-M.)

The appeal mainly reiterates allegations in the charge concerning Trotter’s dispute with the District about her placement on the salary schedule, including her efforts to provide the

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

District with verification of her prior teaching experience and the District's failure to respond.³ The appeal does not reference any particular portion of the dismissal or otherwise state the specific issues of procedure, fact, law or rationale to which the appeal is taken. Nor does it identify the page or part of the dismissal to which the appeal is taken or state the grounds. Thus, the appeal is subject to dismissal on this ground alone. (*City of Brea* (2009) PERB Decision No. 2083-M.)

In addition, PERB Regulation 32635, subdivision (b) provides: "Unless good cause is shown, a charging party may not present on appeal new charge allegations or supporting evidence." The Board has found good cause when "the information provided could not have been obtained through reasonable diligence prior to the Board agent's dismissal of the charge." (*Sacramento City Teachers Association (Ferreira)* (2002) PERB Decision No. 1503.)

The appeal alleges the occurrence of a meeting in May 2010 with the District and Trotter's union representative "about restoration of steps," and the lack of follow-up. The appeal also includes two attachments containing information provided by the other school district concerning Trotter's prior teaching, which are dated February 6, 2004 and April 1, 2008. The charge was dismissed on December 27, 2011. The date of the meeting alleged for the first time on appeal and the dates of the documents attached to the appeal predate the dismissal of the charge. The appeal provides no reason why the new allegations concerning the meeting and the attached documents could not have been provided to the Office of the

³ Trotter also argues that she should not be penalized for the time it took the other school district to process the verification of her prior teaching experience. Assuming the date of verification has relevance to the calculation of the statute of limitations, the two documents Trotter attaches to the appeal as verification of her prior teaching experience are dated February 6, 2004 and April 1, 2008. Although there is no good cause to consider these documents for the first time on appeal, as explained above, it simply is noted that both dates fall outside the six-month limitations period established by the filing of the charge on March 8, 2010. (See EERA sec. 3541.5, subd. (a)(1) ["the board shall not . . . [i]ssue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge."].)

General Counsel during the processing of the charge. Thus, there is no good cause to consider on appeal the new allegations or supporting documents. Moreover, neither the new allegations nor documents cure the deficiencies in the charge as described in the Office of the General Counsel's warning letter of December 9, 2011.

ORDER

The unfair practice charge in Case No. LA-CE-5431-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Dowdin Calvillo and Huguenin joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
Telephone: (818) 551-2805
Fax: (818) 551-2820



December 27, 2011

Gwendolyn Diane Nelson Trotter

Re: *Gwendolyn Diane Nelson Trotter v. San Bernardino City Unified School District*
Unfair Practice Charge No. LA-CE-5431-E
DISMISSAL LETTER

Dear Ms. Trotter:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 8, 2010. Additional information in support of the charge was filed on July 23, 2010. Gwendolyn Diane Nelson Trotter (Trotter or Charging Party) alleges that the San Bernardino City Unified School District (District or Respondent) violated the Educational Employment Relations Act (EERA or Act)¹ by failing to pay her according to correct placement on the salary schedule.

Charging Party was informed in the attached Warning Letter dated December 9, 2011, 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 that 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 on or before December 16, 2011, the charge would be dismissed.

PERB has not received either an amended charge or a request for withdrawal.² Therefore, the charge is hereby dismissed based on the facts and reasons set forth in the December 9, 2011 Warning Letter.

Right to Appeal

Pursuant to PERB Regulations,³ Charging Party 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

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

² I called you on December 20, 2011, in an attempt to verify your receipt of the Warning Letter, but the call was not answered and there was no opportunity to leave a voice message.

this dismissal. (Cal. Code Regs, tit. 8, § 32635, subd. (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 during a regular PERB business day. (Cal. Code Regs, tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB 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. (Cal. Code Regs, tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
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. (Cal. Code Regs, tit. 8, § 32635, subd. (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 Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs, tit. 8, § 32135, subd. (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

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

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. (Cal. Code Regs, tit. 8, § 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,

M. SUZANNE MURPHY
General Counsel

By _____
Valerie Pike Racho
Regional Attorney

Attachment

cc: Sherry G. Gordon, Attorney

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
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December 9, 2011

Gwendolyn Diane Nelson Trotter

Re: *Gwendolyn Diane Nelson Trotter v. San Bernardino City Unified School District*
Unfair Practice Charge No. LA-CE-5431-E
WARNING LETTER

Dear Ms. Trotter:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 8, 2010. Additional information in support of the charge was filed on July 23, 2010. Gwendolyn Diane Nelson Trotter (Trotter or Charging Party) alleges that the San Bernardino City Unified School District (District or Respondent) violated the Educational Employment Relations Act (EERA or Act)¹ by failing to pay her according to correct placement on the salary schedule.

Summary of Facts Provided by the Charging Party

Trotter has been employed by the District as a music teacher since approximately June 27, 2003, and is included in a bargaining unit exclusively represented by the San Bernardino Teachers Association (Association). Around December 2003, Trotter received a telephone call from a District Human Resources staff person informing her that the District could not credit the years of experience she had at another school district during the period of 1996-1999, because during that time she had been working as a day-to-day substitute. From 1999-2003, Trotter also worked in that same school district as a regular full-time employee. Initial placement on the District's salary schedule is determined by an employee's education level and prior experience. On December 18, 2003, Trotter signed a "probationary contract" that "showed acceptance" of four years of previous experience and placed her at step five on the salary schedule. Trotter's original understanding at the time of her hire, however, was that she would be placed at step nine on the salary schedule.

On or about February 5, 2004, a representative from Trotter's former school district verified that Trotter had been on continuous assignment during the years of employment at issue. Trotter provided this documentation to the District and to the Association. When Trotter called the District to check on the status of her salary schedule placement on or around that same date, she was informed that District Assistant Superintendent Harold Vollkommer

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

(Vollkommer) would not grant credit for her years as a substitute in the other school district. Trotter then contacted Association President Peggy Taylor, who said that there was nothing the Association could do to assist Trotter in resolving the issue.

A few years later, around April 2007, Trotter spoke with newly-appointed Association President Linda Whittaker (Whittaker), and again asserted that she had been incorrectly placed on the salary schedule relative to her years of experience. Whittaker then referred Trotter to Association Executive Directors Conrad Ohlson and Peg Tracey (Tracey). In August 2008, Tracey wrote to Vollkommer, advocating for Trotter to be credited on the salary schedule for her time as a substitute, and "restored to full pay for her previous experience." There is no information in the charge whether Vollkommer ever responded to the Association or to Trotter regarding that letter, but apparently the problem persisted, because Trotter was still requesting a meeting over the issue with Vollkommer in February 2010. It appears that such a meeting took place between Trotter and Vollkommer on or around July 19, 2010, wherein Vollkommer explained the District's rationale for not crediting the substitute experience, and Trotter asserted that under the collective bargaining agreement between the Association and the District, she should have at least been placed at step six of the salary schedule instead of step five.

Trotter notes that she is a 59 year old African-American woman, and believes that she is a victim of age, race, and gender discrimination by the District.

For the reasons discussed below, the facts in the charge do not demonstrate a prima facie violation of EERA.

Discussion

1. Claims of Age, Race, and Gender Discrimination

PERB is a quasi-judicial agency with exclusive jurisdiction over California's public sector collective bargaining statutes, including EERA. PERB's jurisdiction does not extend to other independent statutory schemes arising under state and federal laws. (*Alum Rock Union Elementary School District* (2005) PERB Decision No. 1748.) Therefore, PERB has no power to review allegations of age, race, or gender discrimination. (*Ibid.*) Accordingly, these allegations may not be considered by PERB when evaluating the unfair practice charge.

2. Timeliness of the Charge and the EERA Discrimination Standard

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.) A 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.)

The facts in the charge show that the District informed Trotter in December 2003 that she was ineligible to receive credit on the salary schedule for her years as a substitute in the other district. At least by February 5, 2004, after Vollkommer had received documentation from the other school district regarding her years of service, Trotter knew that Vollkommer still refused to credit her time as a substitute. Thus, in order to be timely filed, an allegation that this conduct by the District was in violation of EERA must have been filed no later than August 5, 2004. As this charge was not filed until March 8, 2010, it is several years untimely and subject to dismissal for this reason alone.

Moreover, even if the charge had been filed within the six-month limitation period, the facts of this matter would not meet the standard for finding unlawful discrimination under EERA. To demonstrate that an employer discriminated or retaliated against an employee in 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; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights.² (*Novato Unified School District* (1982) PERB Decision No. 210.) Thus, in order to sustain a discrimination violation, there must be facts demonstrating that an employer's actions were unlawfully motivated, i.e., that such actions were taken in direct response to the employee's exercise of protected rights under EERA. In this case, the only instance of protected conduct of which the District had requisite knowledge is Tracey's August 12, 2008 letter to Vollkommer.³ (*County of Riverside* (2011) PERB Decision No. 2184-M [seeking union assistance for a workplace issue is well-established protected activity].) However, this protected conduct took place at least four years after the District had taken the position that Trotter was not entitled to credit on the salary schedule for her years of experience as a substitute. PERB has consistently held that the timing of an employer's action does not support an inference of unlawful motive when the adverse action predates the

² This last element of the test for unlawful discrimination may be shown through circumstantial evidence, and is commonly referred to as the "nexus" or connection between protected conduct and adverse action. (*Moreland Elementary School District* (1982) PERB Decision No. 227.) Nexus may be demonstrated by adverse action occurring closely in time to protected conduct (*Ibid.*) and at least one additional factor, such as, disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S), a departure from established procedures when dealing with the employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104), and inconsistent, nonexistent, contradictory, or vague justifications for the employer's actions. (*Oakland Unified School District* (2003) PERB Decision No. 1529; *McFarland Unified School District* (1990) PERB Decision No. 786; *State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S.)

³ Notably, even if some reasonable period of time after the date of the August 12, 2008 letter was used to establish the point at which Trotter either knew, or should have known, that the District would not change her salary schedule placement, the charge would still be filed well outside the six-month limitation period.

employee's protected activity, as is the precise case here. (*San Mateo County Community College District* (2008) PERB Decision No. 1980; *Berkeley Unified School District* (2004) PERB Decision No. 1702.) Accordingly, even if the charge had been filed in a timely manner, there is no evidence to suggest that the District's action toward Trotter was in any way connected to her protected conduct, and therefore, no violation of EERA is demonstrated.

For these reasons the charge, as presently written, does not state a prima facie case.⁴ If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may 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 an authorized agent of 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 an amended charge or withdrawal is not filed on or before **December 16, 2011**,⁵ PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Valerie Pike Racho
Regional Attorney

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⁴ In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make "a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Ibid.*)

⁵ A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)