STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

PAMELA MNYANDU, Charging Party, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-5680-E PERB Decision No. 2299 December 20, 2012

Appearance: Pamela Mnyandu, on her own behalf.

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 Pamela Mnyandu (Mnyandu) from the dismissal of an unfair practice charge. The charge, as amended, alleged that the Los Angeles Unified School District (LAUSD) violated the Educational Employment Relations Act (EERA)[1] by unlawfully withholding wages, misrepresenting or misreporting Mnyandu's wages on her 2011 W-2, failing to provide information, and failing to remedy the wage withholding problem. The Office of the General Counsel dismissed the charge for lack of jurisdiction over the pay dispute between Mnyandu and LAUSD and failure to state a prima facie unfair practice charge.

The Board has reviewed the record in its entirety and given full consideration to the issues raised on appeal. Based on this review, the Board affirms the dismissal of the charge for the reasons stated below.

[1] EERA is codified at Government Code section 3540 et seq. Hereafter, these sections of the Government Code will be cited as sections of EERA.

BACKGROUND

On April 2, 2012, Mnyandu filed an unfair practice charge against LAUSD, which stated:

> "SEE ATTACHED": THEY WROTE ME A LETTER ON 01/26/2012 CLAIMING I'VE REPAYED THEM ONLY $200.00 INSTEAD OF +_12,000.00 THEY UNLAWFULLY DEDUCTED FROM MY WAGE WITHOUT MY CONSENT.

The attached Statement of Facts states in its entirety the following:

> On 01/27/2012 I received an Overpayment Remittance Confirmation letter from LAUSD stating that I had repaid them only $200,000[2] in the year 2011, which is deliberately untrue. This is to cover their books, as they know they knowingly acted unlawfully.
>
> My W2 for 2011 indicates that I earned $17,728.67 but only $7,610.38 was paid to me. They kept the difference for themselves. To this day, it's still unaccounted for.
>
> Be that as it may, the amount of $17,728.67 reflected in my W2 is significantly inaccurate. I earned more than that, but they've declined my request to be provided with accurate records.
>
> On 08/12/2011 they had unilaterally and unlawfully withheld -+$12,000.00 from my salary and later claimed "I owed them."
>
> After a series of enquiries, Francisco Tamayo wrote me an email on 08/18/2011 and called the underpayment a **"temporal fix until the time gets corrected",** which was never done.
>
> In October of 2011, after realizing that all my good faith efforts were in vain; unfair labor practice had been committed; and my efforts to get them to provide me with the printout of my payment records had failed, I went and filed a complaint with the EEOC on 10/20/2012[3] and the investigation is still in process.

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[2] The Overpayment Remittance Confirmation to which the Statement of Facts refers was enclosed with the unfair practice charge. It states that Mnyandu repaid LAUSD $200.00 in the tax year 2011.

[3] In a subsequent filing, Mnyandu clarified that her EEOC complaint was filed on October 21, 2011, not "10/20/2012."

To this day they are still unlawfully keeping this money.

(Bold and underlining in the original.)

There were several documents enclosed with the unfair practice filing, namely Mnyandu's Employee Statement of Earnings (pay date August 12, 2011); Mnyandu's 2011 W-2 Wage and Tax Statement; a letter from LAUSD dated January 26, 201[2], to Mnyandu entitled Overpayment Remittance Notification; an e-mail dated August 18, 2011, from Mnyandu to a United Teachers Los Angeles e-mail address for Judith Brunner (Brunner) regarding a pay issue; and an e-mail response to Brunner and Mnyandu of the same date from Francisco Tamayo (Tamayo) at a LAUSD e-mail address.

On May 10, 2012, the Office of the General Counsel sent Mnyandu a warning letter, which explained that "PERB's jurisdiction is limited to the determination of unfair labor practice claims *arising under public sector labor statutes*."[4] (Warning letter, p. 2 [italics in the original].) The Office of General Counsel stated that "allegations regarding disputes not related to collective bargaining are outside of PERB's jurisdiction." The warning letter gives examples of the types of violations over which PERB does have jurisdiction and describes the elements of an interference charge and a retaliation charge. In closing, the Office of General Counsel reiterated that the charge does not allege interference, retaliation or any claim within PERB's jurisdiction, but rather a pay dispute between Mnyandu and LAUSD.

On May 15, 2012, in response to the warning letter, Mnyandu filed an amended charge, and in support thereof, a document entitled "RECITIFICATION OF DEFIENCY [sic] PER 05/10/2012 NOTIFICATION." Using the information provided in the warning letter about the types of claims over which PERB has jurisdiction, Mnyandu reframed her pay dispute with LAUSD as both an interference claim and a retaliation claim in the amended charge. In

[4] *California School Employees Association, Chapter 245 (Waymire)* (2001) PERB Decision No. 1448; *Sweetwater Union High School District* (2001) PERB Decision No. 1417-E.

essence, Mnyandu characterized her pay dispute as an "adverse employment action" and alleged several instances of protected activity, the most recent as having occurred in May 2011, when Mnyandu sought assistance from her union regarding the alleged failure by LAUSD to provide her with monthly illness payments.

On May 24, 2012, LAUSD filed a response to the charge,[5] contending that the charge fails to state a prima facie case. LAUSD argued that, in any event, the charge is untimely given that the alleged incorrect pay withholding was alleged to have occurred on August 12, 2011, approximately eight months prior to the filing of the charge.

On May 27, 2012, Mnyandu filed a 39-page document entitled "PETITION FOR PERB TO ISSUE AN UNFAIR LABOR PRACTICE COMPLAINT AGAINST LAUSD PER AMENDED CHARGE NUMBER: LA-CE-5680-E DATED 05/14/2012."

On June 25, 2012, the Office of the General Counsel dismissed the charge. The dismissal letter enumerates all of the wrongful acts complained of by Mnyandu in chronological order, the most recent having occurred on September 8, 2011, when LAUSD "changed its story" about the pay withholding. The dismissal letter finds that, with the exception of one allegation, all of Mnyandu's allegations are untimely as they relate to events that occurred more than six months prior to the filing of the charge. As to the one allegation falling within the limitations period – Mnyandu's receipt of a letter from LAUSD on January 27, 2012, claiming that Mnyandu repaid only $200 to LAUSD, followed by receipt of her W-2 – the dismissal letter concludes that Mnyandu failed to state a prima facie case of either retaliation or interference.

On July 2, 2012, Mnyandu filed a timely appeal.

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[5] LAUSD's response was made under penalty of perjury. (See PERB Reg. § 32620, subd. (c) [any written response to a charge must be signed under penalty of perjury by the party or its agent with the declaration that the response is true and complete to the best of the respondent's knowledge and belief]; PERB Regs. are codified at Cal. Code Regs., tit. 8, secs. 31001, et seq.)

DISCUSSION

Mnyandu raises three issues on appeal. First, she contends that LAUSD should be equitably estopped from using the statute of limitations as a defense to the charge. Second, she contends that the Board agent erred in a footnote of the dismissal in stating she informed Mnyandu that "respondent was entitled to time to respond to [Charging Party's May 14, 2012] first amended charge." Last, she contends that the allegations in her amended charge state a prima facie case of retaliation and interference.

I. Timeliness

As the Office of the General Counsel correctly stated in its dismissal 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 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 belated discovery of the legal significance of the underlying conduct does not excuse an otherwise untimely filing. (*Empire Union School District* (2004) PERB Decision No. 1650.) In unfair practice cases, the charging party bears the burden of demonstrating that the charge is timely filed as part of the prima facie case. (*Long Beach Community College* (2009) PERB Decision No. 2002; *Tehachapi Unified School District* (1993) PERB Decision No. 1024; *State of California (Department of Insurance)* (1997) PERB Decision No. 1197-S.)

The heart of this matter is the following allegation from the initial charge:

> On 08/12/2011 they had unilaterally and unlawfully withheld -
> +$12,000.00 from my salary and later claimed "I owed them."

As explained further below, PERB does not have jurisdiction over wage disputes of this kind. Assuming it did, Mnyandu knew of the conduct underlying the charge on August 12, 2011,

when LAUSD "unilaterally and unlawfully withheld" $12,000 from her pay. She filed her unfair practice charge on April 2, 2012, more than six months from the underlying conduct giving rise to the charge. Although Mnyandu's receipt of a letter from LAUSD on January 27, 2012, claiming that Mnyandu repaid only $200 to LAUSD, and her receipt of her W-2 occurred within the statutory limitations period, both the letter and the W-2 emanate from the alleged wrongful withholding of August 12, 2011. As explained in the following section, none of these allegations, even if timely filed, constitutes a prima facie unfair practice charge.

Mnyandu claims that after LAUSD withheld $12,000 from her pay in August 2011, she made inquiries in August and September 2011, but was given misleading, false or inaccurate responses by Tamayo and others. She further asserts that she did not "discover[]" Tamayo's deception concerning the pay issue until receipt of Tamayo's letter of January 26, 2012, and the 2011 W-2. Mnyandu argues that LAUSD should now be equitably estopped from "using any Statute of Limitations defense"[6] because there is evidence that Tamayo "used deceptive means to justify the pretended reasons why he unlawfully deducted . . . money."

The doctrine of equitable estoppel does not cure the timeliness issue. For the doctrine of equitable estoppel to apply, all of these elements must be alleged with factual specificity: (1) a representation or concealment of material facts; (2) made with the knowledge of the true facts; (3) to a party ignorant of the truth; (4) with the intention that the ignorant party act on the representation or concealment; and (5) the party was in fact induced to act on the

[6] Mnyandu cites to *San Dieguito Union High School District* (1982) PERB Decision No. 194 in arguing that principles of equitable estoppel render her charge timely. In that case, the Board concluded that the respondent was not prevented by the doctrine of equitable estoppel from raising the statute of limitations as a defense to the charge. Subsequent to the Board's decision in *San Dieguito*, the Board overruled prior cases holding that the respondent has the burden of pleading the statute of limitations as an affirmative defense. Rather, the charging party has the burden of proving by a preponderance of the evidence that the charge was timely filed as part of the prima facie case. (*Long Beach Community College District, supra,* PERB Decision No. 2002.)

representation or concealment. (13 Witkin, Summary of Cal. Law (10th ed. 2005 Equity, § 191, pp. 527-528.)

Alleging facts sufficient to raise equitable estoppel is a high burden. The doctrine of equitable estoppel will only be invoked if each of the elements is pleaded or proven. (*Southern Cal. Edison Co. v. Public Utility Com.* (2000) 85 Cal.App.4th 1086, 1110; *Amarawansa v. Superior Court* (1996) 49 Cal.App.4th 1251, 1260.) When one of the elements is missing, there can be no estoppel. (*In re Marriage of Thompson* (1996) 41 Cal.App.4th 1049, 1061.) The doctrine operates defensively to prevent one from taking unfair advantage of another "but not to give an unfair advantage to one seeking to invoke the doctrine." (*Ibid.*; In *re Marriage of Umphrey* (1990) 218 Cal.App.3d 647, 658.) It cannot be used to confer substantive rights on a party who otherwise has none. (*Stein v. Simpson* (1951) 37 Cal.2d 79, 83.)

As stated by the California Supreme Court in *Steinhart v. County of Los Angeles* (2010) 47 Cal.4th 1298, 1318:

> As we have explained, where a party asserts estoppel, "the facts proved must be such that an estoppel is clearly deducible from them. ... [Citation.] [¶] The representation, whether by word or act, to justify a prudent man in acting upon it, must be plain, not doubtful or matter of questionable inference. *Certainty* is essential to all estoppels. [Citation.]" (Wheaton v. Insurance Co. (1888) 76 Cal. 415, 429-430.)

(Italics in the original.)

As applied here, the allegations do not establish any of the elements necessary for an estoppel. The charge fails to allege any misrepresentation or concealment of material facts on the part of LAUSD to support Mnyandu's claim that she was induced to delay the filing of an unfair practice charge in reliance thereon. Notwithstanding any of the alleged deceptive, false or misleading responses to Mnyandu's inquiries following the $12,000 withholding, Mnyandu was not ignorant of the truth. She knew the withholding of August 12, 2011 to be the wrongful

act from which any claim based upon that act would lie.[7] Thus, we conclude that based on the allegations of the charge Mnyandu's estoppel claim fails as a matter of law.

Therefore, August 12, 2011 is the date upon which the statute of limitations would begin to run, if this were a case within PERB's subject matter jurisdiction. It is not tolled or otherwise avoided by the doctrine of equitable estoppel.

II. Footnote Error

Mnyandu asserts that the Board agent did not inform her that LAUSD was entitled to respond to her amended charge, and therefore footnote 2 of the dismissal is "**completely false**." (Emphasis in original.) This assertion, even if true, would not change the outcome of this case. Moreover, a respondent's right to file a response is explicitly provided for in PERB's regulatory framework. PERB Regulation 32620, subdivision (c) states that "[t]he respondent shall be apprised of the allegations, and may state its position on the charge during the course of the inquiries."

In objecting to footnote 2, Mnyandu also complains that the extension of time within which to file a response, granted to LAUSD by the Board agent, violated PERB Regulation 32132, subdivision (b), which provides:

> A request for an extension of time within which to file any document with a Board agent shall be in writing and shall be filed with the Board agent at least three days before the expiration of the time required for filing. The request shall indicate the reason for the request and, if known, the position of each other party

[7] Mnyandu's initial charge states:

> In October of 2011, after realizing that all my good faith efforts were in vain; unfair labor practice had been committed; and my efforts to get them to provide me with the printout of my payment records had failed, I . . . filed a complaint with the EEOC . . . .

This alone demonstrates that Mnyandu was not prevented by any employer actions from filing an unfair practice charge with PERB within the six month statutory limitations period. Had she filed her unfair practice charge at the time she filed her complaint with EEOC, her charge at least would have been timely filed.

> regarding the extension and shall be accompanied by proof of service of the request upon each party. Extensions of time may be granted by the Board agent for good cause only.

Mnyandu asserts that the request was ex parte and outside the time limits provided for in this regulation. Similar objections were raised in *UPTE-CWA Local 9119 (Witke)* (2012) PERB Decision No. 2253-H, and rejected. As the Board stated in that case, "[t]here is no basis to conclude from [the respondent's] shortcomings [in complying with PERB Regulation 32132, subdivision (b)], however, that the Board agent did not find good cause to grant" the extension. The same is true here.

III. Prima Facie Burden

No violations arising under PERB's statutory or regulatory scheme were identified in the initial charge. The Office of the General Counsel appropriately identified at the outset of the charge processing investigation that Mnyandu's pay dispute with LAUSD is outside of PERB's subject matter jurisdiction. On appeal, Mnyandu raises no new arguments that were not previously addressed by the Office of the General Counsel. We agree with the Office of General Counsel that PERB lacks jurisdiction to hear this matter.

PERB Regulation 32620, subdivision (d), requires the Board agent to advise the charging party in writing of the deficiencies in the charge in a warning letter. On May 10, 2012, the Office of the General Counsel did just that by explaining the jurisdictional deficiencies of the charge. The warning letter also went on to explain the types of claims over which PERB does have jurisdiction, describing the legal elements of retaliation and interference charges. Based on the content of Mnyandu's subsequent filings, Mnyandu may have gotten the impression that the fundamental jurisdictional problem with her case could be fixed by characterizing the same basic facts alleged in the initial charge in interference or retaliation terms.

Among the duties enumerated in PERB Regulation 32620, subdivision (a), the first one requires that Board agents "[a]assist the charging party to state in proper form the information required by section 32615." PERB Regulation 32615 describes the required content of an unfair practice charge. Warning letters are intended to assist charging parties with these requirements.

As appears to be the case here, Mnyandu initially chose the wrong forum for resolving her pay dispute with LAUSD, then filed an amended charge that attempted to cure the fatal subject matter jurisdictional defect by re-characterizing what is essentially a wage claim into a claim that the wage dispute arose in retaliation for her EERA-protected activities. We recognize that the Office of the General Counsel performed its duties with diligence in accordance with PERB Regulations in providing assistance to Mnyandu in explaining the jurisdictional limitations of PERB's authority. We only observe that in cases that are clearly outside PERB's jurisdiction,[8] charging parties may be better served by stating the limits of PERB's jurisdiction in the warning letter and refraining from providing more generalized information about unfair practice charges that is not germane to the alleged dispute. At the same time we recognize that such judgment calls are within the exclusive province of the Office of the General Counsel to make on a case-by-case basis.

Because the jurisdictional defect in this charge cannot be cured, we affirm the Office of the General Counsel's dismissal of the charge.

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[8] (See, e.g., *Alum Rock Union Elementary School District* (2005) PERB Decision No. 1748 [PERB lacks jurisdiction over claims of race, age and disability discrimination, citing *California School Employees Association, Chapter 245 (Waymire)* (2001) PERB Decision No. 1448]; *State of California (Department of Corrections)* (2004) PERB Decision No. 1559-a-S [PERB lacks jurisdiction over violations of the California Penal Code]; *Salinas City Elementary School District* (1996) PERB Decision No. 1131 [PERB lacks jurisdiction over an employer's conduct related to issues arising in the context of a worker's compensation case, such as the periodic issuance of temporary and permanent disability checks].)

ORDER

The unfair practice charge in Case No. LA-CE-5680-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Dowdin Calvillo and Huguenin joined in this Decision.