

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



DAISY FAY ARMSTRONG,)
)
 Charging Party,) Case No. S-CE-920
)
 v.) PERB Decision No. 548
)
 OAKDALE UNION ELEMENTARY SCHOOL) December 16, 1985
 DISTRICT,)
)
 Respondent.)
 _____)

Appearances; Daisy Fay Armstrong, on her own behalf; Finkle & Stroup by Mary Beth de Goede for Oakdale Union Elementary School District.

Before Hesse, Chairperson; Jaeger, Morgenstern, Burt and Porter, Members.

DECISION

This case is before the Public Employment Relations Board on appeal by charging party of the Board agent's dismissal, attached hereto, of her charge alleging that the Oakdale Union Elementary School District violated section 3543.5(a) and (b) of the Educational Employment Relations Act (EERA) (Gov. Code sec. 3540 et seq.).

We have reviewed the dismissal and finding it free from prejudicial error, adopt it as the Decision of the Board itself, in that the charge was not timely filed pursuant to EERA section 3541.5.

ORDER

The unfair practice charge in Case No. S-CE-920 is
DISMISSED WITHOUT LEAVE TO AMEND.

By the BOARD.

PUBLIC EMPLOYMENT RELATIONS BOARD

SACRAMENTO REGIONAL OFFICE
1031 18TH STREET, SUITE 102
SACRAMENTO, CALIFORNIA 95814
(916) 322-3198



October 16, 1985

Daisy Fay Armstrong

Re: Armstrong v. Oakdale Elementary School District
Unfair Practice Charge S-CE-920

Dear Ms. Armstrong:

The above-referenced charge alleges that the Oakdale Elementary School District (District) dismissed Ms. Armstrong for exercising protected rights. This conduct is alleged to violate section 3543.5(a) and (b) of the Educational Employment Relations Act (EERA).

After writing you on August 23, 1985, I received the following information. The Petition for Writ of Mandamus filed by Ms. Armstrong does not state that the reason for Ms. Armstrong's dismissal was her participation in union activity. Rather, it argues that her dismissal violated Education Code section 45101 and Article 21.5 of the District's Employee Rules which require that a valid cause for discipline be no more than two years old. (See Attachment 1.) Ms. Armstrong did not file a grievance under the collective bargaining agreement despite the existence of Article 3.2 which prohibits discrimination against employees because of the exercise of their rights to engage or not engage in association activity.¹ In addition, Ms. Armstrong states that the instant charge is the first time it is alleged that the District terminated Ms. Armstrong because of her filing of a grievance in 1980. On April 4, 1985, Ms. Armstrong filed a charge of discrimination with the California State Department of Fair Employment and Housing. This charge alleges that her termination was because of her sex.

Based on the facts described above as well as those contained in ray August 23 letter (Attachment 2). this charge does not state a prima facie violation of the EERA for the reasons which follows.

¹There is a factual dispute over whether Ms. Armstrong was covered by the collective bargaining agreement because of alleged confidential status.

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EERA section 3541.5(a) states:

(a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following:
(1) issue 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; . . .

This charge was filed on July 9, 1985, which means that the six-month statutory period began on January 9, 1985. Ms. Armstrong was dismissed from her position by the District on April 5, 1984, approximately ten months prior to the beginning of the statutory period. The Public Employment Relations Board (PERB) recognizes the doctrine of equitable tolling as described in the case of Elkins v. Derby (1974) 12 Cal.3d 410. This doctrine does not provide for unlimited tolling of the statute of limitations, rather, tolling is permissible only when a party has pursued reasonable alternative administrative remedies which provide the respondent with sufficient notice to preserve relevant evidence. Los Angeles Unified School District (1982) PERB Decision No. 237. In this case Ms. Armstrong did not pursue claims which notified the District that the essence of her charge was that the District dismissed her for participation in union activity. Under similar facts the PERB refused to toll the statute in Los Angeles Unified School District, supra. Accordingly, this charge cannot be considered timely.

Pursuant to Public Employment Relations Board regulation section 32635 (California Administrative Code, title 8, part III), you may appeal the refusal to issue a complaint (dismissal) to the Board itself.

Right to Appeal

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 (section 32635(a)). To be timely filed, the original and five (5) copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) on November 5, 1985, or sent by telegraph or certified United States mail postmarked not later than November 5, 1985 (section 32135). The Board's address is:

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Public Employment Relations Board
1031 18th Street
Sacramento. CA 95814

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 (5) copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal (section 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 section 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.

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 (section 32132).

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Very truly yours.

JEFFREY SLOAN
Acting General Counsel

By

Robert Thompson
Regional Attorney

1 JAMES J. MILAM
2 Attorney at Law
3 1211 K Street
4 Modesto, CA 95354
5 Tel: (209) 529-5186
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SUPERIOR COURT OF CALIFORNIA, COUNTY OF STANISLAUS

DAISY ARMSTRONG,
Petitioner,

NO. 200231

vs.
THE OAKDALE UNION SCHOOL DISTRICT,
Respondent,

PETITION FOR WRIT OF MANDATE,
OR IN THE ALTERNATIVE, WRIT
OF ADMINISTRATIVE MANDAMUS

and
KENNETH WRYE, SUPERINTENDENT OF
THE OAKDALE UNION SCHOOL DISTRICT,
Real Party In Interest.

The petitioner alleges:

1. That the OAKDALE UNION SCHOOL DISTRICT is a school district existing in the County of Stanislaus, State of California; under the authority of the California Education Code and the Constitution of the State of California.
2. Ever since 1975 the petitioner has been a classified employee of the Respondent, OAKDALE UNION SCHOOL DISTRICT. The petitioner has the status of a permanent employee of the OAKDALE UNION SCHOOL DISTRICT with all the rights accruing to a permanent employee.
3. Ever since 1980 the Real Party in Interest, KENNETH WRYE, has been and now is, the superintendent of the OAKDALE UNION SCHOOL DISTRICT.
4. On April 5, 1984, the Petitioner, DAISY ARMSTRONG, was dismissed from her employ with the OAKDALE UNION SCHOOL DISTRICT. Said dismissal followed a dismissal hearing held before the Board of Trustees of the OAKDALE UNION SCHOOL DISTRICT on

1 April 5, 1984.

2 5. The dismissal of Daisy Armstrong was based upon the
3 "Notice of Charges Against Permanent Classified Employee and
4 Recommendation for Dismissal from Position." A copy of said
5 document is attached hereto marked as Exhibit "A". Said dismissal
6 was based upon an alleged violation of Government Code Section 109
7 In short, the basis of the dismissal was that DAISY ARMSTRONG
8 purchased materials for the OAKDALE UNION SCHOOL DISTRICT at
9 "grossly exaggerated prices". The dismissal order was further
10 based upon the theory of the real party in interest that DAISY
11 ARMSTRONG purchased the goods in order to obtain gratuities for he
12 own use. The charges were denied and the hearing held thereupon.
13 The events which were the basis for the dismissal took place during
14 1980. The dismissal took place in 1984. Notice of the intended
15 dismissal was served upon Mrs. Armstrong in 1984.

16 6. Education Code Section 45101 and Section 21.5 of
17 Article 21 of the Employee Rules of the OAKDALE UNION SCHOOL
18 DISTRICT require that a valid cause for discipline can be no more
19 than two (2) years preceding the date of the filing of the "notice
20 of intended disciplinary action". DAISY ARMSTRONG did not conceal
21 any of the actions which are the basis for her termination.
22 DAISY ARMSTRONG denies any violation of Section 1090 of the
23 California Government Code.

24 7. At the hearing held before the Board of Trustees of
25 the OAKDALE UNION SCHOOL DISTRICT, DAISY ARMSTRONG was denied
26 due process and a fair hearing due to the reception of incompetent
27 and inadequate evidence.

28 8. A transcript of the hearing of dismissal will be
29 filed in this proceeding as soon as copies of that transcript are
30 certified by the attorneys for the parties to this proceeding.

31 9. The OAKDALE UNION SCHOOL DISTRICT made no findings
32 of fact in this case. The OAKDALE UNION SCHOOL DISTRICT simply
33 dismissed the Petitioner, DAISY ARMSTRONG, from her permanent
34 employment.

35 10. The petitioner is in doubt whether the proper
36 remedy in her case is ordinary mandamus or administrative

1 mandamus. Therefore, the petitioner asks the court to treat this
2 petition in the alternative as either ordinary mandamus, or
3 administrative mandamus, whichever may, in the court's discretion
4 be deemed appropriate.

5 11. As a result of her loss of employment, the
6 petitioner will continue to lose income, and has lost income in
7 the past and will continue to lose that income until she is
8 re-employed by the respondent.

9 12. As a result of her termination and the charges
10 brought against her by the OAKDALE UNION SCHOOL DISTRICT the
11 petitioner has been compelled to employ the services of an
12 attorney and has paid sums to her attorney for his services and
13 will become in the future obligated to pay further sums for his
14 services and the cost of those proceedings. The petitioner alleges
15 that she is entitled to reasonable attorney's fees according to
16 proof made at the time of the trial of this matter.

17 WHEREFORE, petitioner prays that the court issue an
18 alternative writ of mandamus to the OAKDALE UNION SCHOOL DISTRICT
19 commanding it to:

20 1. Pay the petitioner all past benefits and other
21 emoluments of her office accruing and due to the Petitioner,
22 DAISY ARMSTRONG, from the date of her termination up to the time o:
23 i the hearing before the Superior Court of this matter, or until the
24 time the petitioner is re-employed by the OAKDALE UNION SCHOOL
25 DISTRICT.

26 2. That petitioner be awarded reasonable attorney's
27 fees according to proof.

28 3. That petitioner recover her costs of suit incurred
29 herein.

30 4. That petitioner recover her damages incurred to the
31 proof presented at the time of the hearing of this petitioner.

32 5. For such other and further relief as the court deems
33 proper.

34 DATED: June 27, 1984

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JAMES J. MILAM,

PUBLIC EMPLOYMENT RELATIONS BOARD

SACRAMENTO REGIONAL OFFICE
1031 18TH STREET SUITE 102
SACRAMENTO, CALIFORNIA 95814
(916) 332-3198



August 23, 1985

Daisy Fay Armstrong

Re: Armstrong v. Oakdale union Elementary School District
Unfair Practice Charge No. S-CE-920

Dear Ms. Armstrong:

The above-referenced charge alleges that the Oakdale Union Elementary School District (District) dismissed Ms. Armstrong for exercising protected rights. This conduct is alleged to violate sections 3543.5(a) and (b) of the Educational Employment Relations Act (EERA).

My investigation revealed the following facts. In September 1980 Ms. Armstrong filed a grievance against the District concerning out-of-class pay. She was successful in pursuing her grievance and received a \$2,500 award in June 1981. Approximately one month later the District board passed a resolution removing her classification from the bargaining unit. In February 1984 Ms. Armstrong was the subject of a District investigation concerning gifts sent to District employees by a company which had been doing business with the District. On April 5, 1984, Ms. Armstrong was dismissed by the District for allegedly accepting these gifts. On June 1, 1984, Ms. Armstrong filed a writ of mandamus with the Stanislaus County Superior Court. On March 27, 1985, the court issued an order denying the writ of administrative mandamus. The instant unfair practice charge was filed on July 9, 1985.

Based on the facts described above this charge fails to state a prima facie violation of the EERA for the reasons which follow;

To establish a violation of section 3543.5(a), a charging party must show that (1) the employee has exercised rights under the 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 employee because of the exercise of those rights. Novato Unified School District (1982) PERB Decision No. 210; Carlsbad Unified School District (1979) PERB Decision No. 89.

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There is evidence in this case that Ms. Armstrong exercised protected rights by filing a grievance in 1980, however, Charging Party stated that Ms. Armstrong had not participated in any other forms of protected conduct since that time. Although the employer did take adverse action in form of dismissal in 1984, there is insufficient evidence to demonstrate a nexus or connection between this adverse action and Ms. Armstrong's participation in the grievance procedure approximately three years earlier. This is especially true in light of the serious allegations relied upon by the District at the time of the dismissal which essentially were not challenged by the Charging Party. Sacramento City Unified School District (1984) PERB Decision No. 421.

In the absence of close timing between the employee's protected conduct and the employer's adverse action, facts concerning two or more of the following factors may be relevant in evaluating whether an adequate "nexus" exists: (1) the employer's disparate treatment of other employees, (2) the employer's departure from established procedures and standards when dealing with the alleged discriminatee, (3) the employer's inconsistent or contradictory justifications for its actions, (4) the employer's cursory investigation of the alleged discriminatee's misconduct, (5) the employer's failure to offer the alleged discriminatee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons, or (6) any other factors which might demonstrate the employer's unlawful motive. Novato Unified School District, supra; North Sacramento School District (1982) PERB Decision No. 264.

For these reasons, charge number S-CE-920, as presently written, does not state a prima facie case. If you feel that there are any factual inaccuracies in this letter or any additional facts which would correct the deficiencies explained above, please amend the charge accordingly. 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 be served on the respondent and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before August 30, 1985, I

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shall dismiss your charge, if you have any questions on how to proceed, please call me at (916) 322-3198.

Sincerely yours,

Robert Thompson
Regional Attorney