STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

GEORGE V. MRVICHIN, Charging Party, v. LOS ANGELES COMMUNITY COLLEGE DISTRICT, Respondent.	)	Case No. LA-CE-3415 PERB Decision No. 1060 October 5, 1994

Appearance: George V. Mrvichin, on his own behalf.

Before Caffrey, Carlyle and Garcia, Members.

DECISION

GARCIA, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by George V. Mrvichin (Mrvichin) of a Board agent's dismissal of his unfair practice charge. In the charge, Mrvichin alleged that the Los Angeles Community College District (District) violated section 3543.5(a) of the Educational Employment Relations Act (EERA or Act)[1] by discriminating and taking reprisal actions against him because of

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[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.5 provides, in pertinent part:

> It shall be unlawful for a public school employer to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

his exercise of rights protected by the Act. The Board agent dismissed the charge and refused to issue a complaint on the grounds that Mrvichin had failed to state a prima facie case.

The Board has reviewed applicable statutes and case law, the warning and dismissal letters, the original and amended charges, Mrvichin's appeal,[2] and the entire record in this case. The Board remands the case to the Board agent for a determination as to whether the Board has jurisdiction over Mrvichin and, if necessary, whether the allegations establish a prima facie case.

JURISDICTION

The Board has jurisdiction only when the parties involved have standing either as an employee, an employee organization, or an employer.[3] Although the District is an employer within the meaning of EERA section 3540.1(k), at issue is whether Mrvichin was an employee[4] within the meaning of EERA section 3540.1(j)

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[2]No response to the appeal was filed by the District.

[3]See EERA section 3541.5, which provides, in pertinent part:

> The initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board.
>
> (a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge. . . .

[4]EERA section 3540.1(j) provides:

> "Public school employee" or "employee" means any person employed by any public school employer except persons elected by popular vote, persons appointed by the Governor of

when the alleged unfair practice occurred. The additional information offered by Mrvichin on appeal may establish that he was an employee and qualifies for access to Board jurisdiction.

BACKGROUND

The main issue on appeal involves the Board agent's treatment of Mrvichin's "standing" to file a charge. As the warning and dismissal letters state, Mrvichin was dismissed from employment with the District on October 20, 1993.[5] Before and after that date, he filed various grievances under the relevant CBAs.[6] In a letter dated January 19, 1994, the District summarized the status of three of those grievances.[7] The date of the letter is critical because, in his unfair practice charge dated February 8, 1994, Mrvichin alleges that he exercised rights

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this state, management employees, and confidential employees.

[5]Mrvichin appealed his dismissal from employment separately through the Personnel Commission, pursuant to the parties' collective bargaining agreement (CBA).

Mrvichin had access to grievance procedures under two CBAs because, during his employment with the District, he served both as a classified employee (athletic trainer, represented by the AFT College Staff Guild (Clerical/Technical Unit)) and as a certified employee (hourly rate instructor, represented by the AFT College Guild (Faculty Unit)).

[7]Briefly, that letter summarized the status of the various grievances as follows: (1) Regarding the grievance filed 10/16/93, the District denied portions of it and stated that other portions of it were still pending in other forums; it also challenged Mrvichin's standing to file that grievance under the relevant CBA; (2) Regarding the grievance filed November 17, 1993, the District denied committing a violation and challenged Mrvichin's standing under the relevant CBA; and (3) Regarding the grievance dated December 14, 1993, the District denied committing a violation and raised the same standing challenge as the other two items.

under EERA by filing grievances; that the District, as evidenced by its January 19 letter, had knowledge of the exercise of those rights; and that the District imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained, or coerced him in various ways because of the exercise of those rights, in violation of EERA section 3543.5(a).

WARNING AND DISMISSAL LETTERS

Based on the charge, the Board agent treated January 19, 1994 (the date of the letter) as the date of the alleged unfair practice, and tested for standing as of that date. Focusing on January 19, 1994, the Board agent notified Mrvichin in a warning letter that he planned to dismiss the charge, citing California Union of Safety Employees (Trevisanut) (1993) PERB Decision No. 1029-S (Trevisanut). which held that:

> . . . in order for a person to have standing to file an unfair practice charge, that person must have been an employee at the time the unfair practice occurred. (Emphasis added.)

Applying the Trevisanut rule, the Board agent concluded that since Mrvichin was dismissed from employment on October 20, 1993, he could not have been an employee on the date the letter was written (January 19, 1994). At one place in the warning letter, the Board agent concluded that Mrvichin did not "have standing to file a charge concerning the alleged unfair practice." Later in the same letter, the Board agent stated that, "For these reasons

the charge, as presently written, does not state a prima facie case."[8]

In response to the warning letter, Mrvichin filed an amended charge, attempting to cure the standing deficiency identified in the warning letter. After considering the amended charge, the Board agent was not persuaded that Mrvichin had stated a prima facie case:

> Obviously, you believe that you should not have been dismissed from your employment on October 20, 1993. The fact remains, however, that you were dismissed on that date, and you lost standing to file a charge concerning any unfair practice occurring after that date. (Dismissal letter, p. 1; emphasis added.)

The Board agent then dismissed the charge.

MRVICHIN'S APPEAL

On appeal, Mrvichin claims standing through an Education Code section which, if applicable, arguably supports his position that he continued to be an "employee."

In summary, the Education Code argument is as follows: Although Mrvichin acknowledges that he was dismissed by the District on October 20, 1993, such dismissals are governed by Education Code section 87737.[9] Mrvichin interprets that section

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[8]The Board agent did not address the merits of Mrvichin's charge, since he planned to dismiss it on a different ground.

[9]That section reads, in pertinent part:

> The notice of suspension and intention to dismiss[] shall be in writing and be served upon the employee . . . If the employee demands a hearing within 30 days, the matter shall proceed to arbitration or hearing, as the case may be, as specified in Article 4.

as preventing his dismissal from becoming "effective" until after the hearing process he invoked pursuant to that section is concluded. Mrvichin argues on appeal that if the dismissed employee makes a timely demand for a hearing pursuant to this section, the dismissal is not considered "effective" until the outcome of the hearing process. Thus, until the result of that process is known, the person should still be considered an "employee" for purposes of standing to file a charge with PERB.

DISCUSSION

The Board agent declined to issue a complaint in this case based on the rationale in the Trevisanut opinion. We find that the Board agent's application of Trevisanut was proper; however, based on additional information brought to the Board's attention on appeal, it is possible that Mrvichin still had standing as an employee at the time of the alleged unfair practice.

The Board ordinarily could not consider the Education Code argument raised by Mrvichin for the first time on appeal, based on PERB Regulation 32635,[10] which reads, in pertinent part:

> (a) Within 20 days of the date of service of a dismissal, the charging party may appeal the dismissal to the Board itself.

> If the employee does not demand a hearing within the 30-day period, his or her dismissal shall be effective upon the expiration of 30 days after service of the notice. [Emphasis added.]

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

> (b) Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence. (Emphasis added.)

Interpreting this regulation, PERB has been reluctant to find that good cause existed to allow a party to raise new allegations or new evidence for the first time on appeal.[11] However, in cases where PERB jurisdiction is in question, the issue can be considered at any stage, and in the absence of an abuse of process, the Board is duty bound to make inquiry.[12]

The primary issue on appeal is whether Mrvichin qualified as an employee with access to PERB jurisdiction; that is, does Mrvichin have standing to file this charge. In his appeal, Mrvichin referred to Education Code section 87737, which seemingly preserved his standing as an employee and PERB's jurisdiction over this case. Since we do not find this theory to

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[11]See, e.g., South San Francisco Unified School District (1990) PERB Decision No. 830; Association of California State Attorneys (Winston) (1992) PERB Decision No. 931-S; California School Employees Association (Watts) (1993) PERB Decision No. 1008; California State Employees Association (Hackett) (1993) PERB Decision No. 1012-S; California School Employees Association (LaFountain) (1992) PERB Decision No. 925 (LaFountain). In these cases the Board did not find good cause existed because no explanation was offered.

[12]See Lake Elsinore School District (1987) PERB Decision No. 646, citing cases which establish that this Board has only such jurisdiction as has been conferred upon it by statute; that the Board acts in excess of its jurisdiction if it violates the statutes conferring and/or limiting its jurisdiction and powers; that where the Board is without jurisdiction with respect to a matter before it, it must dismiss the matter on its own motion, regardless of whether the jurisdictional issue has been raised by the parties; and that where the Board is without jurisdiction, it cannot acquire jurisdiction by the parties' consent, agreement, stipulation or acquiescence, nor by waiver or estoppel.

be specious or without merit, the District should be given an opportunity to respond to the theory and the Board agent should determine the issue.

As a secondary matter, it is useful to distinguish between the Board's obligation to investigate whether a charging party has established a prima facie case pursuant to PERB Regulation 32640[13] and the Board's duty under EERA to determine PERB jurisdiction.[14] The issue of "standing" (jurisdiction over the parties) is separate and distinguishable from the issue of whether the elements of a prima facie case exist. Neither the EERA jurisdictional statute nor PERB regulations requires a charging party to establish "prima facie standing;" EERA requires

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[13]PERB Regulation 32640 provides, in pertinent part:

> (a) The Board agent shall issue a complaint if the charge or the evidence is sufficient to establish a prima facie case. The complaint shall contain a statement of the specific facts upon which Board jurisdiction is based, including the identity of the respondent, and shall state with particularity the conduct which is alleged to constitute an unfair practice. The complaint shall include, when known, when and where the conduct alleged to constitute an unfair practice occurred or is occurring, and the name(s) of the person(s) who allegedly committed the acts in question. The Board may disregard any error or defect in the complaint that does not substantially affect the rights of the parties. [Emphasis added.]

Thus, the regulation addresses conduct and persons who allegedly committed the acts underlying the unfair practice charge.

[14]See former Chair Hesse's concurrence in Trevisanut, citing San Leandro Unified School District (1984) PERB Decision No. 450 and Hacienda La Puente Unified School District (1988) PERB Decision No. 685, tying standing to jurisdictional statutes.

us to dismiss a charge for lack of Board jurisdiction if a party has no standing to file a charge or fails to make a prima facie case for the charge filed. "Standing" for the purpose of establishing PERB jurisdiction should be inquired into by the Board agent. If found, the Board agent would then inquire into the existence of a prima facie case.

ORDER

The Board hereby REMANDS the unfair practice charge in Case No. LA-CE-3415 to the General Counsel for further investigation. The Board directs the General Counsel to determine whether Mrvichin has standing; that is, whether he was an employee on the date of the alleged unfair practice and, if so, whether he has established a prima facie case.

Member Carlyle joined in this Decision.

Member Caffrey's dissent begins on page 10.

CAFFREY, Member, dissenting: George V. Mrvichin (Mrvichin) has not alleged facts sufficient to conclude that he has standing as an employee under section 3541.5(a) of the Educational Employment Relations Act (EERA) to file the instant unfair practice charge. Therefore, I would affirm the regional attorney's dismissal of that charge.

In determining the sufficiency of an unfair practice charge, the Public Employment Relations Board (PERB) considers factual allegations to be true. (San Juan Unified School District (1977) EERB No. 12.)[1] On appeal, Mrvichin alleges that he was dismissed as a classified employee by the Los Angeles Community College District (District) on October 20, 1993. He also alleges that he demanded a hearing in accordance with Education Code section 87737, and the hearing was scheduled on or about June 28, 1994. Mrvichin argues that he retained standing as an employee under EERA section 3541.5(a) to file the instant unfair practice charge on February 8, 1994, because:

> Under the expressed, and implied terms of California Education Code 87737, the dismissal of Charging Party as a Classified Employee shall not be effective until after this hearing process has been completed. . . .

Education Code section 87737 appears within Title 3, Division 7, Part 51, Chapter 3, Article 6 of the Education Code. Article 6 is entitled "Instructor Dismissal Procedures." Education Code 87737 describes a hearing process available to

[1]Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board.

certain community college instructors upon dismissal. Mrvichin's argument that the terms of Education Code 87737 apply to him as a dismissed classified employee is incorrect. Therefore, Mrvichin's assertion that he retained standing to file the instant charge pursuant to Education Code 87737 is without merit.[2]

Additionally, the majority errs in holding that "The Board ordinarily could not consider the Education Code argument raised by Mrvichin for the first time on appeal, based on PERB Regulation 32635." That regulation prohibits a charging party from presenting new charge allegations or new supporting evidence for the first time on appeal of a dismissal. Mrvichin's reference to Education Code 87737 represents a new legal argument on the question of his standing to file the instant charge. It does not constitute a new allegation or new evidence. Parties are free to present to the Board new legal arguments not previously offered to Board agents.

The majority's finding that "the District should be given an opportunity to respond to the [Education Code 87737] theory" is also misguided. Mrvichin raised this "theory" in his appeal of a dismissal of his charge. Under PERB Regulation 32635, the District was served with Mrvichin's appeal and given 20 days to file a response. It did not do so. For the majority to

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[2]I find it unnecessary to reach the question of whether Education Code 87737, if applicable, affects the standing of a dismissed employee to file an unfair practice charge under EERA section 3541.5(a).

expressly find that the District should be given another opportunity "to respond to the theory" raises questions of due process and possible prejudice to Mrvichin.

Mrvichin has not met his burden of establishing that he has standing as an employee to file the unfair practice charge in Case No. LA-CE-3415 and, therefore, it should be dismissed.