STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JERRY RUBEN RODRIQUEZ, Charging Party, v. CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS CHAPTER #149, Respondent.	)	Case No. SF-CO-489 PERB Decision No. 1121 November 7, 1995

Appearance; Jerry Ruben Rodriquez, on his own behalf.

Before Garcia, Johnson and Caffrey, Members.

DECISION

GARCIA, Member: This case is before the Public Employment Relations Board (Board) on appeal by Jerry Ruben Rodriquez (Rodriquez) of a Board agent's dismissal (attached hereto) of his unfair practice charge. In the charge, Rodriquez alleged that the California School Employees Association and its Chapter #149 breached its duty of fair representation guaranteed by section 3544.9 of the Educational Employment Relations Act (EERA), thereby violating EERA section 3543.6(b)[1] when it failed to

[1]EERA is codified at Government Code section 3540 et seq. Section 3544.9 states, in pertinent part:

> The employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit.

Section 3543.6 provides, in pertinent part:

> It shall be unlawful for an employee organization to:

fairly represent him with regard to certain employment disputes with his employer, the Salinas City Elementary School District. The Board agent dismissed Rodriquez's charge and refused to issue a complaint on the grounds that his allegations were untimely filed.

The Board has reviewed the applicable statutes and case law, the warning and dismissal letters, the original and amended charges, Rodriguez's appeal and the entire record in this case. The Board finds the Board agent's warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. SF-CO-489 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Johnson and Caffrey joined in this Decision.

(b) 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.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415) 557-1350

August 2, 1995

Jerry Ruben Rodriguez

Re: **DISMISSAL OF UNFAIR PRACTICE CHARGE/REFUSAL TO ISSUE COMPLAINT**
Jerry Ruben Rodriguez v. California School Employees Association and its Chapter #149
Unfair Practice Charge No. SF-CO-489

Dear Mr. Rodriguez:

The above-referenced unfair practice charge, filed on March 14, 1995, alleges that the California School Employees Association and its Chapter #149 (Association) failed to fairly represent Jerry Ruben Rodriguez with regard to certain employment disputes with his employer, the Salinas City Elementary School District (District). This conduct is alleged to violate Government Code section 3543.6 of the Educational Employment Relations Act (EERA).

I indicated to you, in my attached letter dated July 21, 1995, 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 July 21, 1-995, the charge would be dismissed.

A brief extension of time was granted for the filing of an amended charge. An amended charge was filed on July 31, 1995.

The amended charge contains numerous additional allegations. However, for the reasons explained in the July 21, 1995 letter, the new allegations that arise outside of the six month statute of limitations period (i.e., prior to September 15, 1994) cannot be the basis for a prima facie violation and need not be summarized here.

The new allegations within the statute of limitations period that concern the Association's conduct relate to a November 5, 1994 letter from District Superintendent Dan Romero, responding to a letter from Rodriguez protesting Romero's May 19, 1994 adverse decision on his grievance concerning the alleged assault by Association representative Pat Bollin. Romero contended that his reasons for the decision remained sound. Rodriguez alleges that

Association Chapter President Maryjane Campbell was informed of this letter but "did not pursue appropriate courses of action."

These allegations fail to cure the deficiencies noted in the July 21, 1995 letter. Rodriguez complained about the incident with Bollin- to Campbell on April 11, 1994 and to Association Executive Director Bud Dougherty on June 8, 1994. Although the charge does not specifically indicate whether any response was provided regarding this particular incident, sufficient time passed prior to September 15, 1994 for Rodriguez to have reason to know that the Association would not respond to his request for assistance. (Regents of the University of California (1983) PERB Dec. No. 359-H.) Therefore, the charge is untimely and I am dismissing the charge based on the facts and reasons set forth above and in my July 21, 1995 letter.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, 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. (Cal. Code of Regs., tit. 8, sec. 32635(a).) To be timely filed, the original and five copies of such appeal must be actually received by the Board itself before the close of business (5 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing. (Cal. Code of Regs., tit. 8, sec. 32135.) Code of Civil Procedure section 1013 shall apply. The Board's address is:

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 copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code of Regs., tit. 8, sec. 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 Cal. Code of Regs., tit. 8, sec. 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. (Cal. Code of Regs., tit. 8, sec. 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
Deputy General Counsel

By
DONN Ginoza
Regional Attorney

Attachment

cc: Margie Valdez

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415) 557-1350

July 21, 1995

Jerry Ruben Rodriguez

Re: **WARNING LETTER**
Jerry Ruben Rodriguez v. California School Employees Association and its Chapter #149
Unfair Practice Charge No. SF-CO-489

Dear Mr. Rodriguez:

The above-referenced unfair practice charge, filed on March 14, 1995, alleges that the California School Employees Association and its Chapter #149 (Association) failed to fairly represent Jerry Ruben Rodriguez with regard to certain employment disputes with his employer, the Salinas City Elementary School District (District). This conduct is alleged to violate Government Code section 3543.6 of the Educational Employment Relations Act (EERA).

Investigation of the charge revealed the following.[1] Jerry Ruben Rodriguez was employed as a maintenance worker by the District during the period from February 1990 through March 1995. The Association is the exclusive representative of his bargaining unit. On February 22, 1990, Rodriguez's supervisor ordered Rodriguez to meet him the following morning at a school for instructions on repair of a heating unit. The supervisor provided Rodriguez with a wiring diagram which Rodriguez could not understand and which his supervisor could not explain. The supervisor then physically demonstrated to Rodriguez how to wire the heating unit. He told Rodriguez to complete the repairs quickly. Rodriguez completed the wiring and then turned to ignite the heater. The heating unit exploded, singing Rodriguez and throwing him backward. Leaving the area, Rodriguez encountered representatives the Association. Rodriguez complained about his supervisor's lack of experience. One of the representatives notified the school principal who assisted Rodriguez in boarding a school vehicle to transport him to a local hospital for medical attention. Rodriguez returned to work after his examination and was handed a Workers' Compensation form by the principal.

[1] The charge consists of a 49-page chronological statement of facts. The recitation of facts contained herein has been abbreviated.

The following day, Rodriguez began to experience problems with shortness of breath. He arranged for a further medical examination. Several days later, tests revealed moderate pulmonary function restriction and possible pneumonitis. Rodriguez retained a Workers' Compensation attorney. Rodriguez was referred to psychological counseling due to severe fear and anxiety of returning to work. During March 1990, Rodriguez complained of increasing difficulty breathing, particularly when exercising.

During March and April 1990, Rodriguez was not pleased with his Workers' Compensation attorney's failure to act on his complaints about his supervisor and aggressively assert his rights in the claim. The District's claims adjuster arranged for Rodriguez to be seen by pulmonary specialists at the Stanford Medical Center. These tests revealed moderate lung capacity reduction, tentatively attributed to asthma. After further tests, the doctors would suggest that Rodriguez had had a preexisting condition, which Rodriguez denied.

In June, the District offered vocational rehabilitation benefits, which Rodriguez accepted.

Further tests at Stanford Medical Center led doctors to the conclusion that Rodriguez suffered hyper-reactive bronchial airways, should be on inhaled steroids, and should avoid exposures to precipitating conditions. They found no evidence that the accident contributed to any appreciable lung injury. The District's superintendent ordered that staff work with Rodriguez and the rehabilitation consultant to develop alternative positions. The District worked with Rodriguez to develop a new job description. Rodriguez rejected a proposed job description around the time of the targeted date for his return to work in November 1990.

In December, Rodriguez returned to work without a job description. Rodriguez evaluated the District's equipment repair needs to determine what cost effective alternatives existed. In January 1991, he proposed dropping an audio visual and equipment repair contract with an outside vendor. In March, after further research by Rodriguez, his rehabilitation plan was submitted to the claims adjuster for approval. After submission to the Workers' Compensation Rehabilitation District Office, the plan was rejected for lack of documentation. Nevertheless, Rodriguez worked for the District making equipment repairs during this period of time, while maintaining his eligibility for rehabilitation benefits. His vocational consultant continued to issue progress reports.

In July 1991, the District rejected Rodriguez's claim for permanent partial disability.

Rodriguez complained about breathing problems in his new job as a result of exposure to certain chemical solvents. He was examined by a doctor who advised that he be provided with protective equipment.

In November 1991, the District Board accepted Rodriguez's proposed job description, including a $100 month raise, following reports that his repair program resulted in cost savings to the District.

A doctor's evaluation in December 1991 concluded that Rodriguez suffered from chronic airways inflammation due to the short-term, high-level exposure to irritant materials during the accident. Another specialist concurred in this evaluation and recommended equipment that would avoid exposure to irritants.

During March 1992, Rodriguez's condition worsened and he took a 100-day medical leave. He requested that the District agree to an evaluation by the same doctors he had seen beginning in December 1991. He believed the District had agreed but discovered that this was not the case. In the summer of 1992, the District eliminated Rodriguez's position by signing a contract with an outside vendor. Rodriguez claims that this information was intentionally concealed from him.

Further medical examination by yet another physician concluded that Rodriguez's asthma was not the result of the heater explosion and that he could continue working as an audio-visual equipment repairman if he avoided exposure to toxic chemicals.

In October 1992, Rodriguez requested the right to return to work with accommodations. The District advised him that he should speak to their attorney. Rodriguez then sought assistance from the Association. The Association referred him to a panel attorney who handled Workers' Compensation cases. This attorney concurred in his first attorney's opinion that, apart from the Workers' Compensation claim, there were no other potential claims for negligence or discrimination.

The Association's referral attorney arranged for an informal rehabilitation conference with the District in October to discuss accommodation in the workplace. The District admitted at the meeting that Rodriguez's position no longer existed. Rodriguez requested that the attorney file discrimination charges.

A second informal conference with Rodriguez's attorney and the District's attorney in December failed to resolve the dispute. The attorneys agreed to work on mutually selecting a medical examiner. The District urged Rodriguez to continue his job search outside of the District. Rodriguez's attorney refused to file discrimination charges at this time and advised him to obtain assistance from the Association regarding the contracting out of the repair work.

The agreed medical examiner concluded that Rodriguez's condition persisted, was caused by the initial accident, and that he should be reemployed with proper safety equipment. In response, the District offered only a unpaid leave of absence or placement on the 39-month reemployment list.

In March 1993, Rodriguez filed charges under the Americans with Disability Act (ADA) with the Equal Employment Opportunities Commission. Marci Seville, an Association attorney, wrote the District demanding Rodriguez's reinstatement and asserting that his ADA rights had been violated. Seville informed Rodriguez that the Association had not yet determined whether to provide him with formal legal representation in the ADA claim.

In April 1993, Seville referred Rodriguez to a private attorney who determined that his ADA claim lacked merit. She advised Rodriguez to agree to the settlement agreement being proposed by the District, which included his right to return to work. Seville concurred in this assessment and advised him to accept the terms of the settlement agreement proposal.

During May 1993, the District insisted on Rodriguez's release of all claims, including Workers' Compensation and ADA. Seville left employment with the Association and assigned his case to another attorney, Maureen Whelan. Rodriguez told Whelan that he was opposed to the settlement agreement because of the rehabilitation plan.

On May 27, 1993, a meeting of the all of the principals involved occurred at which time the District presented Rodriguez with its comprehensive settlement agreement. Whelan and his Workers' Compensation attorney urged him to sign the agreement. Whelan told him that his ADA case was weak and that the Association would not continue to represent him if he did not accept the agreement. Rodriguez balked and raised an issue of needing funds to repair his truck that he used in his work. The District offered a portion of his demand in a handwritten addendum.

Rodriguez continued to feel pressured into signing the agreement. He did not like the agreement. He signed reluctantly. Shortly

after the meeting, he discovered that the final copy he received differed from the one he signed in that it substituted a different rehabilitation plan. The charge does not explain precisely how the substituted plan differed, but does suggest that a reference to his last leave of absence being a cumulative injury rather than an independent injury was his main concern. On this basis, Rodriguez claims that the District intentionally discriminated against him as disabled person, violated safety regulations requiring a safe working environment, and denied him his Workers' Compensation benefits.

Rodriguez returned to work in the fall of 1993. He was fitted with a respirator. He was subsequently fitted with a second respirator after the first proved to be unsatisfactory. Rodriguez fired his Workers' Compensation attorney and pursued a malpractice action against him.

An industrial hygienist inspected Rodriguez's workplace and recommended better room ventilation. The agreed medical examiner concurred in this recommendation. No new measures were taken. Rodriguez complained about inadequate heating and had to keep the existing windows and doors closed. His request for improved heating and ventilation was apparently not acted upon.

In January 1994, Rodriguez's condition worsened, during a time he had to keep the windows close to avoid the cold.

In February 1994, Rodriguez filed a complaint with the Monterey County District Attorney's office claiming Workers' Compensation fraud based on the alteration of the agreement. The office declined to proceed. Rodriguez also began gathering information regarding a breach of the Association's duty to represent him. Also in February, Rodriguez suffered another respiratory episode. He filed a new Workers' Compensation claim.

An Association representative, Pat Bollin, verbally and physically assaulted Rodriguez by grabbing him on March 18, 1994 when she learned that he was gathering information against the Association. He filed assault and battery charges with the Salinas Police Department. On March 22 and 23, he also requested an investigation of Seville and Whelan by the Association's Chief Counsel, Margie Valdez. On March 27, Rodriguez filed a grievance based on the Bollin incident. He pursued this grievance, but the District rejected it at the first two levels, on April 11 and May 19, respectively, despite Bollin's admission of the confrontation and her grabbing of Rodriguez. A final review resulted in a denial of the grievance on July 29, 1994. The Salinas Police Department produced a report which Rodriguez submitted at the last step of the grievance procedure. He later complained that

the police officer had altered the report which the District had reviewed. On April 11, Rodriguez requested that Mary Jane Campbell, Chapter President, take some action against Bollin for her assault.

The District rejected the new Workers' Compensation claim. Rodriguez informed the District that he would not be returning to work until the agreed medical examiner recommended adequate ventilation and heat. The District responded by requiring a medical release from the examiner prior to his return to work. In a deposition, the medical examiner asserted that Rodriguez could no longer work in his position and should seek another position.

On June 8, 1994, Rodriguez telephoned Association Executive Director Bud Dougherty to request an internal investigation of Seville, Whelan and Bollin. He confirmed this request in a letter dated June 15. Also on June 8, Rodriguez called Valdez to request an inquiry as to whether Seville and Whelan had followed procedures in investigating his claims. He confirmed this request in a letter dated June 11. Valdez responded on June 24 that her investigation revealed no improprieties. On June 9, Rodriguez requested that the Association Board of Directors and Association President Steve Araujo also initiate an internal investigation regarding Seville, Whelan and Bollin.

On June 20, 1994, the District claimed that Rodriguez was not participating in the vocational rehabilitation program and threatened to terminate these benefits. It also disputed Rodriguez's claimed permanent disability rating. In July, the District proposed two part-time positions for Rodriguez, which he rejected..

On September 15, 1994, Rodriguez requested a medical leave, which the District denied. Twice he requested reconsideration but was denied both times. He continued to be eligible for vocational rehabilitation benefits during the fall of 1994.

In December, the District's attorney advised Rodriguez that his medical condition was such that he was not capable of working in any environment, except an office environment. The attorney invited Rodriguez to submit a settlement proposal, which he did.

On January 26, 1995, the District notified Rodriguez that he was no longer employed, but placed on the 39 month reemployment list.

Subsequently, Rodriguez sought action from the District's Board of Education to address the serious and wilful conduct of the District that resulted in his irreversible lung damage and

inability to perform his job duties and requested a permanent leave of absence. On February 28, 1995, the Board rejected him on both requests. The District claimed that it had complied with the settlement agreement, and would not make any special exceptions for him.

Rodriguez contends that the conduct of the Association demonstrates that it intentionally breached its duty of fair representation, conspired with the District to violate his civil rights, and failed to investigate issues of misconduct by Association representatives.

Based on the facts stated above, the charge as presently written fails to state a prima facie violation of the EERA for the reasons that follow.

Government Code section 3541.5(a) states that PERB "shall not . . . 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."

PERB has held that the six month period commences to run when the charging party knew or should have known of the conduct giving rise to the alleged unfair practice. (Regents of the University of California (1983) PERB Dec. No. 359-H.)

The charge was filed on March 14, 1995. Therefore, only those acts or omissions by the Association on or after September 14, 1994 are timely. There is no conduct alleged to have been engaged in by the Association in violation of his rights after September 14, 1994. Therefore, the charge is not timely filed.

Nevertheless, Rodriguez asserts that the alleged breach of the duty of fair representation, acts of conspiracy, and failure to investigate misconduct by Association representatives are timely allegations because he did not understand at the time the events took place that his rights under the EERA were being violated. He did not discover the legal significance of these events until shortly before he filed the unfair practice charge. However, this late discovery does not excuse the untimely filing. The time for filing begins to run from the date that the charging party is aware of the conduct constituting the unfair practice, not from the date he discovers its legal significance. (Operating Engineers International Union (Reich) (1986) PERB Dec. No. 591-H.)

Rodriguez also contends that his charge is timely filed because at no time prior to the filing of the charge did the Association ever discharge its obligation to investigate his complaints.

This argument appears to assert that the Association's violation was of. a continuing nature. This argument must also be rejected. The violations alleged do not appear to be of a continuing nature. Rodriguez knew or should have known prior to September 14, 1994 that the Association had engaged in conduct that would have supported his claims. (Regents of the University of California, supra. PERB Dec. No. 359-H.)

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 which 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 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 July 28, 1995. I shall dismiss your charge. If you have any questions, please call me at (415) 557-1350.

Sincerely

DONN GINOZA
Regional Attorney