**STATE OF CALIFORNIA**
**DECISION OF THE**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

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| SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 99, | ) | |
| Charging Party, | ) | Case No. LA-CE-3672 |
| v. | ) | PERB Decision No. 1181 |
| LOS ANGELES UNIFIED SCHOOL DISTRICT, | ) | December 10, 1996 |
| Respondent. | ) | |

Appearances; Posner & Rosen by Howard Z. Rosen, Attorney, for Service Employees International Union, Local 99; O'Melveny & Myers by Steven M. Cooper, Attorney, for Los Angeles Unified School District.

Before Caffrey, Chairman; Garcia and Johnson, Members.

DECISION

CAFFREY, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Service Employees International Union, Local 99 (SEIU) of a Board agent's dismissal (attached) of its unfair practice charge. In the charge, SEIU alleged that the Los Angeles Unified School District (District) violated section 3543.5(a) and (b) of the Educational Employment Relations Act (EERA)[1] by unilaterally

[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 states, 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

implementing a change in the terms of employment relating to the District's drug and alcohol testing policy.

The Board has reviewed the entire record in this case, including SEIU's original and amended unfair practice charge, the Board agent's warning and dismissal letters, SEIU's appeal and the District's response thereto. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself in accordance with the following discussion.

## DISCUSSION

Pursuant to Federal law and regulations, the District on January 1, 1995, implemented a drug and alcohol testing policy for employees in safety-sensitive positions. The policy provided for random drug and alcohol testing and indicated that employees found to have alcohol levels of .02 percent or higher would be subject to dismissal.

On October 26, 1995, an employee of the District and member of the bargaining unit represented by SEIU was subjected to a random drug and alcohol test and registered an alcohol level greater than .02 percent. As a result, the employee was dismissed by the District on December 12, 1995.

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> to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

On May 8, 1996, SEIU filed the instant unfair practice charge alleging that the District's dismissal of the employee resulted from its unilateral change in the terms of employment for employees in safety-sensitive positions. An amended charge was filed on August 5, 1996.

SEIU asserts that the policy implemented by the District on January 1, 1995, indicates that employees found to have alcohol levels of .02 percent or higher would be "subject to dismissal." SEIU contends that not until the dismissal of an employee on December 12, 1995, did it become clear that the District had adopted a zero tolerance policy that mandated dismissal of employees found to have .02 percent or higher alcohol levels. SEIU asserts that a policy of mandatory dismissal for certain conduct represents a change from a policy which states that an employee will be "subject to dismissal" for that conduct.

In dismissing SEIU's charge, the Board agent notes that EERA section 3541.5(a)(I)[2] prohibits PERB from considering a charge based on an alleged unfair practice occurring more than six months before the filing of the charge. The Board agent also

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[2]EERA section 3541.5 states, in pertinent part:

> (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.

points out that this statute of limitations commences when the charging party has actual or constructive notice of a clear intent to implement the action which constitutes the basis of the unfair practice charge. (West Valley-Mission Community College District (1995) PERB Decision No. 1113 (West Valley-Mission).) The Board agent found that SEIU had notice on January 1, 1995, that the new policy would subject employees to dismissal if they were found to have alcohol levels of .02 percent or greater. Therefore, the statute of limitations began to run on January 1, 1995, and SEIU's May 8, 1996, charge is untimely.

On appeal, SEIU acknowledges the EERA statute of limitations. However, SEIU repeats its contention that the District's policy indicating that employees would be "subject to dismissal" for having an alcohol level in excess of .02 percent does not provide constructive knowledge of the intent to implement a zero tolerance policy calling for mandatory dismissal of all employees engaged in that conduct. SEIU also offers the findings and recommendations of a hearing officer for the District's Personnel Commission concerning the dismissal of another employee for violation of the drug and alcohol testing policy. SEIU asserts that the hearing officer found that "the District did not communicate to the Union or the employees its zero tolerance policy which required mandatory termination for violation of the alcohol Program . . ."

The District responds by supporting the Board agent's finding that SEIU's charge is untimely. If the charge is found

to be timely, the District argues that it should be dismissed because the implementation of the drug and alcohol testing policy is consistent with the District's rights under the parties' collective bargaining agreement. Furthermore, the District argues that SEIU waived its right to negotiate over the drug and alcohol testing policy when it failed to request negotiations during the time the District was developing the policy in 1994.

The limitations period described in EERA section 3541.5(a)(1) is mandatory and bars PERB's jurisdiction over charges alleging conduct occurring more than six months prior to the filing of the charge. (Calexico Unified School District (1989) PERB Decision No. 754.) The issue here is whether SEIU had notice of the District's clear intent to implement the action on which the charge is based more than six months prior to the filing of its unfair practice charge. (West Valley-Mission.)

An employer's policy indicating that employees will be "subject to dismissal" for having an alcohol level in excess of .02 percent evinces the clear intent that any and all employees involved in that conduct may be dismissed. Therefore, the District's decision in December 1995 to dismiss an employee found to have an alcohol level above .02 percent is perfectly consistent with the drug and alcohol testing policy adopted January 1, 1995. Simply put, the policy clearly provides for the dismissal of employees found to be in violation of the policy. SEIU had actual or constructive knowledge of this intent at the

time of the implementation of the policy on January 1, 1995. Therefore, SEIU's May 8, 1996, unfair practice charge is untimely.

The decision of a Personnel Commission hearing officer pertaining to the dismissal of another SEIU member who was found to have an alcohol level above .02 percent does not lead the Board to a different conclusion. The hearing officer, in determining whether the District was required to consider mitigating factors in deciding to dismiss the employee, concluded that the District had not communicated to employees its intent to adopt a zero tolerance approach for violations of the drug and alcohol testing policy. It is unclear what standard the hearing officer used in reaching this conclusion, or how that standard may relate to the West Valley-Mission "actual or constructive knowledge" standard for EERA's statute of limitations. It is also unclear to what extent the circumstances described by the hearing officer are present in the dismissal of the employee cited in SEIU's charge. It is clear that the hearing officer made no finding that the District violated the drug and alcohol testing policy in dismissing the employee, and recommended that the dismissal be sustained. The hearing officer's decision does not affect the Board's conclusion that the January 1, 1995, drug and alcohol testing policy provided SEIU with actual or constructive knowledge of the District's clear intent to take the

action which forms the basis of the instant unfair practice charge.[3]

ORDER

The unfair practice charge in Case No. LA-CE-3672 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Member Johnson joined in this Decision.

Member Garcia's concurrence begins on page 8.

[3]Since SEIU's charge is untimely, the Board finds it unnecessary to consider the other arguments offered by the District.

GARCIA, Member, concurring: I agree that this case should be dismissed because the Service Employees International Union, Local 99 has failed to demonstrate that its charge was timely filed. However, I would simply adopt the Public Employment Relations Board (PERB or Board) agent's dismissal in affirming because the discussion of a hearing in another forum appears irrelevant if the Board does not have jurisdiction. The Board agent's dismissal letter accurately identifies the issue and analyzes it succinctly by stating:

> A charging party must file a charge when it has actual or constructive notice of a clear intent to implement the action which constitutes the basis for the unfair practice, provided that nothing subsequent to that date evinces a wavering of that intent. (West Valley-Mission Community College District (1995) PERB Decision No. 1113.) The statute of limitations begins to run when the charging party becomes aware of the conduct constituting the unfair practice, not when the charging party discovers the legal significance of that, conduct. (See California State Employees' Association (1985) PERB Decision No. 546-S.)
>
> It appears that SEIU was aware that under the new policy employees would be subject to dismissal from its initial implementation. When the District implemented the policy on January 1, 1995, it stated an employee in violation "is removed from safety-sensitive duty [and] subject to dismissal." On May 10, 1995, Freeman signed a statement which provided that having an .02 blood alcohol level "may result in [his] termination from the District." Accordingly, the statute of limitations began to run on January 1, 1995, not on December 12, 1995, when Freeman was fired under the policy. Therefore this charge is untimely filed, and fails to present a prima facie violation of the EERA within the jurisdiction of PERB.

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Blvd., Suite 650
Los Angeles, CA 90010-2334
(213) 736-3127

August 9, 199 6

Howard Z. Rosen
Posner & Rosen
3600 Wilshire Blvd., Suite 1800 .
Los Angeles, CA 90010

Re: Unfair Practice Charge No. LA-CE-3672,
Service Employees International Union, Local 99 v. Los Angeles Unified School District
DISMISSAL LETTER

Dear Mr. Rosen:

In the above-referenced charge the Service Employees International Union, Local 99 (SEIU) alleges the Los Angeles Unified School District (District) violated the Educational Employment Relations Act (EERA or Act) sections 3543.5(a) and (c) by unilaterally implementing a substance abuse policy.

You allege the District fired bargaining unit member, Lionel L. Freeman because he registered an alcohol level greater than .02 on a random alcohol screen, on December 12, 1995. You contend the policy under which the District fired Freeman was implemented without bargaining with SEIU.

On July 24, 1996, I issued a warning letter explaining the original charge failed to present a prima facie violation within the jurisdiction of the PERB. On August 5, 1996, you filed your first amended charge which indicated,

> It is the Union's position that Mr. Freeman's December 12, 1995 discharge commences the running of the six month statute of limitations, not the implementation of the policy.

Although the District implemented the drug and alcohol testing policy on January 1, 1995, you allege prior to Freeman's discharge on December 12, 1995, SEIU had no way of knowing how the policy would apply in the event an employee tested in excess of .02. In your first amended charge you also allege SEIU would not have known that the policy's language stating employees are "subject to dismissal" if their blood alcohol level is above .02 subjected an employee to mandatory dismissal.

The above-stated facts fail to state a prima facie violation of the EERA within the jurisdiction of PERB for the reasons that follow. EERA § 3541.5 (a) provides the Board 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.

In the instant charge you allege the District unilaterally implemented a drug-testing policy in violation of EERA. However you filed this charge on May 8, 1996, over a year after the District implemented its policy, on January 1, 1995.

A charging party must file a charge when it has actual or constructive notice of a clear intent to implement the action which constitutes the basis for the unfair practice, provided that nothing subsequent to that date evinces a wavering of that intent. (West Valley-Mission Community College District (1995) PERB Decision No. 1113.) The statute of limitations begins to run when the charging party becomes aware of the conduct constituting the unfair practice, not when the charging party discovers the legal significance of that conduct. (See California State Employees' Association (1985) PERB Decision No. 546-S.)

It appears that SEIU was aware that under the new policy employees would be subject to dismissal from its initial implementation. When the District implemented the policy on January 1, 1995, it stated an employee in violation "is removed from safety-sensitive duty [and] subject to dismissal." On May 10, 1995, Freeman signed a statement which provided that having an .02 blood alcohol level "may result in [his] termination from the District." Accordingly, the statute of limitations began to run on January 1, 1995, not on December 12, 1995, when Freeman was fired under the policy. Therefore this charge is untimely filed, and fails to present a prima facie violation of the EERA within the jurisdiction of PERB.

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 Regs., tit. 8,

sec. 32635(a).) Any document filed with the Board must contain the case name and number. 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 Regs., tit. 8, sec. 32135.) Code of Civil Procedure section 1013 shall apply. The Board's address is:

Attention: Appeals Assistant
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 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 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 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
Tammy L. Samsel
Regional Attorney

Attachment

STATE OF CALIFORNIA PETE WILSON, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Blvd., Suite 650
Los Angeles, CA 90010-2334
(213) 736-3127

July 24, 1996

Howard Z. Rosen
Posner & Rosen
3600 Wilshire Blvd., Suite 1800 •
Los Angeles, CA 90010

Re: Unfair Practice Charge No. LA-CE-3672,
Service Employees International Union, Local 99 v.
Los Angeles Unified School District
WARNING LETTER

Dear Mr. Rosen:

In the above-referenced charge the Service Employees International Union, Local 99 (SEIU) alleges the Los Angeles Unified School District (District) violated the Educational Employment Relations Act (EERA or Act) sections 3543.5(a) and (c) by unilaterally implementing a substance abuse policy.

You allege the District fired bargaining unit member, Lionel L. Freeman because he registered an alcohol level greater than .02 on a random alcohol screen, on December 12, 1995. You contend the policy under which the District fired Freeman was implemented without bargaining with SEIU.

On January 1, 1995, the District implemented its drug-testing policy. Prior to implementation, the District distributed to SEIU a draft of the proposed drug-testing policy. That draft, dated November 10, 1994, indicated:

> The Federal Highway Administration of the U.S. Department of Transportation has published rules requiring alcohol and drug testing for persons required to have a commercial driver's license. Local 99 members who are required to have a commercial driver's license for their position will be subject to alcohol and drug testing beginning January 1, 1995.

On May 10, 1995, Freeman signed a statement acknowledging that he received the District's Drug and Alcohol Testing Program Policy and Reference Guide for Employees. Freeman also acknowledged that having an alcohol concentration of .02 or greater could result in his termination.

The above-stated facts fail to state a prima facie violation of the EERA for the reasons that follow. EERA § 3541.5(a) provides the Board 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.

In the instant charge you allege the District unilaterally implemented a drug-testing policy in violation of EERA. However you filed this charge on May 8, 1996, over a year after the District implemented its policy, on January 1, 1995. You failed to present any facts of belated discovery. Accordingly this charge is untimely filed, and fails to present a prima facie violation of the EERA within the jurisdiction of PERB.

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 August 5, 1996. I shall dismiss your charge. If you have any questions, please call me at (213) 736-7508.

Sincerely,

Tammy *IK* Samsel
Regional Attorney