STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

DONALD SANTOIANNI, Charging Party, v. LOS ANGELES COMMUNITY COLLEGE DISTRICT, Respondent.	)	Case No. LA-CE-3910 PERB Decision No. 1283 September 15, 1998

Appearance; Donald Santoianni, on his own behalf.

Before Johnson, Amador and Jackson, Members.

DECISION

JACKSON, Member: This case is before the Public Employment Relations Board (Board) on appeal by Donald Santoianni (Santoianni) of a Board agent's dismissal (attached) of his unfair practice charge. As amended, Santoianni's charge alleges that the Los Angeles Community College District violated the Educational Employment Relations Act section 3543.5(a)[1] by laying

[1]EERA is codified at Government Code section 3540 et seq. 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. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

him off from his position as a Lab Technician in April, 1995 and failing to rehire him in the Fall of 1997.[2]

The Board has reviewed the entire record in this case, including the unfair practice charge, the warning and dismissal letters and Santoianni's appeal. The Board finds the warning and dismissal letters to be free from prejudicial error and adopts them as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. LA-CE-3910 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Johnson and Amador joined in this Decision.

[2]We affirm the board agent's dismissal upon the ground that Santoianni failed to establish a prima facie case of how either his layoff in 1995 or the District's refusal to rehire him in the Fall of 1997 constituted discrimination.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415) 439-6940

May 4, 1998

Donald Santoianni

Re: **DISMISSAL OF CHARGE/REFUSAL TO ISSUE COMPLAINT**
Donald Santoianni v. Los Angeles Community College District
Unfair Practice Charge No. LA-CE-3910

Dear Mr. Santoianni:

The above-referenced unfair practice charge, filed March 5, 1998, alleges the Los Angeles Community College District (District) discriminated against you by failing to rehire you in the Fall of 1997, after your layoff. This conduct is alleged to violate Government Code section 3543.5(a) of the Educational Employment Relations Act (EERA or Act).

I indicated to you, in my attached letter dated April 9, 1998, 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 April 16, 1998, the charge would be dismissed. I later extended this deadline until April 27, 1998.

On April 29, 1998, I received a first amended charge. The amended charge reiterates the original allegations and adds the following information and assertions.

Prior to April 1995, Charging Party was serving as the AFT Assistant Executive Secretary for Grievances. As Assistant Executive Secretary, Charging Party responsibilities included filing grievance and representing the grievants, attending monthly campus grievance meetings, and serving on the Staff Guild's Negotiating Team. In order to complete these duties, the District agreed to allow Charging Party two days of release time every week. Thus, Charging Party received his regular pay as a Lab Technician for working at Western Los Angeles Community College (WLAC) Monday through Wednesday, plus a monthly stipend from the Staff Guild for his work at the union office on Thursdays and Fridays.

On November 9, 1994, Charging Party met with Dr. Wong, WLAC's President, to discuss problems with the new Dean of Admissions. During this meeting, Charging Party reminded Dr. Wong of a previous agreement between the parties during which Dr. Wong agreed not to discipline another WLAC employee over unsubstantiated charges. Apparently Charging Party argued during the November 9, 1994, meeting, that the new Dean of Admissions was using the allegations against the employees. During this meeting, Dr. Wong told Charging Party, "Do not preach to me." Charging Party contends this comment demonstrates the District's unlawful motivation.

In April 1995, the Math-Science Department at WLAC determined that there was a lack of work in the physics lab, and thus a position should be eliminated. The District informed Charging Party that he was being laid off, and negotiated with Charging Party and AFT over the effects of this layoff. The parties agreed that Charging Party would be assigned two days a week to the physics lab at Los Angeles Trade Technical College, and would work three days a week in the union office. Charging Party disagrees that there was a lack of work, and believes the position should not have been eliminated.

In the Fall 1997, the District hired a part-time, temporary laboratory technician at WLAC, that was announced a 25% physics and 25% biology position. Charging Party states he is not interested in this position, but instead presents these facts to demonstrate there is enough work at WLAC, and that his layoff was for discriminatory reasons.

Based on the facts provided in the original and amended charges, the charge fails to demonstrate a prima facie case, and must be dismissed.

Charging Party contends that his April 1995 layoff was for discriminatory reasons. Government Code section 3541.5(a)((1) prohibits the Board from issuing a complaint with 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, Charging Party's layoff occurred more than two years prior to the filing of this charge. Although Charging Party asserts "all the pieces did not fit together until" Fall of 1997, the belated discovery of the legal significance of the District underlying conduct does not excuse an untimely filing. (UCLA Labor Relations Division (1989) PERB Decision No. 735-H.) As such, the charge must be dismissed as untimely.

Charging Party contends in the original charge that he should have been offered the part-time, temporary position at WLAC. In my letter dated April 9, 1998, I stated that the charge failed to

demonstrate Charging Party was not offered this position for discriminatory reasons. Although Charging Party has demonstrated protected activity, the charge fails to demonstrate the District had an obligation to offer you this position, and that they chose not to offer it to you for discriminatory reasons. Thus, this allegation fails to demonstrate a prima facie case for the reasons stated herein and in my April 9, 1998, 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
Kristin L. Rosi
Regional Attorney

Attachment

cc: Herbert Spillman

STATE OF CALIFORNIA PETE WILSON, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415) 439-6940

April 9, 1998

Donald Santoianni

Re: **WARNING LETTER**
Donald Santoianni v. Los Angeles Community College District
Unfair Practice Charge No. LA-CE-3910

Dear Mr. Santoianni:

The above-referenced unfair practice charge, filed March 5, 1998, alleges the Los Angeles Community College District (District) discriminated against you by failing to rehire you after your layoff. This conduct is alleged to violate Government Code section 3543.5(a) of the Educational Employment Relations Act (EERA or Act).

Investigation of the charge revealed the following. You were employed by the District as a Physical Sciences Laboratory Technician at West Los Angeles Community College (WLAC). As a Laboratory Technician, you were exclusively represented by the American Federation of Teachers College Staff Guild (AFT).

In or about April 1995, you were laid off from the District due to lack of work. At the time of your lay off, the District indicated that the Physics program at WLAC would be closed, possibly for several years. Additionally, at the time of the lay off, you were serving as Assistant Executive Secretary of AFT Local 1521. You do not assert, however, that your lay off was for discriminatory reasons.

Pursuant to contractual obligations, the District, rather than severing your employment, transferred you to a Laboratory Technician position at Los Angeles Trade Technical College and, eventually, Los Angeles Southwest Community College. WLAC did not offer a Physics program in the Fall of 1995. WLAC offered only one Physics class in Spring 1996, but did not hire a laboratory technician.

In or about the Fall 1997, Dr. John Ogren, a Physics professor at WLAC, informed Charging Party that the District intended to hire a part-time, temporary laboratory technician, that would be 25%

biology and 25% physics. In November 1997, the District hired Stan Levin into the new position. Charging Party claims the District had an obligation to hire Charging Party, rather than Stan Levin, into this position.

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

Charging Party asserts the District has a contractual obligation to hire him into the part-time, temporary position at WLAC. Although PERB lacks the authority to enforce contractual provisions (Gov. Code sec. 3541.5(b), the failure to follow contractual provisions may constitute a unilateral change in the terms and conditions of employment, thus demonstrating an unfair practice. However, Charging Party lacks standing to assert unilateral change violations, and as such, the charge fails to state a prima facie case. (Oxnard School District (1988) PERB Decision No. 667.) Moreover, even assuming Charging Party had standing to assert a unilateral change, the parties contract notes in Article 13(F)(5) that reemployment and recall rights are limited to "regular" positions. Thus, it seems Charging Party does not have recall rights into the temporary WLAC position.

Assuming Charging Party also wishes to contend the District discriminated against him because of his protected activities, the charge still fails to state a prima facie case. To demonstrate a violation of EERA section 3543.5(a), the charging party must show that: (1) the employee exercised rights under 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 employees 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; Department of Developmental Services (19 82) PERB Decision No. 228-S; California State University (Sacramento) (1982) PERB Decision No. 211-H.)

With regard to nexus, PERB often looks towards the timing of the District's actions. In the instant charge, the District's action in failing to place Charging Party into the temporary position is remote in time to Charging Party's protected activity of serving as Executive Secretary in Local 1521. Charging Party's protected activity occurred three years prior to the District's alleged adverse action, and thus the timing of the action does not demonstrate the requisite nexus.

Moreover, even assuming Charging Party engaged in protected activities more recently than three years ago, the charge still

fails to demonstrate the requisite nexus. Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor, it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee; (2) the employer's departure from established procedures and standards when dealing with the employee; (3) the employer's inconsistent or contradictory justifications for its actions; (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; or (6) any other facts which might demonstrate the employer's unlawful motive. (Novato Unified School District, supra; North Sacramento School District (1982) PERB Decision No. 264.) As presently written, this charge fails to demonstrate any of these factors and therefore does not state a prima facie violation of EERA section 3543.5(a).

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 April 16, 1998, I shall dismiss your charge. If you have any questions, please call me at (415) 439-6940.

Sincerely,

Kristin L. Rosi
Regional Attorney