STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MILDRED NICOLE BRYANT, Charging Party, v. PERALTA COMMUNITY COLLEGE DISTRICT, Respondent.	Case No. SF-CE-2145-E PERB Decision No. 1418 February 26, 2001

Appearance: Mildred Nicole Bryant, on her own behalf.

Before Amador, Baker and Whitehead, Members.

DECISION

BAKER, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by Mildred Nicole Bryant (Bryant) of a Board agent's dismissal (attached) of her unfair practice charge.

The charge alleged that the Peralta Community College District violated section 3543.5 (a) and (b) of the Educational Employment Relations Act (EERA)[1] by failing to respond to the

[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.

parties' grievance arbitration procedures and by issuing an improper performance evaluation to Bryant.

The Board has reviewed the entire record in this case, including the unfair practice charge, the warning and dismissal letters and Bryant's appeal. The Board finds that because Bryant failed to meet her burden of supplying sufficient facts to show that the alleged unlawful conduct occurred within six-months of the filing date of her charge, it must be dismissed as untimely.

DISCUSSION

Bryant's charge stated, in its entirety:

> Failure to respond to grievance arbitration procedures.
>
> Violation of evaluation process. Another classified staff person (Dena Semmons) was allowed to perform, conduct an evaluation of me. She was not my 1st level manager. Nor was the evaluation period valid.

EERA section 3541.5 (a) (1) provides that 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." The Board has held that it is the charging party's burden to demonstrate the charge has been timely filed. (Tehachapi Unified School District (1993) PERB Decision No. 1024.) As Bryant's charge failed to provide any dates, it failed to supply sufficient facts to show that the alleged unlawful conduct occurred within six-months of the filing of the charge.

> (b) Deny to employee organizations rights guaranteed to them by this chapter.

In her appeal, Bryant requests that the Board consider new supporting evidence offered for the first time in her appeal. Consideration of new supporting evidence on appeal is controlled by PERB Regulation 32635[2] which provides, in pertinent part:

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

Interpreting this regulation, the Board 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. The reason for this reluctance is stated in South San Francisco Unified School District (1990) PERB Decision No. 830:

> The purpose of PERB Regulation 32635(b) is to require the charging party to present its allegations and supporting evidence to the Board agent in the first instance, so that the Board agent can fully investigate the charge prior to deciding whether to issue a complaint or dismiss the case.

When a party has the opportunity to cure defects in a prima facie case at earlier stages and does not do so, the Board is reluctant to allow a party to raise such facts or evidence later. (Oakland Education Association (Freeman) (1994) PERB Decision No. 1057.)

In support of her appeal, Bryant states that, "Due to a series of unavoidable and uncontrollable circumstances" she was forced to move out of state and relocate to East Carondelet, Illinois. Bryant claims in her appeal that she, "communicated (by phone) my situation to Ms. Tammy Samsel, Regional Director of the San Francisco office, during a conversation with her sometime in July." There is only one reference in the record of a phone call in July of 2000. Board Agent Tammy Samsel noted in her August 1, 2000 warning letter to Bryant that a phone call was placed to Bryant on July 12, 2000. The purpose of this call was

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

to let Bryant know that her charge did not state a prima facie violation of EERA and that more information was needed. Had Bryant communicated her impending move out of state to the Board agent during this phone call on July 12, 2000 or any other time in July, it would be reflected in the record. Bryant's claim that she informed the Board agent of her impending move is not supported by the record.

Bryant claims she did not receive the Board agent's August 1, 2000, warning letter until after her charge was dismissed by the Board agent. Bryant claims she had her mail forwarded to Illinois which resulted in a one-week to 14-day delay in receiving her mail. Even if Bryant did not receive the August 1, 2000, warning letter until she reached Illinois on August 11, Bryant has not demonstrated good cause to allow for the consideration of new evidence to support her charge. The warning letter was mailed from the Board's San Francisco regional office on Tuesday, August 1, 2000. Bryant did not move out of state until Sunday, August 6, 2000. Bryant provided no indication in her appeal as to when she submitted her change of address card to the Post Office, no effective date for the forwarding of her mail, and most importantly, no reason why she could not have apprised the Board agent of her new address or even that she was moving.

In light of the July 12, 2000, phone call wherein the Board agent explained that Bryant's charge was deficient, Bryant's failure to keep PERB informed of her current address and to communicate with PERB in an effective and timely manner does not constitute good cause under PERB Regulation 32635(b). The remainder of her appeal is an attempt to overcome deficiencies in timeliness and establish a prima facie case for her charge. This portion of Bryant's appeal is not addressed as no good cause exists to consider the new supporting evidence on appeal.

ORDER

The unfair practice charge in Case No. SF-CE-2145-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Amador and Whitehead joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

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

August 11, 2000

Mildred Nicole Bryant

Re: Mildred Nicole Bryant v. Peralta Community College District
Unfair Practice Charge No. SF-CE-2145
Dismissal and Refusal to Issue a Complaint

Dear Ms. Bryant:

I indicated to you, in my attached letter dated August 1, 2000, 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 August 8, 2000, the charge would be dismissed.

I have not received either an amended charge or a request for withdrawal. Therefore, I am dismissing the charge based on the facts and reasons contained in my August 1, 2000 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 Regs., tit. 8, sec. 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, sec. 32135(a); see also Cal. Code Regs., tit. 8, sec. 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Cal. Code Regs., tit. 8, sec. 32135(d),

provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code. Regs., tit. 8, secs. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

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. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, sec. 32135(c).)

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 Director

Attachment

cc: Clinton Hilliard

PUBLIC EMPLOYMENT RELATIONS BOARD

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

August 1, 2000

Mildred Nicole Bryant

Re: Mildred Nicole Bryant v. Peralta Community College District
Unfair Practice Charge No. SF-CE-2145
Warning Letter

Dear Ms. Bryant:

In the above-referenced charge you allege Peralta Community College District violated the Educational Employment Relations Act (EERA or Act) § 3543.5(a) and (b). On or about July 12, 2000, I called you and indicated that I would need additional information regarding this charge. I have not yet received any additional information. The charge states in its entirety:

> Failure to respond to grievance arbitration procedures.
>
> Violation of evaluation process. Another classified staff person (Dena Demmons) was allowed to perform, conduct an evaluation of me. She was not my 1st level manager. Nor was the evaluation period valid.

The above-stated information fails to state a prima facie violation for the reasons that follow.

EERA § 3541.5(a)(1) provides the Public Employment Relations 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." It is your burden, as the charging party to demonstrate the charge has been timely filed. (See Tehachapi Unified School District (1993) PERB Decision No. 1024.) As the charge does not provide any dates, it fails to demonstrate that it is timely filed. Thus, the charge must be dismissed as outside the jurisdiction of PERB.

Even if the charge is timely filed, the charge fails to state a prima facie violation. A charging party should allege the "who, what, when, where, and how" of an unfair practice. (United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision 944.) Mere legal conclusions are insufficient. (See State of California (Department of Food and Agriculture (1994) PERB Decision No.

1071-S.) The charge as it is presently written does not provide the requisite information. Thus, the charge must be dismissed.

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 (1982) PERB Decision No. 228-S; California State University (Sacramento) (1982) PERB Decision No. 211-H.)

The charge does not include facts indicating that you exercised rights under the EERA or engaged in protected activities prior to receiving the performance evaluation. Thus, the charge does not meet the above-described test for a prima facie retaliation violation.

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.)

Although the charge alleges that the District failed to follow proper evaluation procedures, the charge does not present facts indicating the alleged adverse action occurred close in time to any protected activities. 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 have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative 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 8, 2000, I shall dismiss your charge. If you have any questions, please call me at (415) 439-6944.

Sincerely,

TAMMY L. SAMSEL
Regional Director