STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

GERALD WAYNE RAX, Charging Party, v. SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 790, Respondent.	Case No. SF-CO-583-E PERB Decision No. 1488 July 8, 2002

Appearance: Gerald Wayne Rax, on his own behalf.

Before Baker, Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Gerald Wayne Rax (Rax) of a Board agent's dismissal (attached) of his unfair practice charge. The charge alleged that the Service Employees International Union, Local 790 violated the Educational Employment Relations Act (EERA) [1] by failing to file a grievance regarding his termination.

The Board has reviewed the entire record in this matter including the original and amended unfair practice charges, the warning and dismissal letters and Rax's appeal. Rax's appeal reiterates arguments in support of his charge made to the Board agent and fails to adequately address the Board agent's finding that the charge was untimely filed.[2] As the

[1]EERA is codified at Government Code section 3540 et seq.

[2]The Board notes that the untimeliness of the allegations in the charge was not the basis for the Board agent's warning letter. As such, Rax's amended charge attempted only to address the finding that his charge failed to state a prima facie case. Although the untimeliness

timeliness of the charge is not established, the Board's inquiry into whether the charge states a prima facie case ends. It is therefore not necessary to determine whether Rax's allegations constitute a prima facie violation of EERA. (Long Beach Community College District (2002) PERB Decision No. 1475.) The Board therefore adopts the portion of the dismissal letter which dismisses Rax's charge as untimely.

ORDER

The unfair practice charge in Case No. SF-CO-583-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Baker and Neima joined in this Decision.

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of the allegations in the charge was not an issue in the warning letter, it was very clearly the basis of the dismissal. Rax therefore has now had ample opportunity through the instant appeal to refute the finding that his charge was not timely.

STATE OF CALIFORNIA GRAY DAVIS, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1515 Clay Street, Suite 2201
Oakland, CA 94612
Telephone: (510) 622-1024
Fax: (510) 622-1027

July 17, 2001

Gerald Wayne Rax

Re: Gerald Wayne Rax v. Service Employees International Union, Local 790
Unfair Practice Charge No. SF-CO-583-E
DISMISSAL LETTER

Dear Mr. Rax:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on April 11, 2001. Gerald Wayne Rax alleges that the Service Employees International Union, Local 790 (SEIU) violated the Educational Employment Relations Act (EERA)[1] by failing to file a grievance regarding his termination.

I indicated to you in my attached letter dated May 11, 2001, 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 May 21, 2001, the charge would be dismissed.

Charging Party filed an amended charge on May 22, 2001 alleging that SEIU acted in an arbitrary, discriminatory and bad faith manner by failing to file a grievance challenging his termination, or at least to fully investigate the basis for a grievance. Rax alleged that the District's refusal to retain him constituted a violation of the District's civil service rules. The collective bargaining agreement permits a grievance to be filed challenging a violation of the civil service rules.

Subsequent to filing of the amended charge, Charging Party also submitted additional information concerning the issue of the timeliness of the charge, as follows. Rax contacted SEIU's chapter president in January 2000 to express his concerns about his employment classification. He was told that his employer, San Francisco Community College District (District), could work him in any capacity it chose. Rax contacted SEIU again in February 2000 to request assistance in changing his status from temporary exempt to permanent, following notice of his success on the District's promotional examination. In April 2000, one week after receiving his letter of termination, Rax complained about his situation to SEIU. On May 3, 2000, SEIU steward Patti Tamura spoke to Rax regarding the possibility of filing a

[1] EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

grievance to challenge his termination. However, no grievance was filed. Rax contacted the director of SEIU in October 2000 to complain about the lack of representation. Rax does not indicate whether the director actually responded. Rather, he states only that the director "did not think that there was any merit to [his] grievance."

Rax further alleges that SEIU knew or should have known that the District's termination of him, despite his success on the promotional examination and the rules requiring that he be upgraded to permanent status, constituted a grieveable violation.

The collective bargaining agreement permits an employee to file a grievance in his own name. (Art. 10, "Grievance", sec. B.) To be timely a grievance must be filed within 20 days of the alleged violation. Time limits may be waived by mutual agreement between the grievant and the District's representative. (Art. 10, secs. E, G.)

EERA section 3541.5(a) provides that a complaint may not issue in respect of any charge based on an unfair practice occurring more than six months prior to the filing of the charge. The limitations period begins to run when the charging party knew or should have known of the conduct underlying the charge. (Fairfield-Suisun Unified School District (1985) PERB Decision No. 547.)

According to the facts stated above, Rax was aware of the basis for a possible grievance at the time he first approached SEIU in April 2000. SEIU was also aware of Rax's request to file a grievance on May 3, 2000. Rax knew or should have known that he and SEIU had only 20 days in which to file a grievance following his termination that was effective the end of April 2000. The charge was not filed until April 11, 2001, which is more than six months after these events.

Rax appears to rely on his subsequent renewed request that a grievance be filed that was submitted to SEIU on October 4, 2000. However, these subsequent events did not commence the running of a new limitations period. (See Riverside Unified School District (1985) PERB Decision No. 522.) Rax had sufficient information in May 2000 from which to conclude that SEIU was unwilling to prosecute a grievance on his behalf. The union's failure to act within 20 days should have put him on notice that it was unwilling to represent him. (See International Union of Operating Engineers (Reich) (1986) PERB Decision No. 591-H [limitations period commences when union assesses the merits of a grievance rather than when charging party discovers legal basis for a charge].)

Therefore, I am dismissing the charge based on the facts and reasons stated above, as well as those contained in my May 11, 2001 letter.

Right to Appeal

Pursuant to PERB Regulations[2], 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. (Regulation 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. (Regulations 32135(a) and 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 Regulation 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. (Regulations 32135(b), (c) and (d); see also Regulations 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. (Regulation 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 Regulation 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. (Regulation 32135(c).)

[2] PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

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. (Regulation 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: P. Tamura

DNG

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1515 Clay Street, Suite 2201
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Telephone: (510) 622-1024
Fax: (510) 622-1027

May 11, 2001

Gerald Wayne Rax

Re: Gerald Wayne Rax v. Service Employees International Union, Local 790
Unfair Practice Charge No. SF-CO-583-E
WARNING LETTER

Dear Mr. Rax:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on April 11, 2001. Gerald Wayne Rax alleges that the Service Employees International Union, Local 790 (SEIU) violated the Educational Employment Relations Act (EERA)[1] by failing to file a grievance regarding his termination.

Investigation of the charge revealed the following. Rax was employed by the San Francisco Community College District (District) as a Senior Personnel Clerk until his termination on May 4, 2000. He was assigned to work in the Human Resources Department of City College of San Francisco.

SEIU is the exclusive representative of a bargaining unit composed of classified employees in the District.

Rax was initially hired in November 1999 and appointed as a temporary exempt employee. In February 2000, Rax competed in a civil service examination and obtained a score making him eligible for a permanent position.

The Director of Human Resources issued Rax a letter dated April 3, 2000 indicating that his appointment as a Senior Personnel Clerk would end at the end of April 2000 because Rax had reached the end of his six-month appointment.

On May 4, 2000, the Director was issued a personnel requisition, which he presented to Rax for his signature. The form indicated that Rax had been "reclassified" as a School Aide III. Rax refused to sign the document.

On October 4, 2000, Rax requested that SEIU file a grievance regarding his termination. Rax indicated that he had recently met with a representative of the District and attempted to

[1] EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

determine if his employment status was temporary exempt or provisional. The form he signed at the time of his hire indicated he was temporary exempt. However, his termination letter indicated that he was a provisional employee. Rax contended that he was temporary exempt. Rax explained that he refused to sign the May 4 requisition form because of the "lack of explanation as to [his] rights and responsibilities and/or misinformation." He closed his letter by requesting that SEIU advise him as to whether or not he was a member of the bargaining unit, and if so whether his dispute was covered by the collective bargaining agreement. Rax also requested that if he were covered that a grievance be filed on his behalf.

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.

Charging Party has alleged that the exclusive representative denied Charging Party the right to fair representation guaranteed by EERA section 3544.9 and thereby violated section 3543.6(b). The duty of fair representation imposed on the exclusive representative extends to grievance handling. (Fremont Teachers Association (King) (1980) PERB Decision No. 125; United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258.) In order to state a prima facie violation of this section of EERA, Charging Party must show that the Respondent's conduct was arbitrary, discriminatory or in bad faith. In United Teachers of Los Angeles (Collins), the Public Employment Relations Board stated:

> Absent bad faith, discrimination, or arbitrary conduct, mere negligence or poor judgment in handling a grievance does not constitute a breach of the union's duty. [Citations omitted.]
>
> A union may exercise its discretion to determine how far to pursue a grievance in the employee's behalf as long as it does not arbitrarily ignore a meritorious grievance or process a grievance in a perfunctory fashion. A union is also not required to process an employee's grievance if the chances for success are minimal.

In order to state a prima facie case of arbitrary conduct violating the duty of fair representation, a Charging Party:

> ". . . must at a minimum include an assertion of sufficient facts from which it becomes apparent how or in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment. (Emphasis added.)" [Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Decision No. 332, p. 9, citing Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124.]

While it may appear troubling that SEIU failed to respond to Rax's letter requesting advice on whether he had a potentially meritorious grievance, this alone is insufficient to state a prima

facie violation involving a breach of the duty of fair representation. As the authorities note, it must be shown that SEIU caused Rax to forfeit a meritorious grievance for arbitrary, discriminatory or bad faith reasons. Though it is true that a union's failure to investigate the merits of a grievance may demonstrate arbitrary, discriminatory or bad faith action, Charging Party nevertheless bears the burden that he had a meritorious grievance in the first instance. By letter dated April 16, 2001, the undersigned advised Rax of this deficiency, suggesting that he examine a copy of the collective bargaining agreement to determine if there was language that would have supported such a grievance. No response has been provided.

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 **May 21, 2001**, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Donn Ginoza
Regional Attorney

DNG