

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



GEORGE V. MRVICHIN,

Charging Party,

v.

LOS ANGELES COMMUNITY COLLEGE
DISTRICT,

Respondent.

Case No. LA-CE-4464-E

PERB Decision No. 1667

July 27, 2004

Appearances: George V. Mrvichin, on his own behalf; Martine Magana, Associate General Counsel, for Los Angeles Community College District.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case is before the Public Employment Relations Board (Board) on appeal by George V. Mrvinchin (Mrvinchin) from a Board agent's dismissal (attached) of his unfair practice charge. The charge alleged that the Los Angeles Community College District (District) violated the Educational Employment Relations Act (EERA)¹ by forcing Mrvinchin to retire.

The Board has reviewed the entire record in this matter, including the original, amended, and second amended unfair practice charge, the warning and dismissal letters, Mrvinchin's appeal and the District's response.² The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself.

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

²Mrvinchin filed several documents with the Board after completion of the record. These documents were not considered by the Board as Mrvinchin has not demonstrated good

ORDER

The unfair practice charge in Case No. LA-CE-4464-E is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Whitehead joined in this Decision.

cause for their late submission. (PERB Reg. 32136; PERB regs. are codified at Cal. Code
Regs., tit.8, sec. 31001, et seq.)

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8386
Fax: (916) 327-6377



September 30, 2003

George Mrvichin

Re: George Mrvichin v. Los Angeles Community College District
Unfair Practice Charge No. LA-CE-4464-E
DISMISSAL LETTER

Dear Mr. Mrvichin:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on October 23, 2002. George Mrvichin alleges that the Los Angeles Community College District (District) violated the Educational Employment Relations Act (EERA)¹ by discriminating against him.

I indicated to you in my attached letter dated July 17, 2003, 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 24, 2003, the charge would be dismissed.

I received an amended charge from you on July 25 and a second amended charge on July 28, 2003.

In your second amended charge, you refer to a grievance you filed against the District that was denied in May 2002. You contend that denial of the grievance "is a form of interference and restraint" and state that the grievance procedure between LACCD and AFT Guild 1521 does not provide for denial of a grievance. However, a review of that grievance procedure (Article 28) merely provides (Step One) for a college administrator to communicate his/her decision in writing. The grievance procedure contains no language which prohibits denial of a grievance. Additionally, I am aware of no legal authority that makes the denial of a grievance a per se act of illegal inference under EERA.

You also contend that since you filed PERB charges against College President Ernest Moreno between 1992 and 1995, he has taken reprisals against you and given rewards to other employees for creating a hostile workplace for you. Few specifics are provided although these

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.

instances appear to be outside PERB's six month statutory limitation period. EERA section 3541.5(a)(1) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.) The charging party bears the burden of demonstrating that the charge is timely filed. (Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.)

The information provided regarding these earlier events does not demonstrate that the notice of termination, the subject of this charge, was motivated by your earlier protected activity.

You also make a general allegation that Moreno has not followed the requirements of "Employee Agreement at Article 18, which states in part that prior to placing any materials into Personnel File (Which is the only file which may be used by the employer.) that the employee must be given an opportunity to sign the material and have attached any response they may wish to address." This allegation was also made in your original charge. However, no facts are provided that demonstrate how, when, or in what manner Article 18 was violated.

PERB Regulation 32615(a)(5) requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." Thus, the charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (State of California (Department of Food and Agriculture) (1994) PERB Decision No. 1071-S, citing United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (Ibid.; Charter Oak Unified School District (1991) PERB Decision No. 873.) Without specific facts demonstrating how and when Article 18 was violated such an allegation does not provide indicia that the District was improperly motivated to issue the notice of termination.

You present other discussion of "additional reprisals" and other matters. However, your amended charge does not provide sufficient facts to demonstrate that the District was improperly motivated when it issued the notice of termination.

As stated in my prior letter, although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (North Sacramento School District (1982) PERB Decision No. 264), 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 (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District (1979) PERB Decision No. 104.); (3) the employer's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S); (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; (6) employer animosity towards union activists (Cupertino Union Elementary School District) (1986) PERB Decision No. 572.); or (7) any other facts which might demonstrate the employer's unlawful motive. (Novato; North Sacramento School District, supra, PERB Decision No. 264.)

Without the necessary evidence of indicia regarding employer motivation, I must dismiss the charge based on the facts and reasons contained herein and in my July 17 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

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

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).)

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
General Counsel

By _____
Bernard McMonigle
Regional Attorney

Attachment

cc: Martine Magaña, Associate General Counsel

PUBLIC EMPLOYMENT RELATIONS BOARD



Sacramento Regional Office
1031 18th Street
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July 17, 2003

George Mrvichin

Re: George Mrvichin v. Los Angeles Community College District
Unfair Practice Charge No. LA-CE-4464-E
WARNING LETTER

Dear Mr. Mrvichin:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on October 23, 2002. George Mrvichin alleges that the Los Angeles Community College District violated the Educational Employment Relations Act (EERA)¹ by discriminating against him.

Your charge states that you were "forced to retire" by the actions of District President Ernest Moreno. He issued you a Notice of Recommended Dismissal dated May 30, 2002, from your classified position as an athletic trainer². Instead, you retired from that position and sought a disability retirement that was denied. You contend that Moreno's action is part of a "long history" of "interference/restraint" which includes the issuance of two PERB complaints (the last settled in July 2001).

You objected to "a number of matters improperly placed into" the disciplinary matter. You also object that Moreno was the Skelly hearing officer and upheld his earlier proposed discipline.

You filed discrimination complaints with the District Office of Diversity Programs and Dean of Students in summer 2002. You were not satisfied with the results.

Your charge states that you are "still under doctors care for illness/injury caused by Moreno and others." It also states that you "continue to suffer additional reprisals concerning "retirement and health benefits". You also mention "continued reprisals as a Certificated Instructor" in a matter over which you filed a grievance; however, few details are provided.

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.

² You filed a grievance, denied by Moreno, alleging that the dismissal violated Article 18 of the collective bargaining agreement between LACCD and the AFT. Article 18 states the types of records that may be placed in an official personnel file. The exact nature of the grievance is not clear from the charge.

PERB Regulation 32615(a)(5) requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." Thus, the charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (State of California (Department of Food and Agriculture) (1994) PERB Decision No. 1071-S, citing United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (Ibid.; Charter Oak Unified School District (1991) PERB Decision No. 873.)

With respect to "additional reprisals" beyond the June 4, 2002, notice of termination you have provided insufficient facts to determine whether there may be any cognizable violations of EERA. Two of the allegations involve matters that appear to not be covered by the EERA. You allege that you suffered work-related injuries and health problems; such matters are generally remedied under the workers' compensation law. You also allege a reprisal concerning retiree benefits; retirees are not covered employees under EERA. San Leandro Unified School District (1984) PERB Decision No. 450

It does appear that you believe that the June 4 notice was retaliation for your prior protected activity. After you received this notice, you unsuccessfully sought a disability retirement. You now seek to return to service as an athletic trainer. However, you have not provided sufficient facts to establish that the termination notice was retaliatory.

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 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (North Sacramento School District (1982) PERB Decision No. 264), 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 (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District (1979) PERB Decision No. 104.); (3) the employer's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S); (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; (6) employer animosity towards union activists (Cupertino Union Elementary School District (1986) PERB Decision No. 572.); or (7) any other facts which

might demonstrate the employer's unlawful motive. (Novato; North Sacramento School District, supra, PERB Decision No. 264.)

Evidence of adverse action is also required to support a claim of discrimination or reprisal under the Novato standard. (Palo Verde Unified School District (1988) PERB Decision No. 689.) In determining whether such evidence is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (Ibid.) In a later decision, the Board further explained that:

The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment. [Newark Unified School District (1991) PERB Decision No. 864; emphasis added; footnote omitted.]

You have established that you engaged in protected activity; you filed PERB charges and grievances. However, you have not demonstrated "nexus"; your charge does not present sufficient facts to demonstrate that the notice of termination was motivated by the protected activity.

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 that 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 July 24, 2003, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Bernard McMonigle
Regional Attorney

BMC