STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ROSA MONTOYA & SALINAS VALLEY FEDERATION OF TEACHERS, AFT LOCAL 1020, AFL-CIO, Charging Parties, v. SALINAS UNION HIGH SCHOOL DISTRICT, Respondent.	Case No. SF-CE-2326-E PERB Decision No. 1692 September 17, 2004

Appearances: Law Offices of Robert J. Bezemek by Laura Ziegler Davis, Attorney, for Rosa Montoya & Salinas Valley Federation of Teachers, AFT Local 1020, AFL-CIO; Lozano Smith by Sarah Levitan Kaatz, Attorney, for Salinas Union High School District.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (Board) on appeal by Rosa Montoya (Montoya) and Salinas Valley Federation of Teachers, AFT Local 1020, AFL-CIO (Federation) (collectively, Charging Parties) of a Board agent's dismissal (attached) of its unfair practice charge. The charge alleged that the Salinas Union High School District (District) violated the Educational Employment Relations Act (EERA)[1] by retaliating against Montoya because of her protected activities. Montoya and the Federation alleged that this conduct constituted a violation of EERA section 3543.5(a) and (b).

The Board has reviewed the entire record, including the unfair practice charge, the warning and dismissal letters, Charging Parties' appeal and the District's response. The Board

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

finds the Board agent's dismissal to be free of prejudicial error and adopts it as a decision of the Board itself.

ORDER

The unfair practice charge in Case No. SF-CE-2326-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Neima joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1022
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June 11, 2003

Pat Lerman, Field Represenative
Salinas Valley Federation of Teachers
7949 Wren Avenue, Suite A
Gilroy, CA 95020

Re: Rosa Montoya & Salinas Valley Federation of Teachers, AFT Local 1020, AFL-CIO v. Salinas Union High School District
Unfair Practice Charge No. SF-CE-2326-E
DISMISSAL LETTER

Dear Ms. Lerman:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 26, 2003. Rosa Montoya & Salinas Valley Federation of Teachers, AFT Local 1020, AFL-CIO alleges that the Salinas Union High School District violated the Educational Employment Relations Act (EERA)[1] by scheduling a performance evaluation because Ms. Montoya exercised protected rights.

I indicated to you in my attached letter dated May 14, 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 May 21, 2003, the charge would be dismissed. I later extended this deadline two times to June 6, 2003.

On June 6, 2003, Charging Party's representative, Pat Lerman, faxed me a letter regarding this charge. The letter was not filed as an amended charge and not served on the Respondent. In order to review Charging Party's additional arguments herein, I have attached Charging Party's letter to this dismissal.

The relevant facts are as follows. The District and Federation are parties to a collective bargaining agreement which expires on June 30, 2003. Article III, Grievance Procedure, provides as pertinent part:

[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.

> **Level II**: In the event that an employee cannot resolve the grievance at the informal step, the employee may appeal the grievance within ten (10) days of the decision at the informal level. S/he shall state and acknowledge in writing the nature of the grievance, the provision(s) of the Agreement alleged to have been violated and the remedy sought, and file it with the Principal or division head. The Principal or division head shall have ten (10) days in which to respond to the appeal. The employee, upon request, shall be entitled to a conference with the Principal or division head at a time and place mutually agreeable to both parties. . . .
>
> **Level III**: If the employee cannot resolve the grievance at Level II, the employee may appeal the grievance within ten (10) days of the receipt of the written decision of the Principal or Division Head at Level II. The employee shall state and acknowledge in writing the nature of the grievance, the reason(s) for the appeal and the remedy sought, and file it, together with a copy of the written decision of the Principal or department head, with the Superintendent or his/her designee. . . .

With regard to time limitations, Article III, Section C.7 provides as follows:

> Failure to appeal a decision within the specified time limits shall be deemed acceptance of the decision.

On May 9, 2002, Ms. Montoya received her 2001-2002 annual evaluation. Ms. Montoya's evaluation was summarized as proficient, except with regard to Required Duties and Professional Responsibilities. Ms. Montoya received an "Unsatisfactory" rating in this category as she failed to attend any departmental staff meetings for the entire year.

On May 15, 2002, Ms. Montoya met with her evaluator Ms. Mortensen. This meeting was considered a Level I-Informal grievance meeting. Ms. Montoya alleged during this meeting that the District failed to meet contractual time limits in issuing her evaluation. Ms. Mortensen did not agree that the contract had been violated. As Ms. Montoya was not satisfied with the Ms. Mortensen's decision, she stated she would elevate the grievance to Level II.

On May 24, 2002, Ms. Montoya met with Principal Candy McCarthy and Ms. Mortensen, as part of the Level II procedures. On May 31, 2002, Ms. Montoya sent a memo to Principal McCarthy and Ms. Mortensen regarding the Level II meeting over her evaluation. On June 14, 2002, Principal McCarthy and Ms. Montoya met again at Level II, to discuss the grievance. On that same date Principal McCarthy issued a Level II response which states in relevant part as follows:

> Paragraph One of your grievance refers to the fact that Mrs. Mortensen did not meet with you for the post conference and final evaluation until May 15, 2002. Therefore, the contractual timelines for the completion of your evaluation were not met. I agreed that the timelines were not met and, therefore, that your evaluation was not valid for the 2001-2002 school year. I said that, as a consequence of the missed deadlines, the 2001-2002 evaluation would be destroyed and that you would be evaluated again in 2002-2003.
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> * * * * *
>
> Finally, I am in agreement that your evaluation for the 2001-2002 school year was not completed within the contractual timelines. I am willing to eliminate this evaluation and have you be evaluated in the 2002-2003 school year.

Neither the Federation nor Ms. Montoya filed a Level III grievance, and as such, the decision was considered final pursuant to Article III, Section C.7.

On September 27, 2002, Principal McCarthy reminded Ms. Montoya that she would be reevaluated for the 2002-2003 school year.

Based on the above stated facts and those provided in the original charge, the charge still fails to state a prima facie violation of the EERA, for the reasons provided below.

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.)

Charging Party contends Principal McCarthy's Level II response is "an offer" and not a specific statement of remedy. However, Principal McCarthy's response is clearly a response to the grievance at Level II, and facts provided fail to demonstrate Ms. Montoya or the Federation pursued the grievance to Level III. As such, the Level II decision to remove the grievance is final, and thus begins the statute of limitations.

Charging Party also contends Ms. Montoya did not see the Level II response until the beginning of the Fall semester. However, facts provided fail to demonstrate Ms. Montoya then attempted to file a Level III grievance. Moreover, as Ms. Montoya met with Principal McCarthy on June 14, 2002, regarding the Level II response, Ms. Montoya was aware that a decision needed to be rendered within ten (10) days of this meeting. As Ms. Montoya failed to

file a Level III grievance, the Level II response is final and binding on the parties. Ms. Montoya thus knew in early July of the District's final decision.

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

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

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 _____
Kristin L. Rosi
Regional Attorney

Attachment

cc: Kristina Markey

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
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May 14, 2003

Patricia Lerman, Field Representative
Salinas Valley Federation of Teachers
7949 Wren Avenue, Suite A
Gilroy, CA 95020

Re: Rosa Montoya & Salinas Valley Federation of Teachers, AFT Local 1020, AFL-CIO v. Salinas Union High School District
Unfair Practice Charge No. SF-CE-2326-E
WARNING LETTER

Dear Ms. Lerman:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 26, 2003. Rosa Montoya & Salinas Valley Federation of Teachers, AFT Local 1020, AFL-CIO alleges that the Salinas Union High School District violated the Educational Employment Relations Act (EERA)[1] by scheduling a performance evaluation because Ms. Montoya exercised protected rights.

Investigation of the charge revealed the following. The Federation is the exclusive representative for the District's certificated employees. Ms. Montoya is an English as a Second Language teacher and the Federations' Building Representative at Alisal High School. As a union representative, Ms. Montoya has filed a number of grievances on behalf of the Federation.

On May 9, 2002, Ms. Montoya received her evaluation for the 2001-2002 school year. Ms. Montoya's evaluation was summarized as proficient, except with regard to Required Duties and Professional Responsibilities. Ms. Montoya received an "Unsatisfactory" rating in this category as she failed to attend any departmental staff meetings for the entire year.

On May 15, 2002, Ms. Montoya met with evaluator Ms. Mortensen. During this meeting, Ms. Montoya indicated she would be filing a grievance over her evaluation, alleging the District failed to meet contractual time limits and failed to attach relevant information to the evaluation.

[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.

On May 24, 2002, Ms. Montoya met with Prinicipal Candy McCarthy and Ms. Mortensen to discuss Ms. Montoya's grievance. This meeting was considered a Step II grievance meeting by the parties, as indicated by Ms. Montoya's May 31, 2002, response to the meeting. In this response, Ms. Montoya states as follows:

> I had met with Ms. Mortensen on May 15, 2002 to have the post-conference and to sign my final evaluation. You said at that time that all evaluates who grieved their evaluation due to timeline (sic) would be evaluated again next year.

On June 14, 2002, Ms. McCarthy issued a Step II response. The response states in relevant part:

> Paragraph One of your grievance refers to the fact that Mrs. Mortensen did not meet with you for the post conference and final evaluation until May 15, 2002. Therefore, the contractual timelines for the completion of your evaluation were not met. I agreed that the timelines were not met and, therefore, that your evaluation was not valid for the 2001-2002 school year. I said that, as a consequence of the missed deadlines, the 2001-2002 evaluation would be destroyed and that you would be evaluated again in 2002-2003.
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> * * * * *
>
> Finally, I am in agreement that your evaluation for the 2001-2002 school year was not completed within the contractual timelines. I am willing to eliminate this evaluation and have you be evaluated in the 2002-2003 school year.

On September 27, 2002, Ms. McCarthy reminded Ms. Montoya that should would be reevaluated during the 2002-2003 school year.

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

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.)

Herein, Ms. Montoya was informed on June 14, 2002, that she would be reevaluated. As such, the timeline began to run on June 14, 2002. As this charge was filed March 26, 2003, the charge is untimely filed. Ms. McCarthy's subsequent restatement of the reevaluation does not start the statute of limitations anew, as Ms. Montoya had actual knowledge of the decision in June 2002. As such, the charge must be dismissed as untimely.

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 May 21, 2003, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Kristin L. Rosi
Regional Attorney

KLR