STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

UNITED TEACHERS OF LOS ANGELES, Charging Party, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-4996-E PERB Decision No. 1929 November 16, 2007

Appearance: United Teachers Los Angeles Adult and Occupational Education Committee by Ernest Kettenring, Chair, for United Teachers of Los Angeles.

Before Shek, McKeag and Rystrom, Members.

DECISION

SHEK, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by United Teachers of Los Angeles (UTLA) of the dismissal of its unfair practice charge. The unfair practice charge alleged that the Los Angeles Unified School District (District) violated sections 3543(a), 3543.1(a) and (b), 3543.2(a), and 3543.5(a), (b), and (d) of the Educational Employment Relations Act (EERA),[1] by retaliating against two district-wide elected representatives of adult education teachers, Ernest Kettenring (Kettenring) and Mark Wutschke (Wutschke), for engaging in protected activities.

The Board has reviewed the entire record in this case, including but not limited to the unfair practice charge, the District's position statement, the first amended unfair practice charge, the Board agent's warning letter and notice of dismissal and deferral to arbitration, and

[1]EERA is codified at Government Code section 3540, et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

UTLA's appeal of the dismissal. The Board hereby dismisses the unfair practice charge based on the following discussion.

BACKGROUND

The Unfair Practice Charge

In its unfair practice charge filed on September 13, 2006, UTLA stated that Kettenring and Wutschke had engaged in protected activities, namely, representing members, advocating union positions, and organizing bargaining unit members. However, the charge failed to provide details about the alleged protected activities.

UTLA alleged that "from June to September 2005," the District engaged in a series of reprisal acts against Kettenring and Wutschke, in relation to the District's investigation of a fellow employee's complaints of harassment and discrimination against Kettenring and Wutschke. The alleged reprisal acts included: (1) "repeated issuance of complaints of harassment and discrimination in the absence of any evidence of such"; (2) breach of confidentiality during its investigation into the discrimination and harassment complaints, by soliciting the names of union activists under the guise of confidentiality, then turning over those names to the school principal; (3) violation of Kettenring's and Wutschke's Weingarten [2] rights; (4) issuance by the District's Equal Opportunity Section of critical material against Kettenring and Wutschke after its own investigation established the charges to be unfounded; and (5) involuntary transfer of Kettenring and Wutschke from their assigned work location.

UTLA further alleged that the charge was timely filed since Kettenring and Wutschke had filed a grievance related to the allegedly retaliatory involuntary transfer on September 19, 2005. UTLA contended that the statute of limitation was tolled during the time that the parties

[2] NLRB v. Weingarten, Inc. (1975) 420 U.S. 251 [88 LRRM 2689] (Weingarten).

had attempted to resolve the charge through the grievance machinery, a process that had been continuing from September 19, 2005 through March 29, 2006.

UTLA filed an amended unfair practice charge on December 6, 2006, alleging that the following facts would toll the statute of limitations for allegations other than the alleged retaliatory transfer: (1) that UTLA's attorney was notified on March 22, 2006, of the filing of a February 24, 2006 harassment and discrimination complaint against Kettenring and Wutschke by a fellow teacher; (2) that Kettenring and Wutschke filed Grievance #2005-101612 on August 24, 2005, amended on October 19, 2005, regarding the District's alleged breach of confidentiality during its investigation into the alleged discrimination complaint, and the District's denial of Kettenring's and Wutschke's Weingarten rights; and (3) that Grievance #2006-101999, filed on March 24, 2006, addressed the alleged issuance of critical material by the District's Equal Opportunity Section after its own investigation established the charges to be unfounded.

The District's Position Statement

In its position statement, the District argued that UTLA had failed to plead facts with sufficient specificity to state a prima facie case. Additionally, the District argued, "To the extent the Union is referencing the conference memoranda or any notices to either teacher, such matters have been litigated and/or resolved," as such matters were already the subject of two prior PERB charges, Case No. LA-CE-4878-E and Case No. LA-CE-4909-E.[3]

[3]From our review, Case No. LA-CE-4878-E was pending before PERB at the time of this appeal; and Case No. LA-CE-4909-E was closed on June 30, 2006 subsequent to a withdrawal of the charge. The underlying charges of these two cases were based upon at least some of the same complaints and alleged protected activities as the present case, but involved different alleged adverse actions from the present case. The District has not alleged how the other cases have any preclusive effect on this case. Because we have concluded that the charge in this case must be dismissed, it is unnecessary for us to further address this defense.

Board Agent's Dismissal and Deferral to Arbitration

The Board agent stated in the warning letter dated November 21, 2006, that the retaliatory involuntary transfer allegation was timely filed because on September 19, 2005, UTLA filed a grievance alleging that the District involuntarily transferred Kettenring in retaliation for his union activities. The grievance progressed through the parties' mutually agreed upon dispute resolution process, until March 29, 2006. The District stated in its October 10, 2006, response that the grievance was still pending at that time. The Board agent concluded that based on the facts and Section 3541.5, this allegation should be deferred to arbitration under the applicable collective bargaining agreement (CBA) and dismissed in accordance with PERB Regulation[4] 32620(b)(5).

The Board agent issued a notice of dismissal and deferral to arbitration on December 27, 2006, stating that all of the allegations stated in the original unfair practice charge and the amended charge, except for those covered by the grievance UTLA filed on September 19, 2005, and the harassment and discrimination complaint filed against Kettenring and Wutschke by a fellow teacher on February 24, 2006, were untimely. The Board agent stated that UTLA failed to provide "a date certain for the occurrence of" the alleged retaliatory investigation and the discrimination complaints. Therefore, the Board agent found that it was not possible for PERB to calculate whether the charge was timely filed as to these allegations, and that the allegations in the amended charge did not state a prima facie case of violations occurring within the statute of limitations.

With regard to the allegation that UTLA's attorney was notified on March 22, 2006, of the filing of a harassment and discrimination complaint by a fellow employee against Kettenring and Wutschke on February 24, 2006, the Board agent found the District's

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

investigations of the complaints was not sufficient to state a prima facie case, because the charge did not allege that the fellow employee was a supervisor or agent of the District at the time she filed the complaint.

UTLA's Appeal

Amongst UTLA's contentions on appeal to the Board is the argument that the statute of limitations was tolled for the allegations[5] contained in the unfair practice charge, due to two grievances filed by Kettenring and Wutschke, on August 24, 2005 (amended on October 19, 2005), and on March 24, 2006, respectively. UTLA asserts that the parties' CBA requires grievances to be filed within 15 days of the occurrence of a violation. It is "implicit" by the CBA, UTLA argues, that the grievance has to be filed within 15 days of the alleged violations. UTLA further contends that the District's acceptance of the grievances without challenging their timeliness showed that the grievances were timely filed, and subsequently tolled the statute of limitations for the filing of the unfair practice charge. UTLA therefore challenges the Board agent's finding that "it is not possible for PERB to calculate whether the charge was timely filed," without evidence pertaining to the dates of the occurrences of the alleged retaliatory events.

DISCUSSION

The issue to be determined here is whether the CBA provision on the time limit for the filing of grievances can be applied implicitly to satisfy the charging party's burden of alleging, in a "clear and concise statement of facts," when the acts of reprisal took place. In Sacramento

[5]Included in these allegations were the District's issuance of complaints of harassment and discrimination against Kettenring and Wutschke; abuse of the process for investigating such complaints; violation of Kettenring's and Wutschke's Weingarten rights; and issuance of critical material despite the Equal Opportunity Section investigation finding the complaints to be unfounded; all in retaliation for the protected activity of Kettenring and Wutschke.

City Unified School District (2001) PERB Decision No. 1461 (Sacramento City Unified School District), the Board adopted a warning letter that cited the following rule:

> 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.) [Sacramento City Unified School District, warning letter, at p. 8.]

Additionally, the charging party has the burden of alleging facts showing that the unfair practice charge was timely filed. (Tehachapi Unified School District (1993) PERB Decision No. 1024; City of Santa Barbara (2004) PERB Decision No. 1628-M (City of Santa Barbara).) The Board held that by failing to allege the date of a meeting at which an alleged violation occurred, the charging party had failed to demonstrate that the charge was timely. (City of Santa Barbara, warning letter, at p. 4.)

In this case, UTLA has failed to satisfy its burden of stating sufficient facts to establish that the alleged unfair practice occurred no more than six months prior to the filing of the charge. (Sec. 3541.5(a)(1).) UTLA did not provide the dates of the occurrences of the alleged retaliatory events, which were the subjects of the grievances filed on August 24, 2005 (amended on October 19, 2005) and March 24, 2006, respectively. Additionally, UTLA has failed to state sufficient facts to show that the six-month limitations "have been tolled during the time it took the charging party to exhaust the grievance machinery." (Sec. 3541.5 (a)(2).) UTLA did not state unambiguously when the grievance procedure had ceased, if at all, for the two above-stated grievances. On this basis, we concur with the Board agent's finding that absent a concise statement of the dates of the occurrences of the alleged violations, and the date of the exhaustion

of the grievance procedure, the timeliness of the allegations based upon the two aforementioned grievances cannot be determined.

ORDER

Consistent with this decision, the allegation of retaliatory involuntary transfer in Case No. LA-CE-4996-E is hereby dismissed and deferred to arbitration under the applicable collective bargaining agreement. The remainder of the unfair practice charge is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Rystrom joined in this Decision.