STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

GARY LEE SCHOESSLER, Charging Party, v. YUBA COMMUNITY COLLEGE DISTRICT, Respondent.	Case No. SA-CE-2396-E PERB Decision No. 1936 December 31, 2007

Appearances: Chapman, Popik & White by Raquel A. Lacayo-Valle, Attorney, for Gary Lee Schoessler; Atkinson, Andelson, Loya, Ruud & Romo by Scott K. Holbrook, Attorney, for Yuba Community College District.

Before Neuwald, Chair; Wesley and Rystrom, Members.

DECISION

NEUWALD, Chair: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by Gary Lee Schoessler (Schoessler) of a Board agent's dismissal of his unfair practice charge. The charge alleged that the Yuba Community College District (District) violated the Educational Employment Relations Act (EERA)[1] by deciding not to renew Schoessler's contract in retaliation for commenting on and participating in a disciplinary process involving another District employee.[2] Schoessler alleged that this conduct constituted a violation of EERA section 3543.5(a).

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

[2]Schoessler also alleged that the District further retaliated against him, after he retired, by refusing to compensate him for unused vacation credits. Schoessler did not appeal the dismissal of this allegation, as such, we do not discuss it here and the parties are bound by the Board agent's dismissal.

Based on a review of the appeal and entire record, the Board affirms the dismissal for the reasons discussed below.

BACKGROUND

Schoessler began his career at the District in 1989 as a part-time administrator and coordinator of the Probation Officer Academy. In 1992, Schoessler entered into a written employment agreement with the District as an educational administrator. He held the position of director of Public Safety programs. The District renewed Schoessler's employment contract each year for 14 years. On February 15, 2006, the Board of Trustees decided not to renew Schoessler's contract as an educational administrator. Albert Alt (Alt), director of Personnel Services and Human Resources Development, informed Schoessler of the Board of Trustee's decision in a meeting on February 16, 2006. Schoessler requested that the Board of Trustees delay its decision so that he could have counsel represent him. He received no response to his request. Schoessler then asked Alt to provide him with a statement of the reasons for the decision. He received a response on February 28, 2006. In this letter, Alt informed Schoessler that the Board of Trustees, by unanimous vote, decided not to renew his contract pursuant to Education Code section 72411,[3] but was offering him a probationary faculty position pursuant

[3]Education Code section 72411 provides, in pertinent part:

> (a) Every educational administrator shall be employed, and all other administrators may be employed, by the governing board of the district by an appointment or contract of up to four years in duration. The governing board of a community college district, with the consent of the administrator concerned, may at any time terminate, effective on the next succeeding first day of July, the term of employment of, and any contract of employment with, the administrator of the district, and reemploy the administrator, on any terms and conditions as may be mutually agreed upon by the board and the administrator, for a new term to commence on the effective date of the termination of the existing term of employment.

to Education Code section 87458.[4] The probationary faculty position represented a 40 percent

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(b) If the governing board of a district determines that an administrator is not to be reemployed by appointment or contract in his or her administrative position upon the expiration of his or her appointment or contract, the administrator shall be given written notice of this determination by the governing board. For an administrator employed by appointment or contract, the term of which is longer than one year, the notice shall be given at least six months in advance of the expiration of the appointment or contract unless the contract or appointment provides otherwise. For every other administrator, notice that the administrator may not be reemployed by appointment or contract in his or her administrative position for the following college year shall be given on or before March 15.

(c) If the governing board fails to reemploy an administrator by appointment or contract in his or her administrative position and the written notice provided for in this section has not been given, the administrator shall, unless the existing appointment or contract provides otherwise, be deemed to be reemployed for a term of the same duration as the one completed with all other terms and conditions remaining unchanged.

[4]Education Code section 87458 states:

A person employed in an administrative position that is not part of the classified service, who has not previously acquired tenured status as a faculty member in the same district and who is not under contract in a program or project to perform services conducted under contract with public or private agencies, or in other categorically funded projects of indeterminate duration, shall have the right to become a first-year probationary faculty member once his or her administrative assignment expires or is terminated if all of the following apply:

(a) The process by which the governing board reaches the determination shall be developed and agreed upon jointly by representatives of the governing board and the academic senate, and approved by the governing board. The agreed upon process shall include reasonable procedures to ensure that the governing board relies primarily upon the advice and judgment of the academic senate to determine that the administrator possesses the minimum qualifications for employment as a faculty member. The process shall further require that the governing board provide the academic senate with an opportunity to present its views to the governing board before the board makes a determination and that the written record of the decision, including the views of the academic senate, shall be available for review pursuant to Section 87358.

reduction in Schoessler's salary. The letter also stated: "You will be confirmed by the Board of Trustees in this position at the March 15, 2006 meeting of the board, should you wish to accept the assignment." Schoessler declined the offer and chose to retire on the expiration of his contract date of June 30, 2006. Schoessler alleges that the District's decision not to renew his contract constituted retaliation because he initiated a report to the president of the District that Alt unfairly disciplined one of Schoessler's employees.[5] Schoessler filed this unfair practice charge on December 28, 2006.

> (b) Until a joint agreement is reached pursuant to subdivision (a), the district process in existence on January 1, 1989, shall remain in effect.
>
> (c) The administrator has completed at least two years of satisfactory service, including any time previously served as a faculty member, in the district.
>
> (d) The termination of the administrative assignment is for any reason other than dismissal for cause.
>
> (e) This section shall apply to every educational administrator whose first day of paid service in the district as a faculty member or an administrator is on or after July 1, 1990. [Emphasis added.]

[5]Schoessler alleged that after he reported the disciplinary issue to the president, all his interactions with Alt were met "with disdain and oppression." For example:

> Mr. Schoessler went to Mr. Alt to deliver several job descriptions he was working on. Mr. Alt angrily threw down the paperwork, accused Mr. Schoessler of 'running wild over there' and said that he was going to put an end to it.

Additionally, shortly thereafter, Schoessler received his first largely negative performance review in 14 years. Alt also nitpicked Schoessler's absence at a monthly management meeting, when typically an absence was addressed through his immediate supervisor, Rod Beilby. Alt informed Schoessler that if he was going to miss the monthly meeting, Schoessler was to notify not only Alt, but the president's office, the vice president's office, and his immediate supervisor.

BOARD AGENT'S DISMISSAL

The Board agent found the charge untimely because Schoessler was not terminated from his employment with the District. The Board agent stated:

> Termination of employment is defined as 'a complete severance of the relationship of employer and employee.' (See Black's Law Dict. (8th ed. 2004).) Here, the employer-employee relationship has not been severed as Mr. Schoessler was offered continued employment with the District as a probationary teacher. While Mr. Schoessler was offered a substantially smaller salary and lost his prestige as a Director of Public Safety Programs, these facts alone do not demonstrate a termination. Indeed, even in the constructive discharge context, such a change in work conditions would not be actionable. (Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 1247 ['a demotion, even when accompanied by reduction in pay, does not by itself trigger a constructive discharge'].)

In reaching this conclusion, the Board agent relied on Gavilan Joint Community College District (1996) PERB Decision No. 1177 (Gavilan) noting that "[t]he limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge."

CHARGING PARTY'S APPEAL

Schoessler argues that the Board agent misapplied the statute of limitations:

> Instead of beginning the running of the limitations period on June 30, 2006, the date that Mr. Schoessler was terminated from his employment, the [Board agent] began the running of the limitations period on February 28, 2006, the date that Mr. Schoessler was informed by Dr. Alt that his employment contract would not be renewed. Because of the District's offer of employment to Mr. Schoessler as a first-year probationary faculty member, the [Board agent] mischaracterized the employment action taken by the District as not a complete severance of the employee-employer relationship . . . and more akin to a 'demotion rather than a termination.'

Specifically, Schoessler argues that the Board agent should have applied Regents of the University of California (2004) PERB Decision No. 1585-H (Regents), which held that the

effective date of termination triggers the statute of limitations as opposed to when he was informed of his termination, rather than Gavilan.

OPPOSITION TO APPEAL

The District first argues that Schoessler does not have standing because he was a "confidential" and/or "management" employee. Because the Board agent's dismissal letter did not discuss standing or "raise this issue again", the District contends the dismissal letter adopted all of the reasons set forth in the warning letter which found that Schoessler lacked standing.

Next, the District argues that the unfair practice charge is untimely. Schoessler was not terminated:

> Rather, Mr. Schoessler's one-year contract was not renewed in accordance with the provisions set forth in the contract itself and in Education Code section 72411(b). Specifically, the District's Notice of Release from Administrative Contract, dated February 28, 2006, set forth the reasons for non-renewal of the contract and offered continued employment in a faculty position pursuant to Education Code section 87458. At no time was Mr. Schoessler 'terminated,' 'laid off,' or otherwise denied District employment. [The Board agent] correctly applied *Gavilan* as requiring the sixth-month time limitation set forth in Government Code section 3541.5(a) of the EERA to commence on February 28, 2006 (date of Notice). [Fns. omitted.]

DISCUSSION

Schoessler argues that the Board agent misapplied the statute of limitations. Schoessler alleges that the District terminated him from his employment and, as such, Regents should apply. Applying Regents would make Schoessler's claim timely.[6] In Regents, the Board held

[6]Schoessler filed the unfair practice charge on December 28, 2006, he was given notice on February 16, 2006, and his contract expired on June 30, 2006.

that an unfair practice charge for termination accrues on the date of dismissal.[7] Our analysis, therefore, turns to whether Schoessler's notice of nonrenewal of his administration contract pursuant to Education Code section 72411 and "right to become a first-year probationary faculty member once his or her administrative assignment" terminated is equivalent to a termination under Regents. We find that it is not.

Schoessler was not terminated nor did the District ever sever the employer-employee relationship. Rather, the District offered him a job which it was obligated to do under Education Code section 87458. Had the District intended to "terminate" the employment relationship as argued by Schoessler, the District: (1) could do so at any time; and (2) must follow other statutorily proscribed procedures. (See Ed. Code, sec. 87660, et seq.) Thus, Schoessler was not "terminated" and Regents is inapplicable. Therefore, pursuant to Empire Union School District (2004) PERB Decision No. 1650, Schoessler's charge is untimely and must be dismissed.[8]

[7]The Board relied on the California Supreme Court's decision in Romano v. Rockwell International, Inc. (1996) 14 Cal.4th 479 [59 Cal.Rptr.2d 20] which held that under the Fair Employment and Housing Act (Sec. 12900, et seq.), a cause of action for wrongful termination accrues on the actual date of termination, not on the date when the employee receives notice of his termination.

[8]While the Board agent's warning letter states that Schoessler failed to demonstrate that he had standing to file his charge, Schoessler cured that defect in his April 17, 2007 amended charge. In his amended charge he alleges that he was a supervisory employee under EERA section 3540.1(b), citing to his duties as director of Public Safety Programs and his lack of discretion in making changes to policies or programs without the approval of his supervisors. In evaluating whether a prima facie case has been established, the charging party's essential allegations are deemed true. (San Juan Unified School District (1977) EERB Decision No. 12. [Prior to 1978, PERB was known as the Ed. Employment Relations Bd. (EERB).])

ORDER

The unfair practice charge in Case No. SA-CE-2396-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Wesley and Rystrom joined in this Decision.