STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SABINO JOHN, Charging Party, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-5757-E PERB Decision No. 2331 October 3, 2013

Appearances: Sabino John, on his own behalf; Aram Kouyoumdjian, Assistant General Counsel, for Los Angeles Unified School District.

Before Huguenin, Winslow and Banks, Members.

DECISION[1]

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Sabino John (John) of a dismissal (attached) by the Office of the General Counsel of John's first amended unfair practice charge. The first amended charge alleged, in pertinent part, that the Los Angeles Unified School District (LAUSD) violated section 3543.5, subdivision (a) of the Educational Employment Relations Act (EERA),[2] by

[1] PERB Regulation 32320, subdivision (d), provides: "Effective July 1, 2013, a majority of the Board members issuing a decision or order pursuant to an appeal filed under Section 32635 [Board review of Dismissals] shall determine whether the decision or order, or any part thereof, shall be designated as precedential." Having met none of the criteria enumerated in the regulation, the decision herein has not been designated as precedential. (PERB Regs. are codified at Cal. Code Regs., tit. 8, sec. 31001 et seq.)

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

removing John's name from LAUSD's list of persons with reemployment rights on or about May 2012, in retaliation for John's exercise of rights guaranteed by EERA.[3]

The Board has reviewed the dismissal and the record in light of John's appeal and the relevant law. Based on this review, we find the dismissal and warning letters to be well-reasoned, adequately supported by the record, and in accordance with applicable law. Accordingly, the Board adopts the dismissal[4] and warning letters as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. LA-CE-5757-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Huguenin and Winslow joined in this Decision.

[3] John's initial and first amended charges alleged numerous other violations of law, most of which lie outside PERB's jurisdiction.

[4] On Page 4 of the dismissal letter, the Office of the General Counsel mistakenly references Higher Education Employer-Employee Relations Act (HEERA) section 3571(a) instead of discrimination and retaliation under EERA section 3543.5. With this correction we adopt the warning and dismissal letter as a decision of the Board itself. (HEERA is codified at sec. 3560 et seq.)

STATE OF CALIFORNIA EDMUND G. BROWN JR., Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1139
Fax: (510) 622-1027

February 6, 2013

Sabino John

Re: *Sabino John v. Los Angeles Unified School District*
Unfair Practice Charge No. LA-CE-5757-E
DISMISSAL LETTER

Dear Mr. John:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on November 6, 2012. Sabino John (John or Charging Party) alleges that the Los Angeles Unified School District (District or Respondent) violated the Educational Employment Relations Act (EERA or Act)[1] by removing Charging Party's name from the District's re-employment list.

Charging Party was informed in the attached Warning Letter dated December 14, 2012, 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 that 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 on or before December 28, 2012, the charge would be dismissed. A subsequent request for an extension of time was granted, and a timely amended charge was filed on January 8, 2013.

The Warning Letter explained that the charge failed to establish a prima facie case because there was an insufficient "nexus" between the Charging Party's protected activity and the removal of his name from the District's re-employment list. The only protected activity alleged in the original charge was Charging Party's filing a PERB charge against the District, which was dismissed on November 10, 2010. Because this protected activity concluded more than a year and a half prior to the removal of Charging Party's name from the re-employment list on June 14, 2012, the Warning Letter explained, the charge failed to establish a sufficient nexus.

The amended charge asserts that Charging Party engaged in protected activity in May and June 2012 by seeking the assistance of his union, SEIU Local 99 (SEIU), and by threatening to bring a PERB charge against the District.

[1] EERA is codified at Government Code section 3540 et seq. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of EERA and PERB Regulations may be found at www.perb.ca.gov.

FACTS AS AMENDED

The amended charge alleges that in "May-June 2012," Charging Party appealed to SEIU for assistance in resolving his dispute with the District, and informed SEIU of his intent to file a charge with PERB.

The amended charge further alleges that in May 2012, the District and Julie Holguin (Holguin), the District's Classified Assignments Coordinator, "were informed by union [representatives] . . . that Mr. John was in the process of filing [a] charge . . . against the District. (See exhibit 1, 2, 3, 4, 5)."

The exhibit attached to the amended charge labeled "1, 2, 3, 4, 5" consists of five pages of documents. The first document is a three-page e-mail message from Holguin to Janie Martinez (Martinez), an SEIU representative, dated July 11, 2012. The message states:

> Hi,
>
> His 39-month reemployment rights ended in May.
>
> Julie

The second page of the e-mail message contains what appears to be a screen capture from the District's computer system. It contains a notation indicating that on February 12, 2009, Charging Party was separated from District employment due to "Exhaustion of illness & vacatn [*sic*]."

The second and third pages of the e-mail message contain the original message from Martinez to Holguin, also dated July 11, 2012. The subject line is "#530280 SABINO JOHN - EMPLOYEE STATUS." It states:

> Good Morning Julie,
>
> This member has contacted our office for some assistance in being reinstated.
>
> Can you give me the status and when he was actually separated?

The fourth and fifth pages of Exhibit "1, 2, 3, 4, 5" are a document entitled "Log of Action on Your Issue," which appears to be SEIU's record of communications between Charging Party and SEIU. The log contains nine entries. The first entry, dated April 5, 2012, indicates that Charging Party made a telephone call to SEIU's call center:

> Mr. John called regarding the same issue he is having, it [has] to do with him being separated from district service while he still had vacation time. Juan [gave] Mr. John a call on Monday[.] [H]e called today

> saying that he is getting ready to file PERB charges on the district and since he [has] a union he wants to know what the union is going to do to assist him getting his job back. I think he exhausted his 39 month[] reemployment rights.

The next three entries, on June 6, June 15, and June 22, 2012, indicate that Charging Party again contacted SEIU on each of those dates seeking assistance. Two entries on June 25 indicate that an SEIU representative made two attempts to contact Charging Party that day, and was successful on the second attempt. An entry on July 11 indicates that Charging Party again contacted SEIU requesting assistance, specifically to obtain "something in writing" regarding his removal from the re-employment list. Two additional entries on July 11 show that Martinez sent an e-mail message to Holguin requesting information on Charging Party's status, and that Holguin responded the same day.

The amended charge also alleges that on June 14, 2012, Charging Party received a telephone call informing him that "Julie" ordered the "rejection of his name from the re-employment list and suspension of re-employment right protocol."[2]

Personnel Commission Rules

The amended charge also includes excerpts from the District's Personnel Commission rules. Rule 740 discusses re-employment rights, and states, in section C.2., that "[r]eemployment rights exist for 39 months." It provides only one exception, pursuant to Education Code section 45298, in which the Personnel Commission "may grant the privilege of return to former class for up to 24 months after the 39-month reemployment period" for employees who have accepted a voluntary demotion.

Rule 600 establishes the procedures for removal of an individual's name from an eligibility list. The procedures list 12 reasons for Personnel Commission staff to do so, including, inter alia, advocating the overthrow of the United States government, making false statements on an application form, and failing to demonstrate work eligibility. The rules state that an individual who is removed for any of the stated reasons "shall be notified in writing." Rule 600 does not address the removal of an employee due to the expiration of his or her re-employment rights.

Rule 901 discusses "disciplinary terms and actions," and provides, in accordance with Education Code section 45116, that individuals who are subject to disciplinary actions are entitled to notice and an opportunity to challenge such actions.

---

[2] The original charge alleged only that Charging Party was informed in a telephone conversation that his "name is being removed from the eligible re-employment list."

DISCUSSION

I. Charging Party's Burden

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." The charging party should include sufficient facts 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 and speculation are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

II. Discrimination/Retaliation

To demonstrate that an employer discriminated or retaliated against an employee in violation of HEERA section 3571(a), the charging party must show that: (1) the employee exercised rights under HEERA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).) In determining whether evidence of adverse action is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*Palo Verde Unified School District* (1988) PERB Decision No. 689.) 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.)

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 (*City of Torrance* (2008) PERB Decision

No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the employer's failure to offer the employee justification at the time it took action (*Oakland Unified School District* (2003) PERB Decision No. 1529) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive. (*North Sacramento School District*, *supra*, PERB Decision No. 264; *Novato*, *supra*, PERB Decision No. 210.)

A. Protected Activity and Adverse Action

The amended charge sufficiently alleges that Charging Party engaged in protected activity by seeking union assistance in his dispute with the District. Charging Party also sufficiently alleges that the District took adverse action against him by removing his name from the re-employment list.

B. Employer Knowledge

The amended charge states, in conclusory fashion, that in May 2012 the District and Holguin "were informed" by SEIU representatives of Charging Party's intent to file a PERB charge, and that Charging Party had sought union assistance.

Charging Party has not provided any facts suggesting that SEIU contacted the District at any time prior to June 14, 2012, when Charging Party was informed of his removal from the re-employment list. Rather, in support of these assertions, the amended charge merely cites "exhibit 1, 2, 3, 4, 5." None of the cited documents, or any other documents provided by Charging Party, reflect any communications between SEIU and the District prior to June 14, 2012.

In fact, the only communications between SEIU and the District appear to have been on July 11, 2012, nearly a month later. An allegation that the employer obtained knowledge of protected activity after the adverse action occurred is insufficient to establish a prima facie case of retaliation. (Cf. *Santa Clarita Community College District* (1996) PERB Decision No. 1178 [no unlawful discrimination where employee's only protected activity occurred after the adverse action].) Therefore, Charging Party has failed to meet his burden to establish that the District had knowledge of his protected activity before it removed him from the re-employment list.

C. Nexus

Even if the amended charge sufficiently establishes the District's knowledge of Charging Party's protected activity, Charging Party must also establish a nexus between his protected activity and his removal from the re-employment list. However, the amended charge fails to allege any facts, other than close temporal proximity, to establish the required nexus.

1. Departure from Established Procedures

Charging Party asserts that the District departed from its established procedures and past practices by failing to provide written notice of his removal from the re-employment list, and failing to give him an opportunity to challenge that removal. Charging Party cites Personnel Commission Rule 901, Education Code section 45116, and *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194 (*Skelly*) as establishing his procedural due process rights to written notice and an opportunity to challenge his removal from the re-employment list.

The amended charge does not establish that the District was required to provide written notice and an opportunity to challenge an individual's removal from the re-employment list under the circumstances presented here. The Education Code sections and Personnel Commission Rules cited by Charging Party all concern the procedures for removing an individual from the re-employment list because of misconduct. *Skelly* establishes the procedural safeguards a public employer is required to follow when taking disciplinary action against an employee. Thus, it appears that these authorities do not apply in this situation.[3]

Nor does the amended charge establish that the District had a past practice of providing written notice and an opportunity to challenge an individual's removal from the re-employment list upon expiration of the individual's 39-month re-employment rights. Charging Party simply states that the District changed its past practice. As a mere legal conclusion, this statement does not meet Charging Party's burden of alleging sufficient facts to state a prima facie case. (*United Teachers-Los Angeles (Ragsdale), supra*, PERB Decision No. 944.) Therefore, it does not appear that the District departed from its established procedures or past practices by failing to provide Charging Party written notice and an opportunity to challenge his removal from the re-employment list.

The amended charge also alleges a departure from established procedures because Holguin failed to recuse herself due to a conflict of interest. Although Charging Party does not explain the nature of Holguin's conflict of interest, it appears to arise from the fact that Holguin was one of the defendants in the discrimination lawsuit filed by Charging Party, and that she would have been released from liability had Charging Party agreed to the proposed settlement agreement that was sent to Charging Party's counsel on January 11, 2011.

Charging Party has not alleged any facts suggesting that Holguin had an obligation to recuse herself from dealing with Charging Party. The Personnel Commission Rules cited by Charging Party do not address conflicts of interest. Therefore, the amended charge does not establish that the District departed from its established procedures or past practices through Holguin's involvement in Charging Party's removal from the re-employment list in June 2012.

[3] Although Charging Party appears to believe that he was removed from the re-employment list partially based on untrue negative information contained in his personnel file, he has not alleged any facts supporting a conclusion that his removal was based on misconduct.

2. Failure to Provide Explanation and Offering a Vague Explanation

The amended charge also asserts that the District failed to provide an explanation at the time it removed him from the re-employment list. As discussed in the Warning Letter, the District notified Charging Party by letter in February 2009 that his re-employment rights would expire in 39 months if he were not reinstated within that time. Charging Party appears to take issue with the fact that the District did not inform him when his re-employment rights actually expired, in May 2012. However, Charging Party has not alleged any facts establishing that the District was required to provide further notice, written or otherwise, after his re-employment rights expired, or that the District had a practice of doing so. Where an employer is not required to provide, and in practice does not provide, an explanation for its actions, the failure to provide an explanation is not sufficient to establish nexus. (*Lake Elsinore Unified School District* (2012) PERB Decision No. 2241.) Therefore, under the circumstances alleged, the District's failure to notify Charging Party of his removal from the re-employment list is not evidence of nexus.

The amended charge also asserts that the District offered a "vague justification" for its actions, in the form of Holguin's July 11, 2012 e-mail message to Martinez. However, Holguin stated that Charging Party's re-employment rights expired in May 2012, which was 39 months after February 2009. Thus, Holguin's message was consistent with the February 2009 letter. Moreover, Holguin's message appears to include the District's computer record showing that Charging Party was separated from District employment in February 2009. Although Holguin's message was brief, it explained both the reason for and the timing of the District's action. Therefore, it does not appear to be vague. As a result, the amended charge does not establish that the District offered a vague explanation for its action.

Because the amended charge fails to establish either (1) the District's knowledge of Charging Party's protected activity or (2) a nexus between the protected activity and Charging Party's removal from the re-employment list, Charging Party has failed to establish a prima facie case of discrimination or retaliation. Therefore, this allegation is dismissed.

III. Proposed Waiver of Re-Employment Rights

The original charge alleged that the District had threatened, intimidated, or coerced Charging Party by proposing a settlement agreement containing a waiver of his re-employment rights with the District. The Warning Letter explained that this allegation was untimely because the agreement was sent to Charging Party's counsel on January 11, 2011.

In the amended charge, Charging Party acknowledges that the proposed agreement "was first discovered" in January 2011, but appears to assert that this allegation is timely because it was not until June 2012 that the District had the opportunity to "enforce the terms of [the] 'waiver.'"

Charging Party appears to argue for the application of the continuing violation doctrine. Under this doctrine, a violation within the statute of limitations period may revive an earlier violation

of the same type. (*Rio Teachers Association (Lucas)* (2011) PERB Decision No. 2157.) However, the later conduct must stand on its own as an independent violation, without reference to the prior violation. (*County of Orange* (2011) PERB Decision No. 2155-M.)

The allegations in the charge are insufficient to invoke the continuing violation doctrine. As discussed above, Charging Party has failed to establish a prima facie case that the District retaliated or discriminated against him because of his protected activity when it removed him from the re-employment list in June 2012. Because this conduct, as alleged in the charge, is not a violation of EERA, it cannot revive the prior alleged violation in January 2011. Therefore, the continuing violation doctrine does not apply, and the allegation regarding the District's January 2011 settlement proposal is dismissed.

IV. Additional Allegations

In addition to the above violations, the amended charge alleges that (1) the District denied Charging Party procedural due practices; (2) the District refused to issue a reason for the action it took; (3) the District changed its past employment process; and (4) Holguin had a conflict of interest and failed to recuse herself. Although these allegations are discussed above in section II.C. as possible evidence of nexus, the amended charge also appears to assert them as independent unfair practices.

As explained in greater detail in the Warning Letter, PERB's jurisdiction is limited to the enforcement of EERA and other public sector labor statutes. Because PERB lacks jurisdiction to enforce the provisions of United States Constitution, the Education Code, and the District's Personnel Commission Rules, the allegations in the amended charge that concern these violations, (1), (2), and (4), above, are dismissed.

The Warning Letter also explained that, as an individual, Charging Party lacks standing to assert a claim that the District implemented a unilateral change in its terms and conditions of employment. (*Los Angeles Unified School District* (2009) PERB Decision No. 2073.) For this reason, allegation (3) is also dismissed.

Right to Appeal

Pursuant to PERB Regulations, Charging Party 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. (Cal. Code Regs., tit. 8, § 32635, subd. (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 during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB 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. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
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. (Cal. Code Regs., tit. 8, § 32635, subd. (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 Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, § 32135, subd. (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. (Cal. Code Regs., tit. 8, § 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,

M. SUZANNE MURPHY
General Counsel

By _____
Joseph Eckhart
Regional Attorney

Attachment

cc: Aram Kouyoumdjian, Assistant General Counsel

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1139
Fax: (510) 622-1027

December 14, 2012

Sabino John

Re: *Sabino John v. Los Angeles Unified School District*
Unfair Practice Charge No. LA-CE-5757-E
WARNING LETTER

Dear Mr. John:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on November 6, 2012. Sabino John (John or Charging Party) alleges that the Los Angeles Unified School District (District or Respondent) violated the Educational Employment Relations Act (EERA or Act)[1] by removing Charging Party's name from the District's re-employment list.

FACTS

The following facts are taken from Charging Party's charge and the documents attached to the charge, and are assumed to be true for purposes of this warning letter:

Employment and Workers' Compensation Claim

In 2006, Charging Party was separated from his regular classroom assignment with the District and was reclassified as a school security guard. In January or February 2007, Charging Party was accused of child abuse and endangerment. He returned to his regular classroom assignment sometime between September and November 2007. A week after he returned, Charging Party was assigned to a student in a motorized wheelchair. Two weeks later, he was hit in the back of the head with a blunt object.

Charging Party filed a Workers' Compensation claim in June or July of 2008. A hearing was held in May 2009, at which the allegations of child endangerment were introduced. On June 29, 2009, an administrative law judge issued an award denying Charging Party Workers' Compensation benefits. That award was rescinded, and Charging Party was subsequently awarded further medical treatment, reimbursement of costs and self-procured medical expenses, and attorneys' fees.

[1] EERA is codified at Government Code section 3540 et seq. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the EERA and PERB Regulations may be found at www.perb.ca.gov.

Re-Employment

On February 13, 2009, Charging Party's name was placed on the District's re-employment list. By letter dated February 25, 2009, the District informed Charging Party that, pursuant to the relevant collective bargaining agreement, his name would remain on that list for 39 months, and that if he was not re-employed within that time, his re-employment rights would be terminated.

On February 3, 2012, Charging Party's physician released him to return to work. By letter dated April 5, 2012, the District acknowledged Charging Party's request to seek re-employment and requested medical documentation of his ability to perform the essential functions of the position.

On April 25, 2012, Charging Party was denied the opportunity to review one of his personnel files, which contains untrue information about him.

On June 13, 2012, Charging Party sent some medical documentation to the District by fax, and requested an extension of time "to comply with standards."

On June 14, 2012, an agent of the District contacted Charging Party by telephone and informed him that his name was being removed from its re-employment list. Charging Party did not receive written notice regarding the reason for this action. The removal was based on the untrue information contained in Charging Party's personnel file.

EEOC Charge and Lawsuit

In October 2008, Charging Party filed a charge with the Equal Employment Opportunity Commission (EEOC), alleging discrimination on the basis of race, national origin, and disability, and failure to provide reasonable accommodations.

In March 2010, Charging Party filed a discrimination lawsuit against the District and nine individuals. In January 2011, the District, through counsel, sent Charging Party a proposed settlement agreement which provided that Charging Party waived "any and all rights to reemployment or reinstatement that he may have with the [District]." Charging Party apparently did not sign the agreement.

PERB Charge

On November 17, 2009, Charging Party filed an unfair practice charge with PERB, LA-CE-5403-E, alleging that the District retaliated against him for filing the workers' compensation claim and the EEOC charge. On November 15, 2010, PERB dismissed Charging Party's charge for failure to state a prima facie case.

ARRA Request and Fraud Charges

In June 2009, Charging Party filed a Request for Treatment as an Assistance Eligible Individual under the American Recovery and Reinvestment Act of 2009 (ARRA). That request was denied.

On April 14, 2012, Charging Party filed fraud charges against the District with the ARRA Fraud Unit, alleging that the District had abused its authority related to implementation of ARRA funds and failed to comply with federal statutes and regulations.

DISCUSSION

I. Charging Party's Burden

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." The charging party should include sufficient facts 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.)

II. Statute of Limitations

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.) A 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.)

III. Discrimination/Retaliation

Charging Party alleges that the District retaliated and discriminated against him by applying "different terms and conditions" when it rejected his application for re-employment.

To demonstrate that an employer discriminated or retaliated against an employee in 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; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).)

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 (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the employer's failure to offer the employee justification at the time it took action (*Oakland Unified School District* (2003) PERB Decision No. 1529) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive. (*North Sacramento School District*, *supra*, PERB Decision No. 264; *Novato*, *supra*, PERB Decision No. 210.)

A. Exercise of Rights Under EERA

Charging Party has alleged that he exercised rights under EERA by filing his previous unfair practice charge with PERB. Filing a PERB charge is protected activity. (*Trustees of the California State University (San Marcos)* (2010) PERB Decision No. 2140-H.) However, none of the other activity alleged in the charge constitutes protected activity under EERA. Filing individual charges with outside agencies, such as the EEOC or the ARRA Fraud Unit, is not protected. (*Fontana Unified School District* (2010) PERB Decision No. 2147.) Filing a Workers' Compensation claim is also not protected. (*State of California, Department of General Services* (1994) PERB Decision No. 1037-S.) Similarly, filing a lawsuit alleging individual discrimination does not appear to be a protected activity.

B. Adverse Action

The only timely allegation of adverse action contained in the charge is that the District removed Charging Party from its re-employment list on June 14, 2012. All other actions allegedly taken by the District occurred more than six months prior to the filing of the charge on November 6, 2012, including the allegations that the District denied Charging Party access to its files (April 25, 2012), accused Charging Party of child abuse and endangerment (2007), and reclassified Charging Party as a security guard (2007).

C. Nexus

The charge does not allege sufficient facts to establish that the District removed Charging Party from the re-employment list because he engaged in protected activity. To establish that an adverse action was taken because of the exercise of protected rights, a charging party must establish that the adverse action occurred in close temporal proximity to the protected activity. (*State of California (Department of Personnel Administration)* (2010) PERB Decision No. 2123-S.) Without close temporal proximity, the Board will not consider other factors supporting an inference of an unlawful motive. (*Ibid.*, citing *Garden Grove Unified School District* (2009) PERB Decision No. 2086 and *Oakland Unified School District* (2003) PERB Decision No. 1512.)

In this case, the only protected activity alleged in the charge took place between November 17, 2009, when Charging Party filed his previous PERB charge, and November 15, 2010, when the charge was dismissed. The District did not remove Charging Party from its re-employment list until more than a year and a half later. The Board has held that a lapse of more than six months between protected activity and an adverse action is insufficient to establish close temporal proximity. (*Los Angeles Unified School District* (1998) PERB Decision No. 1300.) Therefore, Charging Party cannot establish that the District removed him from its re-employment list because of his previous PERB charge, and the retaliation allegation must be dismissed.

IV. Threat, Intimidation, or Coercion

The charge suggests that the settlement agreement proposed by the District, which contained a waiver of Charging Party's rights to re-employment or reinstatement with the District, constituted a threat, intimidation, or coercion. However, this settlement agreement was sent to Charging Party's counsel on January 11, 2011. Because this action occurred more than six months before the charge was filed, this allegation is untimely and must be dismissed.

V. Unilateral Change

The charge suggests that in removing Charging Party's name from its re-employment list, the District "change[d] its past practices and or [sic] processes on re-employment." An employer has a duty to meet and confer with an exclusive representative before changing terms and conditions of employment. However, only an exclusive representative has standing to assert a claim that an employer unilaterally changed the terms and conditions of employment. (*Los Angeles Unified School District* (2009) PERB Decision No. 2073.) As an individual, Charging Party lacks standing to allege that the District's actions constituted a unilateral change.

VI. Refusal to Provide Information

The charge alleges that the District refused to allow Charging Party to review his personnel file on April 25, 2012. Although an exclusive representative has a right to request and receive

information from an employer (*Klamath-Trinity Joint Unified School District* (2005) PERB Decision No. 1778), an individual employee has no such right under EERA (*Antelope Valley Hospital District* (2011) PERB Decision No. 2167-M). Moreover, as noted above, this allegation is untimely because the District's refusal took place more than six months before the charge was filed.

VII. Other Violations

The charge also alleges that the District, by removing Charging Party's name from its re-employment list: 1) deprived Charging Party of a "substantive right"; (2) used "official authority or influence for the purpose of interfering with" Charging Party's right to report "improper government activity," which he alleges he did by filing a charge with the ARRA Fraud Unit; and (3) "committed fraud by not issuing appropriate notification," citing the Worker Adjustment and Retraining Notification Act.

PERB's jurisdiction is limited to the determination of unfair labor practice claims arising under EERA and other public sector labor statutes. (*California School Employees Association, Chapter 245 (Waymire)* (2001) PERB Decision No. 1448; *Sweetwater Union High School District* (2001) PERB Decision No. 1417.) The charge does not identify what "substantive right," under EERA, if any, Charging Party was deprived of. Moreover, EERA does not provide a right to report improper government activity or a right to "appropriate notification" prior to an individual's removal from a re-employment list. Therefore, it appears that PERB lacks jurisdiction over these allegations.

For these reasons the charge, as presently written, does not state a prima facie case.[2] If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may 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 an authorized agent of 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 an amended charge or withdrawal is not filed on or before December 28, 2012,[3] PERB will dismiss your charge.

---

[2] In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make "a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Ibid.*)

[3] A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)

If you have any questions, please call me at the above telephone number.

Sincerely,

Joseph Eckhart
Regional Attorney

JE