

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



CONSTANTINO GABRIE,

Charging Party,

v.

LOS ANGELES COMMUNITY COLLEGE
DISTRICT,

Respondent.

Case No. LA-CE-5871-E

PERB Decision No. 2389

August 20, 2014

Appearances: Felahy Law Group by Jennifer M. Yang, Attorney, for Constantino Gabriele; Liebert, Cassidy & Whitmore by Jessica R. Frier, Attorney, for Los Angeles Community College District.

Before Martinez, Chair; Huguenin and Banks, Members.

DECISION¹

HUGUENIN, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Constantino Gabriele (Gabrie) of PERB's Office of the General Counsel's dismissal (attached) of his unfair practice charge. Gabriele's charge, as amended, alleges that the Los Angeles Community College District (District) violated the Meyers-Milias-Brown Act (MMBA)² by depriving Gabriele of his property rights without due process. Since the MMBA does not apply to employer-employee relations in California's community

¹ PERB Regulation 32320(d) provides, in pertinent part: "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 of Regs., tit. 8, § 31001 et seq.)

² MMBA is codified at Government Code section 3500 et seq. Unless otherwise noted, all statutory references are to the Government Code.

colleges, the Office of the General Counsel determined whether or not Gabriele had stated a prima facie violation of the Educational Employment Relations Act (EERA).³

We have reviewed the unfair practice charge, the amended charge, the appeal, the District's responses thereto, the warning and dismissal letters and the entire record in light of relevant law. Based on this review, we affirm the dismissal of Gabriele's charges for the reasons stated below.

PROCEDURAL HISTORY

On November 18, 2013, Gabriele filed his initial unfair practice charge. On December 31, 2013, the Office of the General Counsel sent Gabriele a warning letter notifying him that his charges did not state a prima facie case. On January 2, 2014, the District submitted its initial position statement. On January 24, 2014, Gabriele filed his first amended charge. On February 20, 2014, the District filed an amended position statement. On March 4, 2014, the Office of the General Counsel dismissed Gabriele's amended charge both for failure to state a prima facie case and for being untimely filed.

On March 25, 2014, Gabriele filed his appeal of the Office of the General Counsel's dismissal of his charge. On April 14, 2014, the District filed its opposition to Gabriele's appeal. On April 21, 2014, the parties were notified that the filings were complete.

FACTS

Gabriele is a former tenured faculty member of the District. Sometime in September 2010, the District sought to dismiss Gabriele from employment and Gabriele filed an

³ EERA is codified at Government Code section 3540 et seq. Moreover, by analogizing to a case where the charging party has failed to allege any specific violation of a Government Code section, we conclude that the Office of the General Counsel properly analyzed Gabriele's claim as a possible violation of EERA. (*Los Banos Unified School District* (2007) PERB Decision No. 1935 [where the charging party fails to allege that any specific section of the Government Code has been violated, a Board agent, upon a review of the charge, may determine under what section the charge should be analyzed].)

administrative appeal. On January 26, 2011, Gabriele and the District reached an agreement whereby Gabriele would remain on paid administrative leave until February 1, 2012—shortly after the time Gabriele would have reached the age of 55—at which point Gabriele would retire from District service. This agreement allowed Gabriele to become eligible for retiree health insurance benefits through the California State Teachers Retirement System (STRS). The settlement agreement precluded Gabriele from seeking further employment with the District and required that upon execution of the agreement Gabriele tender an irrevocable letter of retirement effective February 1, 2012.

In May of 2011, Gabriele consulted an attorney for the Los Angeles College Faculty Guild, Local 1521 (Faculty Guild)—Gabriele’s exclusive representative—as to whether he could seek employment outside of the District under the terms of the settlement agreement. Gabriele was advised that under the agreement he could work in another district. In August of 2011, Gabriele began working part-time at Pasadena City College for the 2011-2012 school year.

Gabriele’s separation from the District became effective on February 1, 2012. In March of 2012, the District administrator responsible for health benefits advised Gabriele that he had to retire through STRS within 120 days of his separation date from the District in order to obtain his retiree health benefits. The District advised Gabriele that failure to retire through STRS would result in the loss of his health benefits. Subsequently, in late March of 2012, Gabriele contacted the Faculty Guild’s attorney whom he had previously consulted, who wrote to the District requesting that Gabriele receive the health benefits that had been agreed to in the settlement of Gabriele’s dismissal case. In response, on April 26, 2012, the District filed a complaint for declaratory relief in Los Angeles Superior Court seeking a determination of each party’s rights and duties under the settlement agreement.

On May 30, 2012, Gabriele submitted a retirement application to STRS.⁴ In his STRS retirement application, Gabriele listed his retirement date as February 1, 2012. In July of 2012, STRS rejected Gabriele's application stating that state law did not permit STRS retirement while the applicant was employed by any STRS employer. Gabriele then submitted another retirement application to STRS, this time with an effective retirement date of July 1, 2012. However, because Gabriele had failed to retire through STRS within 120 days of separation from the District, he was deemed ineligible for retiree health insurance benefits.

DISMISSAL OF GABRIE'S CHARGES

On March 4, 2014, PERB's Office of the General Counsel dismissed Gabriele's charges for failure to state a prima facie case and for untimeliness. Since Gabriele had alleged that the District's improper conduct was the deprivation without due process of his right to retiree health insurance benefits, the Office of the General Counsel determined that Gabriele had failed to allege a violation of EERA. In addition, the Office of the General Counsel determined that: (1) PERB's jurisdiction is limited to the determination of unfair practice claims arising under public sector labor statutes, and disputes such as Gabriele's are unrelated to collective bargaining and are outside of PERB's jurisdiction; and (2) the District's alleged improper conduct fell well-outside of EERA's six-month statutory limitations period and neither tolling nor a theory of continuing violation applied.

Regarding timeliness, the Office of the General Counsel noted that the District's conduct which was alleged to have been an unfair practice occurred on or about February 1, 2011 (approximately 21 months) before the filing of Gabriele's unfair practice charge. The Office of the General Counsel also determined that although EERA section 3541.5(a)(2) allows for tolling of the limitations period under appropriate circumstances, such

⁴ The final day for Gabriele to retire through STRS in order to comply with the 120-day requirement was May 31, 2012.

circumstances are not present in Gabriele's case. According to the Office of the General Counsel, tolling is only appropriate "where a collectively negotiated agreement provides for binding arbitration" (Warning Ltr., p. 3) or during the pendency of

a non-binding dispute resolution procedure if: (1) the procedure is contained in a written agreement negotiated by the parties; (2) the procedure is being used to resolve the same dispute that is the subject of the unfair practice charge; (3) the charging party reasonably and in good faith pursues the procedure; and (4) tolling does not frustrate the purpose of the statutory limitation period by causing surprise or prejudice to the respondent.

(*Ibid.*, citing *County of Riverside* (2011) PERB Decision No. 2176-M (*Riverside*)). The Office of the General Counsel determined that the District's complaint for declaratory relief and the subsequent appeal did not toll the statute of limitations because it was not a mutually-agreed upon forum for resolving disputes between the parties as required under *Riverside*. Thus, finding no allegation that the parties were using either binding arbitration or a bilaterally agreed upon non-binding dispute resolution procedure, the Office of the General Counsel determined that tolling did not apply. The Office of the General Counsel determined as well that denial of Gabriele's retiree health insurance benefits did not constitute a continuing violation. Thus, the Office of the General Counsel dismissed Gabriele's charges as untimely.

GABRIE'S APPEAL

On appeal, Gabriele argues that he alleged a prima facie case that the District violated section 3506.5 of the MMBA.⁵ Gabriele contends that the District's complaint for declaratory

⁵ Gabriele continues to claim that the District violated section 3506.5 of the MMBA. The part of section 3506.5 which could apply to an individual is subsection (a) which states:

A public agency shall not do any of the following:

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or

relief was retaliatory and also that both equitable tolling and the continuing violation doctrine apply to extend the limitations period during the pendency of the declaratory relief action and its appeal.

The District urges us to deny Gabriele's appeal for failure to state the grounds for each issue appealed and for failure to demonstrate good cause for presenting new allegations on appeal. (Citing PERB Reg. 32635.) In addition, the District maintains that Gabriele's new allegations are time barred, and that the Office of the General Counsel appropriately concluded that Gabriele's allegations are not sufficient to state a prima facie case under any theory.

DISCUSSION

EERA section 3543.5(a) protects an employee from employer threats, reprisals and discrimination, because he or she exercised rights protected by EERA. Section 3543.5(a) also makes it unlawful for an employer to interfere with an employee's exercise of his or her EERA protected rights. In order to state a prima facie case for any violation of EERA

otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

As we have noted, the MMBA does not apply to employer-employee relations in California's community colleges. California's community colleges are considered public school employers and its employer-employee relations are governed by EERA. EERA section 3543.5(a) contains a nearly identical provision to MMBA section 3506.5. EERA section 3543.5(a) states:

It is unlawful for a public school employer to do any of the following:

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

We shall therefore consider whether Gabriele has stated a prima facie case for a violation of EERA section 3543.5(a).

section 3543.5(a), the charging party must, at minimum, allege either that he exercised EERA-protected rights for which the employer is retaliating, or that the employer engaged in conduct that interfered with the charging party's exercise of an EERA-protected right.

Gabrie agreed to retire from the District shortly after reaching the age of 55 as a settlement of dismissal proceedings. Dismissal of public school employees is governed by the Education Code. Gabriele does not allege that his dismissal violated his rights under EERA. We have no jurisdiction over claims of discrimination or retaliation based on other statutory frameworks, or over claimed violations of constitutional rights to due process. (*City & County of San Francisco* (2011) PERB Decision No. 2222-M [PERB's jurisdiction does not include, among other things, enforcement of the Americans with Disabilities Act, the U.S. Constitution, the Whistleblower Protection Reporting Act, laws governing improper government activity, laws governing sexual harassment, laws governing defamation, or laws governing the unemployment insurance process]; *State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2018-S [PERB's jurisdiction is limited and does not include the enforcement of other independent statutory schemes]; *Compton Unified School District* (2006) PERB Decision No. 1805 [PERB's jurisdiction is limited and does not include enforcement of the Education Code]; *Ventura County Community College District* (1996) PERB Decision No. 1167 [Absent an independent violation of EERA, the Board has no jurisdiction over other Government Code sections, the Education Code or federal law].)

Gabrie's initial and first amended charges allege that Gabriele was discriminated against by the District. The only protected conduct alleged by Gabriele is his March-April 2012 request for and utilization of union assistance to resolve the dispute that had arisen earlier in March 2012 over his retiree health benefits and the requirement that to receive the retiree health benefits he retire through STRS. However, this arguably protected conduct occurred after, not

before, the District had informed Gabriele in early March of 2012 that he had to retire through STRS. (*Alameda County Medical Center* (2004) PERB Decision No. 1707-M [timing element in retaliation case not met where adverse actions consistently occurred before employee engaged in protected conduct]; *Riverside Unified School District* (1987) PERB Decision No. 639 [protected activity after decision to take adverse action cannot be basis for inferring unlawful motive].) Thus, assuming arguendo that conditioning retiree health insurance benefits upon Gabriele's retirement through STRS were an adverse employer action, such conduct could not have been motivated by Gabriele's protected activity which occurred thereafter.

For the first time, Gabriele now claims that the District's complaint for declaratory relief filed on April 26, 2012, was retaliatory. While evidence of the District's complaint for declaratory relief was submitted by the District in its position statement in response to Gabriele's initial unfair practice charge, it was not alleged to be retaliatory by Gabriele until his appeal. "Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." (PERB Reg. 32635(b).) We conclude that good cause does not exist to accept Gabriele's allegation that the District's complaint for declaratory relief was retaliatory. Gabriele failed to demonstrate good cause for the presentation of new allegations and/or supporting evidence on appeal, and nothing in the documents filed related to the appeal indicates there is good cause. (*Regents of the University of California* (2006) PERB Decision No. 1843-H.)

Because we conclude that Gabriele has failed to allege a violation of EERA section 3543.5(a), it is immaterial whether the charges were timely filed. Therefore, we need not and do not consider whether the Office of the General Counsel should have equitably tolled

the statute of limitations. For the same reason, we need not and do not consider whether the District's conduct constituted a continuing violation of EERA.

ORDER

The unfair practice charge in Case No. LA-CE-5871-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Martinez and Member Banks joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
Telephone: (818) 551-2806
Fax: (818) 551-2820



March 4, 2014

Jennifer Yanni, Attorney
Felahy Law Group
4000 Cover Street, Suite 100
Long Beach, CA 90808

Re: *Constantino Gabriele v. Los Angeles Community College District*
Unfair Practice Charge No. LA-CE-5871-E
DISMISSAL LETTER

Dear Ms. Yanni:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on November 18, 2013. Constantino Gabriele (Charging Party) alleges that the Los Angeles Community College District (District or Respondent) violated the Educational Employment Relations Act (EERA or Act)¹ by failing to provide Charging Party his retiree health benefits pursuant to a settlement agreement.

Charging Party was informed in the attached Warning Letter dated December 31, 2013 (Warning Letter), that the above-referenced charge did not state a prima facie case. Charging Party was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, he should amend the charge. Charging Party was further advised that, unless he amended the charge to state a prima facie case or withdrew it on or before January 10, 2014, the charge would be dismissed. At Charging Party's request, the deadline to file an amended charge was extended to January 24, 2014. On January 24, 2014, this office received a First Amended Charge.

Facts as Amended

In December 2010, the Los Angeles Community College District (District) and Mr. Gabriele—with the assistance of his union, Los Angeles Faculty Guild, Local 1521 (Union)—reached a Settlement Agreement in which Mr. Gabriele would be placed on paid administrative leave through January 31, 2012. The agreement provided that Mr. Gabriele would resign from his position on February 1, 2012, after which he could apply for retirement benefits under the California State Teachers Retirement System (CalSTRS). In or around May 2011, Mr. Gabriele inquired whether he could take on part-time employment while he was on administrative leave. Mr. Gabriele's Union representative advised him that he could take on part-time employment

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.

and doing so would not affect his benefits. Based on this advice, Mr. Gabriele took part-time employment with the Pasadena City College (PCC) between August 2011 and June 2012.

After Charging Party's February 1, 2012, retirement from the District, a dispute arose regarding whether the Settlement Agreement required Charging Party to retire through the CalSTRS within 120 days in order to obtain his health insurance benefits. In a March 29, 2012 letter, the Union requested that the District comply with the terms of the parties Settlement Agreement that entitled Mr. Gabriele to receive health insurance upon retiring.

In April 2012, the District filed a Declaratory Relief Action in the matter of *Los Angeles Community College District v. Constantino Gabriele*, Los Angeles County Superior Court, Case No. BC483225 (Superior Court Case) to resolve such dispute.

In June 2012, after his employment ended with PCC, Mr. Gabriele learned that "the hours he worked were being used as the basis upon which his benefits were denied." Mr. Gabriele's retirement from CalSTRS became effective on July 1, 2012 which was outside of the 120 day statutory period necessary to preserve his eligibility for retiree health care.

Between March 8, 2012 and August 23, 2012, Mr. Gabriele submitted more than 50 inquiries to the Union, CalSTRS, and the District for assistance in finalizing his retirement benefits. Mr. Gabriele was "afforded no answers, training, or assistance in completing the process."

On May 9, 2013, the Superior Court Case went to trial, and on May 14, 2013, the Court issued a "Tentative Decision & Statement of Decision Following Trial" (Tentative Decision), finding in favor of the District. Charging Party subsequently filed an appeal of the Tentative Decision, which is pending.

Discussion

I. Contract Enforcement and Jurisdiction

In the Warning Letter, Charging Party was advised that PERB does not have jurisdiction to enforce the Settlement Agreement that was reached by the parties. (Gov. Code, § 3541.5 subd. (b).) In the amended charge, Charging Party clarifies as follows:

By his charge, Mr. Gabriele does not seek to have PERB enforce the Settlement Agreement. . . . Rather, Mr. Gabriele seeks to have PERB enforce its jurisdiction over unfair practices, namely the deprivation of his property right without due process.

PERB's jurisdiction is limited to the determination of unfair labor practice claims *arising under 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-E.) The purpose of EERA is to "promote the improvement of personnel management and employer-employee relations by providing a uniform basis for

recognizing the right of public school employees to join organizations of their own choice, to be represented by the organizations in their professional and employment relationships with public school employers.” (Gov. Code, § 3540.) In other words, the public sector labor statutes within PERB’s jurisdiction are intended to promote harmonious labor relations through collective bargaining and PERB’s jurisdiction is confined to disputes involving, for example, collective bargaining and employee rights to union representation. PERB’s jurisdiction does not include employment disputes that are unrelated to the exercise of rights to collective bargaining. Nor does PERB’s jurisdiction include enforcement of the retirement laws and laws governing rights under the United States Constitution. Thus, allegations regarding disputes not related to collective bargaining are outside of PERB’s jurisdiction.

II. Statute of Limitations and Tolling

To the extent Charging Party is alleging that the District unlawfully retaliated against Charging Party for engaging in EERA protected activities, this allegation must also fail.² In the Warning Letter, Charging Party was advised that PERB has no jurisdiction to issue a complaint for alleged unfair practice charges that occurred more than six months prior to the filing of the charge. (*Los Angeles Unified School District* (2007) PERB Decision No. 1929; *Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board* (2005) 35 Cal.4th 1072). Charging Party was further advised that the alleged unfair practice occurred on or about February 1, 2012 (i.e., when Charging Party learned the District will not be paying for his retiree health insurance benefits); however, such conduct occurred more than 21 months prior to the filing of the instant charge. Further, as explained in the Warning Letter, the statute of limitations was not tolled by the filing of the Superior Court lawsuit in April 2012 and the appeal thereof in May 2013. (*County of Riverside* (2011) PERB Decision No. 2176-M.)

Under the continuing violation doctrine, a violation within the statute of limitations period may “revive” an earlier violation of the same type that occurred outside of the limitations period. (*County of Orange* (2011) PERB Decision No. 2155-M.) The violation within the statute of limitations period, however, must constitute an independent violation without reference to the earlier violations. (*Ibid.*) Mr. Gabriele’s continued failure to receive his retiree health insurance benefits after the effective date of his retirement from the District (i.e., February 1, 2012) does not constitute an independent violation such that the statute of limitations is revived. (See, e.g., *Trustees of the California State University* (2009) PERB Decision No. 2038-H [continuing violation doctrine did not apply to alleged retaliatory actions that occurred more than six months before the charge was filed because no actions of the same type were taken by the employer within the limitations period].) Accordingly, this charge fails to allege sufficient facts demonstrating that the charge is timely under the Act’s six-month statute of limitations. (*State of California (Department of Personnel Administration)* (1992) PERB Decision

² The Board agent may, upon review of an unfair practice charge, determine the grounds under which the charge should be analyzed. (*Los Banos Unified School District* (2007) PERB Decision No. 1935.)

No. 929-S [charging party has the burden of alleging sufficient facts to demonstrate timeliness].)

III. Standing

Charging Party takes issue with the Warning Letter's conclusion that because of Mr. Gabriele's retirement, he did not have standing to file the instant charge. EERA, Section 3541.5, subdivision (a) states, in pertinent part: "Any employee . . . shall have the right to file an unfair practice charge. . . ." The Board has interpreted this to mean that to have standing to file a charge, that person must have been an employee at the time the unlawfully alleged conduct occurred. (See *California Union of Safety Employees (Trevisanut, et al.)* (1993) PERB Decision No. 1029-S [interpreting similar language under the Ralph C. Dills Act³ at Gov. Code, § 3514.5 subd. (a).) When assessing whether a charge dismissal is appropriate, the Board views a charging party's allegations in the light most favorable to the charging party. (*County of Santa Clara* (2013) PERB Decision No. 2321-M.) The amended charge alleges that the hours Mr. Gabriele worked at PCC while being employed by the District were counted against him by CalSTRS and resulted in the District allegedly denying him his retirement benefits. Viewed in the light most favorable to Charging Party, this conduct occurred while Charging Party was employed by the District. As such, Mr. Gabriele has standing to allege an unfair labor practice relating to such conduct.

Conclusion

Even if standing was established, the charge does not demonstrate a prima facie violation of the EERA for the reasons set forth above, and those applicable in the December 31, 2013 Warning Letter. Accordingly, this charge is hereby 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

³ The Dills Act is codified at Government Code section 3512 et seq.

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 _____
Yaron Partovi
Regional Attorney

Attachment

cc: Melanie L. Chaney

PUBLIC EMPLOYMENT RELATIONS BOARD

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Glendale, CA 91203-3219
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December 31, 2013

Constantino Gabriele

Re: *Constantino Gabriele v. Los Angeles Community College District*
Unfair Practice Charge No. LA-CE-5871-E
WARNING LETTER

Dear Mr. Gabriele:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on November 18, 2013. Constantino Gabriele (Charging Party) alleges that the Los Angeles Community College District (District or Respondent) violated the Educational Employment Relations Act (EERA or Act)¹ by failing to provide Charging Party his retiree health benefits pursuant to a settlement agreement.

Investigation of the charge revealed the following relevant information. The Los Angeles College Faculty Guild, Local 1521 (Union) is exclusive representative of the certificated faculty unit at the District. The Union and the District are parties to a collective bargaining agreement (CBA) that is set to expire on June 30, 2014.

Relevant Facts

In September 2010, the District instituted dismissal proceedings against Charging Party, who taught Dental Technology courses at Los Angeles Community College. An administrative hearing on Charging Party's appeal of his termination was scheduled before the Office of Administrative Hearings (OAH).

In December 2010, the OAH administrative law judge conducted a pre-trial settlement conference attended by the District, Charging Party, and their representatives. A Settlement Agreement was reached between the parties and the OAH case was dismissed. Pursuant to the Settlement Agreement, dated January 26, 2011, Charging Party agreed to resign from the District and waive his right to a hearing. In return, the District agreed to continue paying Charging Party's salary through January 31, 2012. The Settlement Agreement also provided in relevant part, "Upon the effective date of his retirement, [Charging Party] shall be entitled to the health insurance benefits provided to retirees." The District's offer was premised on the

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.

fact that Charging Party would become 55 years old shortly before his resignation from service on February 1, 2012.

After Charging Party's February 1, 2012, retirement, a dispute arose regarding whether the Settlement Agreement required Charging Party to retire through the California State Teachers Retirement System within 120 days in order to obtain his health insurance benefits. Charging Party alleged that he felt "deceived" by the District. In April 2012, the District filed a Declaratory Relief Action in the matter of *Los Angeles Community College District v. Constantino Gabriele*, Los Angeles County Superior Court, Case No. BC483225 to resolve such dispute. On May 9, 2013, the Superior Court case went to trial, and on May 14, 2013, the Court issued a "Tentative Decision & Statement of Decision Following Trial" (Tentative Decision), finding in favor of the District. Charging Party filed an appeal of the Tentative Decision, which is pending.

DISCUSSION

I. Union's Breach of the Duty of Fair Representation

The charge includes multiple allegations that the Union failed to adequately represent Charging Party after the OAH dismissal proceedings. Charging Party has raised similar breach-of-the-duty-of-fair-representation allegations in a related filing, *Constantino Gabriele v. Los Angeles College Faculty Guild, Local 1521*, PERB Case No. LA-CO-1598-E, dated November 18, 2013.² Since the instant charge was filed against the District, this letter does not address any allegations made against the exclusive representative. (See PERB Regulation 32615, subd. (a).)

II. Statute of Limitations and Tolling

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 may do so by alleging sufficient facts describing 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.)

Additionally, it is incumbent upon charging party to allege facts showing that the unfair practice charge was timely filed; i.e., that the alleged unfair practice occurred no more than six months prior to the filing of the charge. (*Los Angeles Unified School District* (2007) PERB Decision No. 1929; *City of Santa Barbara* (2004) PERB Decision No. 1628-M.) PERB is

² The Board agent is hereby taking official notice of the records in PERB Case No. LA-CO-1598-E. (See *State of California* (2007) PERB Order No. Ad-367-S)

prohibited 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. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board* (2005) 35 Cal.4th 1072.) 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.)

Charging Party retired from employment in 2012. The alleged unfair labor practice occurred on or about February 1, 2012, when Charging Party reached retirement age and learned that the District will not be paying for his retiree health insurance benefits. Since the original charge was filed on November 18, 2013, the allegations contained in the charge that occurred prior to May 18, 2013, are untimely unless an exception to the statute of limitations applies. The District's alleged failure to provide Charging Party his retiree health benefits occurred more than 21 months prior to the filing of the instant charge. This is well beyond the six-month period for filing an unfair practice charge under EERA, and therefore, the charge is untimely.

EERA section 3541.5(a)(2) is the statutory provision which provides for tolling of the limitations period, in appropriate circumstances. However, according to its terms, only where a collectively negotiated agreement provides for binding arbitration will the statute of limitations be tolled during the efforts of the parties to resolve their differences through the grievance machinery. Here, statutory tolling does not apply since there is no evidence that the retiree health benefits dispute was pursued through a negotiated agreement that contains a grievance procedure that culminates in binding arbitration.

The doctrine of equitable tolling applies during the time the parties are using a non-binding dispute resolution procedure if: (1) the procedure is contained in a written agreement negotiated by the parties; (2) the procedure is being used to resolve the same dispute that is the subject of the unfair practice charge; (3) the charging party reasonably and in good faith pursues the procedure; and (4) tolling does not frustrate the purpose of the statutory limitation period by causing surprise or prejudice to the respondent. (*County of Riverside* (2011) PERB Decision No. 2176-M.) The charge is devoid of facts showing that Charging Party used a bilaterally agreed-upon non-binding dispute resolution procedure. (PERB Regulation 32615 subd. (a)(5).) Moreover, the statute of limitations was not tolled by Charging Party's involvement in the Superior Court lawsuit in May 2013 and the appeal thereof. (*County of Riverside* (2011) PERB Decision No. 2176-M [no equitable tolling for superior court actions because the court was not a mutually-agreed forum for resolving disputes between the parties; *State Bar of California* (2007) PERB Decision No. 1904-M [the filing of a federal lawsuit does not toll the statute of limitations under Government Code section 3514.5(a)(2)].)

Accordingly, this charge fails to allege sufficient facts demonstrating that the charge is timely under the Act's six-month statute of limitations. (*State of California (Department of Personnel Administration)* (1992) PERB Decision No. 929-S [charging party has the burden of alleging sufficient facts to demonstrate timeliness].)

III. Standing

PERB's jurisdiction under the EERA is described in Government Code section 3541.5(a) which provides that "any employee, employee organization, or employer shall have the right to file an unfair practice charge . . ." Additionally, EERA defines an "employee" as "a person employed by a public school employer...." Thus, individuals who are not employees at the time of an alleged violation lack standing to pursue the claim before PERB. (*San Francisco Unified School District* (2009) PERB Decision No. 2000 [charging party lacked standing to file an unfair practice charge under EERA, when he was not an employee at the time the alleged unfair practice occurred].) The instant charge alleges that the District failed/refused to pay Charging Party's health benefits *after* he resigned (and subsequently reached retirement age in 2012) in accordance with the Settlement Agreement. Accordingly, since Charging Party was retired at the time the conduct giving rise to his charge occurred, he is not an employee within the meaning of EERA, and PERB does not have jurisdiction over this matter.

IV. Contract Enforcement

Though unclear, it also appears that, though this charge, Charging Party is seeking to have PERB enforce the Settlement Agreement that was reached in January 2011. However, the EERA provides at section 3541.5(b) that:

The board shall not have the authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of any agreement that would not also constitute an unfair practice under this chapter.

Accordingly, PERB is without jurisdiction to enforce the January 2011 Settlement Agreement.

CONCLUSION

For these reasons the charge, as presently written, does not state a prima facie case.³ 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

³ 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.*)

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 January 10, 2014,⁴ PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Yaron Partovi
Regional Attorney

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⁴ A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)