STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

RAMIRO TIZCARENO, Charging Party, v. HUENEME ELEMENTARY SCHOOL DISTRICT, Respondent.	Case No. LA-CE-6005-E PERB Decision No. 2448 August 21, 2015

Appearance: Ramiro Tizcareno, on his own behalf.

Before Huguenin, Winslow and Gregersen, Members.

DECISION[1]

WINSLOW, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by Ramiro Tizcareno (Tizcareno) of PERB's Office of the General Counsel's dismissal (attached) of his first amended unfair practice charge. The original charge, filed on February 24, 2015, alleged that the Hueneme Elementary School District (District) violated the Educational Employment Relations Act (EERA)[2] and numerous other statutes and regulations by: (1) refusing to return Tizcareno to work after being placed on a 39-month re-employment list and after his physicians certified his ability to perform the work;

[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 Regs., tit. 8, § 31001 et seq.)

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

(2) maintaining in his personnel file documents from the Superior Court, presumably relating to his divorce; and (3) declaring in September 2014, that he was no longer an employee of the District. Tizcareno's original charge alleged that this conduct constituted a violation of EERA section 3540 et seq., as well as Education Code sections 45113 and 45195; Title 18, section 1001 of the United States Code; Evidence Code section 1011; and Penal Code sections 115, 118, 487 and 532. Tizcareno's first amended charge, filed on May 20, 2015, in response to a warning letter issued by the Office of the General Counsel, made similar allegations.[3]

The Board has reviewed the case file in its entirety and has fully considered the relevant issues and contentions on appeal. Based on this review, the Board finds the warning and dismissal letters accurately describe the allegations included in the unfair practice charge, as amended. The warning and dismissal letters are well-reasoned and in accordance with applicable law, except as noted below.[4]

The appeal raises no issues warranting the Board's further consideration. Moreover, the appeal fails to comply with PERB Regulation 32635(a), as we discuss below. We therefore deny the appeal, affirm the dismissal of the charge, and adopt the warning and dismissal letters as the decision of the Board itself, except as noted in footnote 4, below.

[3] The amended charge omitted references to statutes other than EERA on the face sheet of the unfair practice form, but continued to allege in the narrative portion of the charge that the District's actions violated various provisions of the Education Code.

[4] On page 6 of the warning letter entitled "III. Standing" the Office of the General Counsel noted that individual employees ". . . do not have standing to allege that the employer violated terms of the CBA." A more accurate statement of the law is found in *Oxnard Union High School District* (2012) PERB Decision No. 2265 (*Oxnard*): "Individual employees lack standing to assert that a breach of a collective bargaining agreement amounts to an unlawful unilateral change, as such EERA bargaining rights rest in employee organizations. (*Oakland Unified School District* (2007) PERB Decision No. 1902.)" (*Oxnard*, at Dismissal Ltr., p. 3.)

DISCUSSION

On May 7, 2015, the Office of the General Counsel issued a warning letter informing Tizcareno that his unfair practice charge was deficient in several respects, including PERB's lack of jurisdiction to enforce the Education Code or other statutes outside PERB's jurisdiction, Tizcareno's lack of standing to enforce the collective bargaining agreement (CBA), his failure to allege what, if any, protected activity he engaged in, and his failure to allege when the District took adverse action against him, i.e., when it terminated his employment or took other adverse action against him.

Based on the six-month statute of limitation, the Office of the General Counsel determined that all alleged violations occurring prior to August 24, 2014, were untimely. The remaining timely alleged actions concern the District's alleged refusal to allow Tizcareno to return to his permanent classified custodian employment even though he provided the District and its board of directors evidence of his ability to perform his job. Tizcareno alleges the District engaged in disparate treatment of Tizcareno, made false statements against Tizcareno, mishandled his personnel file, misapplied the Education Code, created a counterfeit "39-month re-employment list" under Education Code section 45195, prevented him from providing a permanent separation date from the California Public Employees' Retirement System, caused his health insurance to be cancelled, damaged his reputation, and violated the California Penal Code, the California Evidence Code, and the United States Code. Tizcareno requested as a remedy that he be awarded certain unpaid salary under the section 17.6.4 of the CBA applicable to his employment with the District.

The first amended charge cured none of the deficiencies described in the warning letter. After a review of the first amended charge, the Office of the General Counsel dismissed the charge based on the same conclusions identified in the warning letter, and further emphasized

that the first amended charge failed to allege that Tizcareno engaged in any activities protected by EERA. Such a failure prevents Tizcareno from alleging a prima facie case against the District for retaliation or discrimination against him, as he claimed.

Tizcareno's appeal alleges that the dismissal letter did not update the "untimely unfair employment charges (Prior to September 8, 2014) filed on February 24, 2015 as requested by [Tizcareno] on the **First Amended Charge** (May 18, 2015)" or "the corrections of Pgs. # 1-5 of the WARNING LETTER . . . ."

Tizcareno's appeal fails to comply with PERB Regulation 32635(a) "Review of Dismissals" which states, in relevant part:

> The Appeal shall:
>
> (1) State the specific issues of procedure, fact, law or rationale to which the appeal is taken;
>
> (2) Identify the page or part of the dismissal to which each appeal is taken;
>
> (3) State the ground for each issue stated.

Tizcareno merely reiterates facts alleged in the unfair practice charge and restates arguments made to the Office of the General Counsel, failing to state "the specific issues of procedure, fact, law or rationale to which the appeal is taken." Tizcareno does not state which facts the Office of the General Counsel allegedly omitted from its warning or dismissal letters. He also fails to state the grounds for his appeal. This failure to comply subjects the appeal to denial on that ground alone. (*State of California (Department of Mental Health, Department of Developmental Services)* (2012) PERB Decision No. 2305-S, p. 4.) Additionally, Tizcareno's first amended charge did not cure the failure to allege any facts showing protected activity by Tizcareno.

For these reasons, we reject the appeal and affirm the dismissal of the unfair practice charge as amended.

ORDER

The unfair practice charge in Case No. LA-CE-6005-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Huguenin and Gregersen joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
Telephone: (818) 551-2809
Fax: (818) 551-2820

May 22, 2015

Ramiro Tizcareno

Re: *Ramiro Tizcareno v. Hueneme Elementary School District*
Unfair Practice Charge No. LA-CE-6005-E
DISMISSAL LETTER

Dear Mr. Tizcareno:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 24, 2015. Ramiro Tizcareno (Charging Party) alleges that the Hueneme Elementary School District (District or Respondent) violated section 3540 et seq. of the Educational Employment Relations Act (EERA or Act) by failing to abide by the collective bargaining agreement (CBA) between the District and the California School Employees Association (CSEA); by relying on information concerning Charging Party that is more than two years old; by failing to follow California and United States laws; by stealing Charging Party's vacation and sick hours; and by refusing to allow Charging Party to return to work.

Charging Party was informed in the attached Warning Letter dated May 7, 2015, that the above-referenced charge did not state a prima facie case. The Warning letter addressed the following issues:[1]

Statute of limitations:
Under the six month statute of limitations, several of Charging Party's allegations were untimely filed;

Jurisdiction:
PERB's jurisdiction is limited to the determination of unfair labor practice claims arising under the EERA and other public sector labor statutes. Allegations that the District violated the Education Code by placing Charging Party on a 39 month reemployment list or otherwise violated the Education Code and "U.S. Federal Laws" are outside of PERB's jurisdiction;

[1] Legal citations relevant to the Statute of Limitations, Jurisdiction, Standing and Discrimination /Retaliation are set forth in the May 7, 2015, Warning Letter.

Standing:
Charging Party lacks standing to allege the District violated the CBA between the District and CSEA;

Discrimination/Retaliation:
The charge lacks information demonstrating that Charging Party engaged in activity protected by EERA. Individual complaints about external laws are not protected by EERA nor are individual complaints about workplace matters. The charge also lacks information demonstrating that the District terminated Charging Party's employment or undertook any action that was adverse to Charging Party's employment. The charge also lacked information demonstrating a nexus between any protected conduct and adverse action.

Charging Party was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, Charging Party should amend the charge. Charging Party was further advised that, unless Charging Party amended the charge to state a prima facie case or withdrew it on or before May 18, 2015, the charge would be dismissed. On May 18, 2015, Charging Party requested and obtained an extension to June 1, 2015, to file a First Amended Charge. On May 20, 2015, Charging Party filed a First Amended Charge.

In the First Amended Charge (FAC), Charging Party clarifies that he has *not* been terminated by the District. Charging Party is a permanent classified Custodian. The District has not yet provided him with a permanent separation date. Charging Party asserts that the District's conduct has negatively impacted him under CalPERS and, or, that his health insurance plan was cancelled. Charging Party repeats many of the allegations he made in the initial charge. Charging Party reasserts that the District has placed Charging Party on a "bogus" 39-month rehire list. As before, the FAC alleges that the District has violated EERA by "failing to abide by the MANDATED Rules and Regulations from the Government of the State of California that provide tenure to Ramiro Tizcareno's permanent classified Custodian employment."

Charging Party further alleges that the District's unfair and disparate application of Education Code tenure and merit rules demonstrates that the District engaged in disparate treatment and provided inconsistent or contradictory justifications for its actions:

> On September 8, 2014, Jennifer Tissler said: "Ramiro Tizcareno's permanent classified custodian employment is to be treated differently (In disparate [application of] the MANDATED rules and regulations) than all the other California Public Employees at [the] District, who are provided tenure by the MANDATED rules and regulations";
>
> On September 15, 2014 Gerald Dannenberg said: "The Board of Directors need not [] terminate Ramiro Tizcareno's permanent classified Custodian employment";

> On September 22, 2014 Gerald Dannenberg said the Charging Party is no longer a District employee;
>
> On September 22, 2014 Gerald Dannenberg acknowledged that Education Code Section 45195 is the law;
>
> On September 22, 2014 Charging Party asked Respondent why his Ventura County Superior Court documents were part of his personnel file. Instead of saying: "I'm going to have to look into it and I'll get back to you," Respondent promptly attempted to deceive the Charging Party by stating whatever came to his mind at that moment: "I thought you gave them to us because you wanted us to put them in your personnel file".

Charging Party states that he is not asking PERB to enforce the Education Code or the CBA. Charging Party asserts that if PERB's "investigation of Education Code Section 45195 '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.'" While PERB will send a charge to a hearing where the charge states a prima facie case of a violation of EERA or another public sector labor relations statute enforced by PERB, PERB lacks jurisdiction to take any action in this matter because the charge does not provide any allegations that Charging Party engaged in activities protected by EERA, i.e., collective bargaining. In other words, PERB adjudicates disputes concerning the exercise of rights to engage and not to engage in collective bargaining activities.

As explained in the May 7, 2015 Warning Letter, individual complaints about external laws such as the Education Code are not protected by EERA nor are individual complaints about workplace matters. The allegations solely describe the parties' dispute over the proper application of the Education Code's tenure and merit system provisions. Nothing in the charge indicates that Charging Party exercised his rights to engage or to abstain from collective bargaining activities. Therefore, the charge is hereby dismissed based on the facts and reasons set forth in the May 7, 2015, Warning Letter.

Right to Appeal

Pursuant to PERB Regulations,[2] 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.

[2] PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of PERB's Regulations may be found at www.perb.ca.gov.

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,

J. FELIX DE LA TORRE
General Counsel

By _____
Mary Weiss
Senior Regional Attorney

Attachment

cc: Nitasha Sawhney, Attorney

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
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May 7, 2015

Ramiro Tizcareno

Re: *Ramiro Tizcareno v. Hueneme Elementary School District*
Unfair Practice Charge No. LA-CE-6005-E
WARNING LETTER

Dear Mr. Tizcareno:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 24, 2015. Ramiro Tizcareno (Charging Party) alleges that the Hueneme Elementary School District (District or Respondent) violated section 3540 et seq. of the Educational Employment Relations Act (EERA or Act)[1] by failing to abide by the collective bargaining agreement (CBA) between the District and the California School Employees Association (CSEA); by relying on information concerning Charging Party that is more than two years old; by failing to follow California and United States laws; by stealing Charging Party's vacation and sick hours; and by refusing to allow Charging Party to return to work.

Charging Party is a custodian. He worked for the District.

FACTS AS ALLEGED

Charging Party "has not been allowed to return to his permanent classified custodian employment even though he provided [District Assistant Superintendent] Deboarah DeSmeth [(DeSmeth)] and the Board of Directors (02/23/2009, 02/12/2010 & 04/26/2010) evidence of his ability to perform his job."

"On February 23, 2009 Hueneme Elementary School District's Board of Directors received a June 28, 2007 Physician's certificate from John R. Ford, M.D. [(Ford)] and a psychiatrist evaluation from Ronald D. Pollack, M.D. [(Pollack)] dated April 14, 2008."

On June 30, 2009, the District and CSEA entered into a Settlement Agreement.[2]

[1] EERA is codified at Government Code section 3540 et seq. PERB's 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.

[2] The charge does not describe the contents or subject matter of the settlement agreement.

On December 17, 2009, DeSmeth placed Charging Party on a 39-month re-employment list.

On February 12, 2010, DeSmeth received evidence of Charging Party's ability to perform the essential functions of his permanent classified Custodian job.

On April 26, 2010, the District Board of Directors received a March 27, 2010, release to return to work from Pollack.

On October 3, 2013, during a telephone conversation, CSEA Costa y Valles Field Office Director Leticia Munguia "mistreated Ramiro Tizcareno because she believes the false statements fabricated against him by" District Superintendent Gerald Dannenberg (Dannenberg), and District Director of Personnel Services Jennifer Tissler (Tissler).

On April 3, 2014, Charging Party inspected his personnel file maintained by the District. A response dated February 12, 2010 to DeSmeth's Employment Status Letter was missing from the file. Charging Party's Ventura County Superior Court documents were found in the District's personnel file. District Personnel Clerk Betty Angulo told Charging Party: "Every time a permanent classified employment is terminated at Hueneme Elementary School District, a Board of Directors' Termination Letter is placed in the employee's personnel file. You do not have a Termination Letter from the Board of Directors in your personnel file. So, technically, you are still an employee."

On September 8, 2014, Tissler "said Ramiro Tizcareno's permenant permanent classified Custodian employment is to be treated differently than all the other California public employees at [the] District, who are provided tenure by the MANDATED rules and regulations."

On September 15, 2014 "Dannenberg said the Board of Directors need not to terminate Ramiro Tizcareno's permanent classified Custodian employment."

On September 22, 2014, Dannenberg said Charging Party is no longer a District employee.

On September 22, 2014, Charging Party met with Dannenberg and asked him if the District had incorporated the merit system and Dannenberg said it had not. Charging Party showed Dannenberg Education Code Section 45195 and Dannenberg stated "That's right, that's the Law." Charging Party pointed out that Education Code Section 45195 provides:

> This section shall apply to districts that have adopted the merit system in the same manner and effect as if it were a part of Article 6 (commencing with Section 45240) of this chapter.

Dannenberg said he would have to look into it and get back to Charging Party. Charging Party asked Dannenberg why his Ventura County Superior Court documents were part of his personnel file. Dannenberg stated: "I thought you gave them to us because you wanted us to put them in your personnel file." Charging Party alleges "Dannenberg could not provide the

name of the School District employee who grabbed Ramiro Tizcareno's divorce documents from Ventura County Superior Court and the reason for that unfair employment practice [Board Policy 1312.3(a)]." Charging Party asserts he did not provide his personal and intimate documents to anyone in the District.

On September 30, 2014, Dannenberg informed Charging Party during a telephone conversation that DeSmith placed Charging Party on the re-employment list pursuant to Education Code section 45195 and asserted "Education Code Section 45195 is a general Education Code every school district needs to follow." Dannenberg also told Charging Party that his "February 12, 2010 response was placed in the investigation file where the Attorneys' June 30, 2009 Settlement Agreement was placed." Charging Party asserts he "has nothing to do with that June 30, 2009 Settlement Agreement between CSEA and Hueneme Elementary School District's Attorneys and Superintendent. [Charging Party] did not sign that Agreement and was not aware it existed until he received it in September 2009."

On October 2, 2014, Charging Party was told during a telephone conversation with a representative of the California Department of Education that "The Department of Education does not have the means or the time to enforce every Section of the Education Code. You can start by contacting your principal or the School District Superintendent."

Charging Party further asserts:

- Tissler, DeSmeth and Dannenberg have not been willing to cooperate and honor the Collective Agreement between CSEA and Hueneme Elementary School District (Article 17.6.4) which states:

  > Anytime, with a physician's certificate, an employee on industrial accident or illness leave is able to return to work, he/she shall be reinstated in the employee's position without loss of pay or benefits.

- The 39-month re-employment list is "bogus" and "does not replace, block or substitute the mandated rules and regulations that provide tenure to Ramiro Tizcareno's permanent classified Custodian employment (Gov. Code sec. 3540 et seq.)."
- Education Code section 45195 states quite clearly at the bottom of the page: "This section shall apply to districts that have adopted the merit system in the same manner and effect as if it were a part of Article 6 (commencing with Section 45240) of this chapter;"
- Dannenberg violated Education Code section 45195 and engaged in many other unfair employment practices against Charging Party, and Dannenberg directed his Assistants to also do the same;
- Every false statement Dannenberg and his Assistants have fabricated against Ramiro Tizcareno is older than two years. They can't be used by Hueneme Elementary School District's Board of Directors to terminate Ramiro Tizcareno's permanent classified Custodian employment, as stated in Education Code Section 45113:

> No disciplinary action shall be taken for any cause which aro[]se more than two years preceding the date of the filing of the notice of cause unless such cause was concealed or not disclosed by such employee when it could be reasonably assumed that the employee should have disclosed the facts to the employing district;

- The June 30, 2009 Settlement Agreement does not replace, block or substitute any of the California State Laws and U.S. Federal Laws (Penal Code Sections: 115, 118, 487, 532 Title 18 Section 1001 of the U.S. Code) that have been violated; or the mandated rules and regulations that provide tenure to Charging Party's permanent classified Custodian employment (Gov. Code sec. 3540 et seq.).
- As a result of the District's actions, Charging Party is "not able to provide a permanent separation date from CalPERS covered employer . . . in order to obtain his pension funds" and Charging Party's "health insurance plan was cancelled on January 1, 2010;"
- Charging Party's "vacation hours and sick hours were stolen without a physician's approval or an actual industrial accident, illness or disability that prevented [Charging Party] from performing his duties as a Custodian;"
- Charging Party "has not been allowed to return to his permanent classified Custodian employment even though he provided DeSmeth and the Board of Directors (02/23/2009, 02/12/2010 & 04/26/2010) evidence of his ability to perform his job;"
- Dannenberg is not willing to cooperate and act according to the well established California State Laws and U.S. Federal Laws that penalize anyone; regardless of past, present or future employment in the United States of America, who knowingly and willfully makes false and fraudulent statements to any office, department or agency of the United States. Therefore, a Judge of competent jurisdiction is needed to enforce Government Code sections 3540 et seq.; Education Code sections: 45113, 45195; Evidence Code section: 1011; Penal Code sections: 115, 118, 487, 532 and Title 18 Section 1001 of the U.S. Code;
- Dannenberg and his Assistants (Including Hueneme Elementary School Districts Attorneys, Kay & Stevens Attorneys at Law, Janae Novotny) need to be prosecuted for the crimes and felonies they have knowingly and willfully engaged themselves into, in an attempt to negatively impact Ramiro Tizcareno's permanent classified Custodian employment;
- Charging Party should get rewarded millions of dollars for the damage fabricated to his reputation by Gerald D. Annenberg and his Assistants;
- Charging Party requests that Dannenberg and his Assistants get punished (fined and imprisoned) for the crimes committed (as prescribed in California Penal Code Sections: 115, 118, 487, 532 and Title 18 Section 1001 of the U.S. Code) and the coercion process done to obtain two different psychiatrist evaluations that are not only outdated, but that provide false and deceiving information about Ramiro Tizcareno's ability to perform the essential functions of his permanent classified Custodian job;
- Since Charging Party has been maliciously slandered, defamed, libeled and not terminated by the Board of Directors:

1) He shall be reinstated to his permanent classified Custodian employment;
2) His 248 vacation hours and 625 sick hours must be added back to his pay check;
3) He shall be rewarded the salary he should have been paid, had he not been deceived into the current "Employment Status" with non-incorporated merit system, Hueneme Elementary School District Article 17.6.4 of the CBA.

DISCUSSION

I. Burden and Statute of Limitations

PERB Regulation 32615(a)(5) requires that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." In doing so, a charging party should allege with specificity the particular facts giving rise to a violation. (*National Union of Healthcare Workers* (2012) PERB Decision No. 2249a-M.) The charging party may do this 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 (*Dept. of Food and Agriculture*), citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Such allegations should focus on the elements of the prima facie case. Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

The charging party's burden also includes alleging 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 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.)

The instant charge was filed on February 24, 2015, thus, allegations based on conduct occurring prior to August 24, 2014, are untimely. The following allegations are untimely because they occurred more than six months before the instant charge was filed:

- Allegations related to a June 28, 2007 Physician's certificate from Ford and a psychiatrist evaluation from Pollack dated April 14, 2008, that was provided to the District's Board of Directors on February 23, 2009;
- Allegations concerning the District's and CSEA's conduct in entering into a settlement agreement on June 30, 2009;
- Allegations concerning the District's placement of Charging Party on a 39 month list in December 17, 2009;

- Allegations related to the provision of evidence of Charging Party's ability to perform the essential functions of his permanent classified Custodian job to the District on February 12, 2010 and allegations related to the Charging Party's release to return to work on or before April 26, 2010;
- CSEA's alleged "mistreat[ment]" of Charging Party on October 3, 2013; and
- Allegations concerning documents that were or were not in Charging Party's personnel file on April 3, 2014.

II. Jurisdiction

PERB's jurisdiction is limited to the determination of unfair labor practice claims arising under the EERA and other public sector labor statutes. (*Compton Unified School District* (2006) PERB Decision No. 1805.) PERB has no jurisdiction to enforce provisions of the Education Code. (*California Teachers' Assn. v. Livingston Union School Dist.* (1990) 219 Cal.App.3d 1503,1525; *Oxnard Educators Association (Gorcey and Tripp)* (1988) PERB Decision No. 664.) Thus, the allegations that the District violated the Education Code by placing Charging Party on a 39 month re-employment list in violation of Education Code section 45195 are outside of PERB's jurisdiction. Similarly, the allegations that Dannenberg and his Assistants and/or the District's Attorneys violated Education Code sections 45195 and 45113, and "U.S. Federal Laws" are outside of PERB's jurisdiction.

III. Standing

Individual employees are not parties to the CBA and do not have standing to allege that the employer violated terms of the CBA. (*Oxnard School District (Gorcey/Tripp)* (1988) PERB Decision No. 667.) Thus, Charging Party lacks standing to assert that the District violated the CBA by failing to honor Article 17.6.4.

IV. Discrimination/Retaliation

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*).) 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).

Protected Activity

PERB has held that while employees engage in protected activity when individually seeking to enforce rights stated in a collective bargaining agreement, or when jointly prosecuting alleged violations of workplace rights, individual complaints about violations of external laws are not protected under EERA. (*Coachella Valley Unified School District* (2013) PERB Decision No. 2342.) PERB has also held that employee complaints about workplace matters to superiors are protected only when those complaints are "a logical continuation of group activity." (*Los Angeles Unified School District* (2003) PERB Decision No. 1552.)

The charge lacks specific facts demonstrating that Charging Party engaged in an activity protected by EERA. It is therefore not possible to proceed and evaluate the other elements of a discrimination violation.

Adverse Action

If the charge were amended to demonstrate that Charging Party engaged in protected activity, the charge still lacks information demonstrating the District took an adverse action against Charging Party, because the facts provided do not specify when the District actually terminated Charging Party's employment or took another action adverse to his employment. It is

therefore not possible to determine, when, if at all, the District took an adverse action against Charging Party.

Nexus

Even if the charge were amended to sufficiently allege that Charging Party engaged in protected activity and that an adverse action occurred, the charge does not provide the dates such conduct occurred and it is therefore impossible to determine whether any protected activity occurred sufficiently close in time to any adverse action to demonstrate close temporal proximity. (*North Sacramento School District*, *supra*, PERB Decision No. 264.) The charge also lacks any information establishing one or more additional factors.

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 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 May 18, 2015,[4] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Mary Weiss
Senior Regional Attorney

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[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.*)

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