

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**



PABLO FELIX PINTOR,

Charging Party,

v.

POMONA UNIFIED SCHOOL DISTRICT,

Respondent.

Case No. LA-CE-6023-E

PERB Decision No. 2498

August 5, 2016

Appearances: Pablo Felix Pintor, on his own behalf; Fagen Friedman & Fulfrost by Howard F. Friedman and James K. Ayden, Attorneys, for Pomona Unified School District.

Before Winslow, Banks and Gregersen, Members.

DECISION¹

GREGERSEN, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Pablo Felix Pintor (Pintor) from a dismissal (attached) by the PERB Office of the General Counsel of his unfair practice charge. The charge alleged that the Pomona Unified School District (District) discriminated against Pintor in violation of the Educational Employment Relations Act (EERA or Act)² by not properly crediting him with seniority credit or providing him proper compensation.

¹ PERB Regulation 32320, subdivision (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 [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 regulations are codified at Cal. Code Regs., tit. 8, § 31001 et seq.)

² EERA is codified at Government Code section 3540 et seq.

The Office of the General Counsel dismissed the charge because it was untimely filed and failed to state a prima facie case that the District had discriminated against Pintor in violation of EERA.

Pintor filed the instant appeal on February 16, 2016. On February 22, 2016, the PERB Appeals Assistant sent a letter to Pintor stating that his appeal did not comply with PERB Regulations in that he had not provided a valid proof of service. Thereafter, Pintor made an attempt to perfect his appeal from the dismissal of the charge. On March 14, 2016, PERB's Appeals Assistant determined Pintor's efforts to perfect the appeal were insufficient and dismissed the appeal as not timely filed. Pintor appealed this administrative determination, giving rise to a decision by the Board itself on June 9, 2016, that Pintor's appeal was timely. (*Pomona Unified School District* (2016) PERB Order No. Ad-438.)

We have reviewed this matter in full, including Pintor's charge; the District's position statement; the Office of the General Counsel's warning, filing deficiency, corrected service and dismissal letters;³ the appeal; and the District's response to the appeal. Based on that

³ On September 30, 2015, Pintor attempted to file a document titled "Unfair Practice Charge, First Amended Charge." The filing did not comply with PERB regulations because there was no signature under penalty of perjury and no completed proof of service showing that the District had been served with a copy of the documents. A filing deficiency letter was sent to Pintor on October 20, 2015. After receiving no response, the Office of the General Counsel dismissed the charge on November 10, 2015. However, because of an inadvertent clerical error, PERB records contained an incorrect mailing address for Pintor. As a result, the November 10, 2015 dismissal letter was revoked to allow for proper service. On December 23, 2015, the Office of the General Counsel corrected the service error by sending Pintor copies of the September 10, 2015 warning letter and the October 20, 2015 filing deficiency letter to Pintor's correct address. The Office of the General Counsel included a letter with the December 23, 2015 mailing informing Pintor that he was being afforded an opportunity to correct the deficiencies set forth in the October 20, 2015 warning letter. Pintor did not respond. On February 1, 2016, the Office of the General Counsel dismissed the charge for failure to state a prima facie case and untimeliness.

review, we conclude that the warning and dismissal letters accurately summarize the charge allegations, and are well reasoned and consistent with applicable law.

Pintor's appeal raises no issues that were not duly considered and thoroughly addressed by the Office of the General Counsel in its determination to dismiss the charge. The warning and dismissal letters accurately set forth the legal standards for determining whether a charge is timely filed as well as whether an employer has unlawfully discriminated against an employee in violation of EERA. For the reasons articulated by the Office of the General Counsel, Pintor has failed to allege facts sufficient to state a prima facie charge of discrimination under the EERA.

In addition, Pintor's appeal fails to comply with PERB Regulation 32635, subdivision (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 grounds for each issue stated.

Pintor merely reiterates facts alleged in the unfair practice charge and restates the arguments made to the Office of the General Counsel. He does not include a specifically stated issue of appeal with citations to any part of the dismissal, or provide grounds for the appeal of each issue. Thus, he fails to state "the specific issues of procedure, fact, law or rationale to which the appeal is taken." 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.)

Accordingly, we hereby affirm the dismissal of the charge and adopt the warning and dismissal letters of the Office of the General Counsel as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. LA-CE-6023-E is hereby DISMISSED.

Members Winslow and 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) 551-2808
Fax: (818) 551-2820



February 1, 2016

Pablo Felix Pintor

Re: *Pablo Felix Pintor v. Pomona Unified School District*
Unfair Practice Charge No. LA-CE-6023-E
DISMISSAL LETTER

Dear Mr. Pintor:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on April 20, 2015. Pablo Felix Pintor (Pintor or Charging Party) alleges that the Pomona Unified School District (District or Respondent) violated the Educational Employment Relations Act (EERA or Act)¹ by discriminating against him.

On September 10, 2015, PERB issued the attached Warning Letter. In response to the Warning Letter, Charging Party attempted to file documents on September 28, 2015. However, since these documents were not filed in accordance with PERB Regulations, PERB mailed Charging Party a Filing Deficiency Letter dated October 20, 2015, which set forth the specific deficiencies which Charging Party needed to cure. (See attached copy of this Filing Deficiency Letter.) No response was received from Charging Party to this Filing Deficiency Letter. Pursuant to the September 10, 2015 Warning Letter, the matter was dismissed on November 10, 2015. On or about December 17, 2015, Charging Party filed an appeal of the dismissal. Because of inadvertent service errors, the Office of the General Counsel asked the Board to send the case back to the Office of the General Counsel in order the matter to continue processing the charge.

On December 23, 2015, PERB corrected the service errors by sending Charging Party copies of the September 10, 2015 Warning Letter and the October 20, 2015 Filing Deficiency Letter. Also, Charging Party was informed in the attached correspondence dated December 23, 2015, that due to the service errors, Charging Party was being afforded an opportunity to correct the deficiencies set forth in the October 20, 2015 Filing Deficiency Letter. Charging Party was further advised that he needed to correct the filing deficiencies by January 15, 2016, otherwise

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.

the charge would be dismissed pursuant to the September 10, 2015 Warning Letter. Despite having received the correspondence,² Charging Party did not respond.

Therefore, the charge is hereby dismissed based on the facts and reasons set forth in the September 10, 2015 Warning Letter.

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

² On January 22, 2015, the undersigned Board agent called Charging Party. He confirmed that he received the December 23, 2015 correspondence and its attached October 20, 2015 Filing Deficiency Letter and the September 10, 2015 Warning Letter.

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 _____
Mirna Solís
Regional Attorney

Attachment

cc: James Ayden, Attorney

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
Telephone: (818) 551-2808
Fax: (818) 551-2820



September 10, 2015

Pablo Felix Pintor

Re: *Pablo Felix Pintor v. Pomona Unified School District*
Unfair Practice Charge No. LA-CE-6023-E
WARNING LETTER

Dear Mr. Pintor:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on April 20, 2015. Pablo Felix Pintor (Pintor or Charging Party) alleges that the Pomona Unified School District (District or Respondent) violated the Educational Employment Relations Act (EERA or Act)¹ by discriminating against him.

Facts As Alleged

While unclear, it appears that, in 2001, the Los Angeles County Office of Education (LACOE) transferred certain services and programs concerning special education to the District. The District allowed LACOE staff who were affected by the transfer to apply for positions with the District. It appears that Charging Party may have been a former LACOE employee, who subsequently obtained a position with the District following the transfer of special education services to the District.

Charging Party asserts that on September 5, 2014, he complained to the District's governing board that the District was discriminating against him by withholding seniority credit accrued as a LACOE employee and by not paying him a comparable salary. Charging Party attaches a document titled "School Board Meeting 6/11/14" containing four argument /concerns. This document appears to be an outline for a presentation before the school board.

In his statement of facts, Charging Party asks PERB the following:

In [sic] writing [sic] can you please let me no [sic] how the cost of living works and how it reflec[t]s on my pay check.

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.

How does the Incremental or vested works; Every how many years am I spouse [sic] to receive it.^[2]

Charging Party also attaches 13 pages of handwritten transcriptions of text messages dating as early as July 30, 2014, between his union representative and himself concerning his seniority and pay concerns.

Discussion

I. Charging Party's Burden and Statute of Limitations

PERB Regulation 32615(a)(5) requires that a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice" be stated in the charge itself. Allegations of fact should be contained in the statement of charge. (*Sacramento City Teachers Association (Franz)* (2008) PERB Decision No. 1959; see also, *Monrovia Unified School District* (1984) PERB Decision No. 460.) The charging party may satisfy its burden by providing facts sufficient to establish the "who, what, when, where and how" of an unfair practice charge. (*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.)

The charging party also has the burden of 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. (*Gavilian Joint Community College District* (1996) PERB Decision No. 1177.)

Charging Party filed the instant charge on April 20, 2015. Therefore, for an allegation to be timely, the allegation must have occurred on or after October 20, 2014. Charging Party

² Charging Party appears to ask PERB for legal advice concerning District's conduct and his entitlement to certain benefits. However, PERB is a neutral quasi-judicial agency that does not provide legal advice. A Board agent can assist a Charging Party by answering "procedural questions of each party regarding the processing of the case." (PERB Reg. 32620(b)(2).) Although Board agents are authorized to provide technical assistance regarding PERB procedures, they do not provide legal representation. (*Los Angeles Community College District* (1981) PERB Decision No. 186.)

attaches handwritten transcriptions of text messages as early as July 30, 2014, indicating that he felt the District was discriminating against him. Also attached is a document titled “School Board meeting 6/11/2014” in which Charging Party or his representative appears to argue that the District discriminated against him by not providing the appropriate salary or seniority credits he is allegedly entitled to. Therefore, from the facts alleged and the attachments to charge, it appears that Charging Party knew well before October 20, 2014, of the conduct underlying the instant charge.

Moreover, the transfer of services from LACOE to the District appears to have occurred in 2001. It is unclear when the District hired Charging Party, but, presumably his employment with the District would have occurred soon after the transfer of services. Soon after the District’s hiring of Charging Party, he should have known of the conduct underlying the instant charge, i.e., that he was not receiving the appropriate pay or seniority credits, yet Charging Party waited until April 20, 2015, to file his charge.

A. Statutory Tolling

EERA section 3541.5, subdivision (a)(1)-(2), provides for tolling of the six-month statute of limitation. This section states in pertinent part:

[T]he board shall not. . . [¶] [i]ssue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration. . . . The board shall, in determining whether the charge was timely filed, consider the six month limitation set forth in this subdivision to have been tolled during the time it took the charging party to exhaust the grievance machinery.

The statutory tolling doctrine only applies where the grievance and the later-filed charge raise the same issue. (*Los Angeles Unified School District* (2014) PERB Decision No. 2359 citing to *Peralta Community College District* (2001) PERB Decision No. 1462.) The statute of limitations does not begin to run or accrue until the grievance machinery has been exhausted and the possibility of a remedy via the grievance procedure is foreclosed. (*California School Employees Association (Spiegelman)* (1984) PERB Decision No. 400; *Los Angeles Unified School District* (1983) PERB Decision No. 31.) “A grievance is considered ‘actively pursued’ during the time in which the grievant is engaged in efforts preparatory to filing, e.g., making contact and meeting with the exclusive representative, investigating and interviewing witnesses, preparing the grievance including necessary documentation, because such preparatory efforts are ‘an inherent and necessary part of a complainant’s pursuit of his or her grievance.’” (*Ibid.*)

Charging Party fails to assert any facts that statutory tolling should apply. The Charging Party does not allege that he filed a grievance pursuant to the collective bargaining agreement

between his exclusive representative and the District, when he filed the grievance and when the grievance process was exhausted.

B. Continuing Violations Doctrine

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. (*Sacramento City Teachers Association (Franz)* (2008) PERB Decision No. 1959 (*Franz*); *Compton Community College District* (1991) PERB Decision No. 915.) The violation within the limitations period must constitute an independent unfair practice without reference to the prior violation. (*North Orange County Community College District* (1999) PERB Decision No. 1342.) If these conditions are satisfied, PERB may consider the prior violation even though it occurred outside the statute of limitations period. Here, Charging Party fails to allege a timely allegation of the same type occurring on or after October 20, 2014, which could potentially “revive” untimely allegations. While Charging Party attaches three e-mail messages dating from February 2015 to April 2015, Charging Party does not assert how these communications constitute a unfair labor practice which would “revive” an untimely unfair labor practice of the same type.

II. Discrimination

Assuming, arguendo, Charging Party is able to establish his allegations were timely filed or that tolling of the statute of limitations should apply, Charging Party, nonetheless, fails to establish a prima facie case of discrimination.

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).

Here, Charging Party fails to allege that he engaged in a recognizable protected activity under EERA and that the District knew of such protected activity. While he asserts that he has not been properly credited with seniority credit or provided the pay he is allegedly entitled to, Charging Party fails to establish the “nexus” element, i.e., that the District took this action because of his protected activity.

As noted above, to establish the “nexus” element, temporal proximity between the protected activity and the adverse action must be present. The lengthy lapse of time between the adverse action and the protected activity precludes an inference of unlawful motive. (See *El Dorado County Office of Education* (1990) PERB Decision No. 788-M [holding that protected activities occurring 22 months, 15 months, and 7-8 months before the alleged adverse action were too distant in time to give rise to inference of unlawful motive].)

Here, temporal proximity is unascertainable because Charging Party fails to identify a protected activity, much less provide a date of when he engaged in such activity. (See *County of San Diego* (2012) PERB Decision No. 2258-M [PERB cannot measure temporal proximity between a protected activity and an adverse action where charge fails to allege when employee engaged in protected activities].)

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

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.

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 **SEPTEMBER 17, 2015**,⁴ PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Mirna Solís
Regional Attorney

MZS

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.)