STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

DAVID CAINES, Charging Party, v. AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES LOCAL 3299, Respondent.	Case No. SF-CO-208-H PERB Decision No. 2555-H March 6, 2018

Appearances: David Caines, on his own behalf; Leonard Carder by Andrew Ziaja, Attorney, for American Federation of State, County & Municipal Employees Local 3299.

Before Gregersen, Chair; Banks and Winslow, Members.

DECISION[1]

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by David Caines (Caines) from the dismissal (attached) of his unfair practice charge against the American Federation of State, County & Municipal Employees Local 3299 (Local 3299.) The charge, as amended, alleged that Local 3299 violated section 3571.1 of the Higher Education Employer-Employee Relations Act (HEERA)[2] by breaching its duty of fair representation. On May 12, 2017, after investigating the charge and multiple

[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] HEERA is codified at Government Code section 3560 et seq.

amendments, PERB's Office of the General Counsel dismissed the charge as untimely and for failure to state a prima facie case. As explained in a warning letter dated October 12, 2016, all of the acts or omissions allegedly constituting Local 3299's unfair practices are alleged to have occurred before June 3, 2015, which is more than six months before December 3, 2015, when the original charge was filed.

On appeal, Caines asserts various errors in the Office of the General Counsel's investigation and decision to dismiss the charge. Local 3299 argues the appeal is meritless and urges the Board to adopt the dismissal.[3]

The Board has reviewed the entire case file and has fully considered the relevant issues and contentions on appeal in light of applicable law. The warning and dismissal letters accurately describe the factual allegations included in the unfair practice charge, as amended, and the Office of the General Counsel's legal conclusions are well reasoned and in accordance with applicable law. Based on this review, the Board adopts the warning and dismissal letters as the decision of the Board itself.

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[3] On June 26, 2017, Caines filed a reply in response to Local 3299's opposition to his appeal. Because PERB Regulations neither expressly provide for or preclude filing reply briefs on appeal, the Board has ruled that it has discretion to consider reply briefs when doing so would "aid the Board in its review of the underlying dispute," such as when an opposition to the appeal has raised a new issue, discussed new case law or formulated new defenses to an allegation. (*Beverly Hills Unified School District* (2008) PERB Decision No. 1969, p. 7.) It has also done so when a reply brief clarifies the issues on appeal by narrowing them in scope or number. (*City of San Luis Obispo* (2016) PERB Order No. Ad-444-M, pp. 4-5.)

Although Caines's reply attempts to clarify issues raised in the appeal, it does not do so in response to any "new" issue, case law, or defense raised for the first time in Local 3299's opposition. Nor does it attempt to clarify the issues on appeal by narrowing their scope or number. More importantly, it is not clear why the arguments raised in reply to Local 3299's opposition could not have been included in the appeal itself. Accordingly, we decline to consider the reply.

DISCUSSION

PERB Regulations require an appeal to identify "the specific issues of procedure, fact, law or rationale to which the appeal is taken"; "the page or part of the dismissal to which each appeal is taken"; and "the grounds for each issue stated." (PERB Reg. 32635, subd. (a)(1), (2), (3); *Petaluma City Elementary School District/Joint Union High School District* (2016) PERB Decision No. 2485, pp. 15-16.) The purpose of the regulation is to place the Board and the respondent "on notice of the issues raised on appeal." (*State Employees Trades Council United (Ventura, et al.)* (2009) PERB Decision No. 2069-H, p. 6; *City & County of San Francisco* (2009) PERB Decision No. 2075-M, p. 4.) An appeal that simply repeats the allegations of the charge, does not reference the substance of the dismissal, the page or part of the dismissal to which the appeal is taken or the grounds for each issue, or otherwise fails to identify the specific issues of procedure, fact, law or rationale as the grounds for reversal is subject to dismissal on that basis alone. (PERB Reg. 32635, subd. (a); *Beaumont Teachers Association/CTA (Grace)* (2012) PERB Decision No. 2260, pp. 2-3; *State of California (Department of Mental Health, Department of Developmental Services)* (2012) PERB Decision No. 2305-S, p. 4.)

Caines's appeal asserts 14 errors by PERB's San Francisco and Los Angeles Regional Offices in processing his charge. Some of the purported errors, such as the decision to transfer the case from the San Francisco to Los Angeles Regional Office of PERB, or the fact that the charge was under investigation for approximately five months before Caines received a warning letter, are not errors, but simply matters of administrative convenience, discretion and workload distribution among PERB's staff. (*Trustees of California State University* (2014) PERB Decision No. 2384-H, p. 4.) Consequently, absent some evidence of prejudice, which Caines's

appeal fails to identify or explain, the Office of the General Counsel's decisions to transfer the case to a different regional office and to grant an extension of time to Local 3299's representative are not grounds for reversing the dismissal. Nor has Caines identified any prejudice resulting from the fact that his charge was under investigation for five months before he received a warning letter from PERB's Office of the General Counsel. Consistent with PERB Regulations, the October 12, 2016 warning letter describes the facts obtained from the charge and, where appropriate, from Local 3299's response to the charge, and identifies various deficiencies in the charge, including untimeliness and a failure to state a prima facie case of a violation of Local 3299's duty of fair representation. (PERB Reg. 32620, subd. (d).) Caines apparently understood the contents of the warning letter and attempted to correct the deficiencies identified therein by filing various amended charges on October 25 and December 22, 2016 and on February 9, 2017. His appeal does not identify or describe how the warning letter failed to provide adequate notice of the deficiencies in his charge or departed in any other manner from the requirements set forth in PERB Regulations. Accordingly, this and other case-processing errors asserted by Caines provide no grounds for reversal.

A handful of purported case-processing errors asserted by Caines would, if true, constitute possible grounds for reversal. For example, the appeal asserts that the October 12, 2016 warning letter was "premature," because the Board agent in the Los Angeles Regional Office sent it without reviewing any of the amended charges submitted by Caines. However, the sequence of events suggests that Caines filed his various amended charges in response to the deficiencies identified in the warning letter. The dismissal letter dated May 12, 2017 indicates that the Office of the General Counsel considered each of the various amendments. Indeed, the factual allegations are grouped and described as they appeared in each successive version of the charge.

The appeal also asserts that the Board agent "[i]gnored important facts" provided by Caines and "didn't accept many of [the] associated documents" submitted in support of the charge allegations. Although the appeal contends that this error "is evident" based on the contents of the warning and dismissal letters, it nowhere identifies what factual allegations were ignored or neglected, nor explains how the Office of the General Counsel's asserted failure to consider such allegations materially altered its investigation and disposition of the charge. In particular, there is no indication *which* factual allegations, if afforded their proper consideration by the Office of the General Counsel, would have made the charge allegations timely or stated a prima facie case of any unfair practice or other violation of HEERA.

Caines similarly complains that the Board agent in the Los Angeles Regional Office "did nothing" when Local 3299's representative submitted a "doctored" version of a document, which did not match the one submitted by Caines in support of his charge. Again, however, the appeal does not identify how the purportedly "doctored" document differs in any respect from the version submitted by Caines or, more importantly, explain how any purported discrepancies materially affected the investigation and dismissal of the charge. At the charge processing stage, the Board and its agents must assume the truth of the charging party's factual allegations (*Golden Plains Unified School District* (2002) PERB Decision No. 1489, p. 6) and accept that version of events most favorable to the charging party's case. (*California School Employees Association & its Chapter 244 (Gutierrez)* (2004) PERB Decision No. 1606, pp. 3-4.) However, even accepting Caines's assertion that Local 3299's representative committed perjury by submitting "doctored" documents to PERB under oath or misrepresented material facts to PERB, the appeal does not identify any disputed material factual allegations which were improperly resolved against Caines, much less explain how any error of this nature affected the

Office of the General Counsel's investigation and disposition of the charge. The appeal thus provides no grounds for reversal on this basis either.

The appeal also challenges the Office of the General Counsel's determination that all of the charge allegations were untimely. The warning and dismissal letters explain that, inasmuch as the material allegations in the charge are alleged to have occurred before June 3, 2015, which is more than six months before the charge was filed, and are not subject to any exception, such as statutory or equitable tolling, they must be dismissed as untimely. Contrary to the appeal's contention, June 3, 2015 was not "an arbitrary date that was chosen by PERB-Glendale," but a date determined by correct application of the statute. As explained in the warning letter, PERB is statutorily prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months before the charge was filed. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1089-1091.) The limitations period begins to run once the charging party knows, or reasonably should have known, of the conduct underlying the charge, not when the charging party gains an understanding of the legal significance of that conduct. (G*avilan Joint Community College District* (1996) PERB Decision No. 1177 (*Gavilan*), p. 4; *San Dieguito Union High School District* (1982) PERB Decision No. 194 (*San Dieguito*), p. 14.) PERB applies the *Gavilan* standard to alleged violations of the duty of fair representation in the same manner it applies this standard to other categories of unfair practices. (*United Teachers Los Angeles (Raines, et al)* (2016) PERB Decision No. 2475, p. 57, 83, fn. 49; *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944, adopting warning letter at p. 4; *United Teachers of Los Angeles (Thomas)* (2010) PERB Decision No. 2150, adopting dismissal letter at p. 2.)

Caines argues, however, that his unique situation calls for a different rule. The facts, as described in the charge, are that in 2010, Local 3299 did not agree to, but allegedly acquiesced to, a reclassification of Caines and other Regents of the University of California (University) employees from the job title Principal Electronic Technician to Electronic Technician II. Caines does not allege that this reclassification resulted in a loss of pay or other employment for him or other affected University employees represented by Local 3299. However, Caines alleges that, years later, he applied for work with two private-sector employers, but was not offered a position because of his Electronic Technician II job title. After Caines left University employment in March 9, 2015, he eventually applied for and accepted a position as an Electronics Technician with a third private-sector employer in August 2015.

Whereas the unfair practice charge alleges that Local 3299 breached its duty of fair representation by failing to oppose the reclassification in 2010, in an effort to avoid dismissal for untimeliness, on appeal Caines appears to argue the charge is timely because he has suffered, and continues to suffer, new injuries as a result of Local 3299's alleged inaction. According to the appeal, the statute of limitations should not begin to run until, at the soonest, six months after Caines was hired by his current private-sector employer at a job title and pay rate below what he would have earned, but for his reclassification.

Our precedents recognize that a charge alleging conduct that occurred more than six months before the charge was filed may still be timely under a continuing violation theory, if the violation has been revived by recurring unlawful conduct of the same nature within the six-month limitations period. (*County of Orange* (2011) PERB Decision No. 2155-M, adopting dismissal letter at p. 4; *San Dieguito, supra,* PERB Decision No. 194, p. 5.) However, Caines does not appear to argue a continuing violations theory, and, in any event, that doctrine is

inapplicable here, because there is no allegation that Local 3299 engaged in any subsequent unlawful conduct that would constitute an independent violation.

Instead, Caines argues that because of the "extraordinary and unique" facts of his case, including that his job title, compensation and seniority are well below his career history, this case "shouldn't be compared to any other PERB Charges from the past or present" for statute of limitations purposes. In essence, Caines contends that his case should be considered timely because Local 3299's acquiescence to the University's 2010 reclassification decision has had ongoing effects on his pay and marketability as a job applicant *for non-University positions*. We decline this invitation to recognize a new exception to the statute of limitations based on the factual allegations of this case.

As matter of law, the duty of fair representation extends only to employees within the representative's bargaining unit and, as a practical matter, Local 3299 cannot be expected to be any more knowledgeable about the compensation policies and practices of potential private-sector employers than Caines. Any connection between the reclassification to a different job title, without loss of pay or other benefits, and Caines's future marketability to private-sector employers several years later is too tenuous to be within Local 3299's duty of fair representation. In the present case, Caines knew of the reclassification and Local 3299's acquiescence to it in 2010, but failed to file a charge until December 3, 2015. The allegation is untimely, and any loss of Caines's marketability occurring years later, which he attributes to the reclassification, does not preserve or revive the statute of limitations. Accordingly, we deny the appeal and adopt the dismissal as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. SF-CO-208-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Gregersen and Member Winslow 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

May 12, 2017

David Caines

Re: *David Caines v. American Federation of State, County & Municipal Employees Local 3299*
Unfair Practice Charge No. SF-CO-208-H
DISMISSAL LETTER

Dear Mr. Caines:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on December 3, 2015 and amended on October 25, 2016 (First Amended Charge), December 22, 2016 (Second Amended Charge) and February 9, 2017 (Third Amended Charge). David Caines (Charging Party) alleges that the American Federation of State, County & Municipal Employees Local 3299 (AFSCME or Respondent) violated section 3571.1 of the Higher Education Employer-Employee Relations Act (HEERA or Act)[1] by breaching its duty of fair representation. Respondent filed verified position statements on January 15, 2016, October 8, 2016, January 27, 2017 and February 27, 2017.

Charging Party was informed in the attached Warning Letter dated October 12, 2016 (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 by no later than October 21, 2016. As discussed above, this office received multiple amended charges.

Background

Charging Party was initially hired by the University of California, San Francisco (UCSF) as a Senior Electronic Technician, then in 2008 promoted to "Principal Electronic Technician." In 2010, he was reclassified to Electronic Technician II, but his rate of pay was not impacted. Charging Party includes several e-mail messages between AFSCME and UCSF in 2013, showing that the reclassification was not authorized by AFSCME mainly because it was not addressed through the "Labor Management Meeting Process" or subject to agreement by AFSCME. Additionally, there are e-mail messages showing that in 2013 and 2014, AFSCME requested a copy of any agreement regarding the job reclassifications. Charging Party asserts

[1] HEERA is codified at Government Code section 3560 et seq. PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the HEERA and PERB Regulations may be found at www.perb.ca.gov.

these requests "were never met!" Charging Party also asserts that AFSCME never responded to his own February 2015 information requests that sought copies of seniority lists. Respondent asserts that Charging Party was advised to make such requests through AFSCME's main office. On March 9, 2015, Charging Party resigned from UCSF without making the information request as directed.

Charging Party applied for outside job opportunities beginning September 2014. He asserts that he did not receive an offer from Tesla Motors because of his Electronic Technician II job title. He also claims he did not receive a job offer at "Getaround" because it confirmed with UCSF that Charging Party's title had been Electronic Technician II. Charging Party accepted an Electronics Technician position with ETM Electromatic in August 2015.

First Amended Charge

Charging Party asserts that AFSCME organizer Miguel Tamayo never responded to his February 2015 e-mail messages requesting "a copy of the UCSF Medical Center Clinical Engineering Department's 'Seniority' List." He asserts that Mr. Tamayo could have asked another AFSCME representative to contact Charging Party.[2]

Charging Party asserts that the statute of limitations should have begun to run on any claim Charging Party may have had resulting from the 2010 reclassification only after he allegedly suffered harm by voluntarily accepting a position with lower pay. According to Charging Party, the harm from a reclassification materializes only after the affected person searching for comparable jobs, learns that such jobs do not exist because of the reclassification. The amended charge re-alleges that Charging Party accepted a position on August 2015 at ETM.

Second Amended Charge

The Second Amended Charge asserts that Mr. Tamayo never communicated with Charging Party over the phone regarding the information requests and the Mr. Tamayo should have delegated responsibility for responding to his e-mails while on medical leave.

Charging Party asserts that the statute of limitations should start when ETM hired him in August 2015. Charging Party also asserts that the limitations period should not begin to run until a charging party actually knows of the allegedly unlawful conduct. The specific allegedly unlawful conduct here was that AFSCME did not demand to bargain with UCSF over the Technician title changes, and that it failed to "obtain a consensus" or else hold a vote among the bargaining unit members regarding the title changes. He further asserts that rather than allowing that the statute of limitations to run, the Union "could have created a 'Pause' condition by forcing Negotiations, requesting for an Injunction, or filing a PERB Charge for

[2] However, Respondent asserts that Mr. Tamayo told Charging Party over the phone that he should submit his information request through the AFSCME main office since Mr. Tamayo was on medical leave.

the purpose to protect all of the PCT members affected. But instead they ignored UCSF notifications. [AFSCME] ultimately allow[ed] a time-barred condition."

Charging Party further asserts that his charge should not be time-barred because the Union's handling of his grievance failed to address a separate UCSF internal investigation into his claims of discrimination, a separate "EEOC" claim process, his medical leave, his stress related to unemployment, the time required to find a new job, and that UCSF only releases payroll information that could be used to develop a potential change in August of each year.

Charging Party contends that AFSCME "compartmentalized unit members within various UDC departments." He claims that when UCSF reorganized the Principal Technician titles system wide, it "put all of UCSF Clinical Engineering's Principal Technicians at a lower pay scale when they became a Technician II." Charging Party cites to spreadsheets that purportedly reflect compensation data obtained through the UC Board of Regents public portal. These spreadsheets additionally purport to show that Principal Technicians were reclassified into different levels at different campuses—e.g., Technician II versus Technician III. Charging Party, in sum, claims that this shows "that [AFSCME] has no unification and no control over the job title situation."

The amended charge also makes allegations regarding AFSCME's handling of a grievance on his behalf. Charging Party asserts that AFSCME should have made use of his EEOC complaints and related allegations in the grievance process. He also asserts that he should have been notified at the outset that the lack of a memorandum of understanding (MOU) in force at the time would mean that any grievance filed on his behalf could not be advanced to binding arbitration.

Third Amended Charge

Charging Party claims that in his present position at ETM, he is not a "senior technical position" and this is creating a "minimum of a $40K shortfall" that will continually increase until he retires.

Charging Party asserts that AFSCME has breached its representational duty by: (1) failing to take action regarding the change in job titles and job descriptions ; (2) not notifying him that his grievance "would most likely fail"; (3) failing to introduce documentary evidence at grievance meetings; (4) failing to take action prior to his Grievance III Process; (5) failing to take action regarding Charging Party's information request regarding seniority information; and (6) "Selective Behavior in picking and choosing which UC Campuses, Departments, and/or Individuals to protect when they have a legitimate claim or charge ."

Charging Party contends that Mr. Tamayo knew about UCSF's Discriminatory practices since 2013 based on two letters sent to him. He asserts that because AFSCME did not assist him, he filed a claim with the EEOC against his employer. However, AFSCME failed to use or address his "Discriminatory Document" during grievance meetings with UCSF.

Discussion

In the Warning Letter, Charging Party was advised that any alleged unlawful conduct by AFSCME that occurred prior to June 3, 2015 is time-barred pursuant to the Act's six-month statute of limitations. The amended charges continue to make claims that that AFSCME breached its representational duty by failing to address the change in his titles that occurred in 2010. As explained in the Warning Letter, these allegations are untimely. There is also evidence showing that Caines was aware of the reclassification as early as 2013 through correspondence between AFSCME and the UCSF management; this would still make the allegation untimely. His claims that AFSCME failed to pursue or assist with his grievances also appears to have occurred outside the statute of limitations. Further any claims that AFSCME failed to adequately address his communications are also untimely since such conduct occurred prior to June 3, 2015 and Charging Party did not file a charge regarding such claim within six months of reasonably knowing that AFSCME would no longer provide assistance.

Further, a charging party's knowledge of the underlying conduct begins the statute of limitations and *not* a belated discovery of the unlawfulness of the conduct. (See *Empire Union School District* (2004) PERB Decision No. 1650 (*Empire*); *UCLA Labor Relations Division* (1989) PERB Decision No. 735-H; *California State Employees' Association (Darzins)* (1985) PERB Decision No. 546-S.) In this case it appears, Charging Party learned about the legal significance of AFSCME's purported breach of the representational duty after he was hired by ETM in August 2015; however, this belated discovery does not otherwise make this allegation timely.

Additionally, it does not appear that the charge presents an exception to the six-month limitations period under the continuing violation doctrine. (*Rio Teachers Association (Lucas)* (2011) PERB Decision No. 2157 [conduct that is otherwise untimely may be "revived" by later violation of the same type]; *County of Orange* (2011) PERB Decision No. 2155-M [the timely conduct must stand on its own as a violation without reference to the prior conduct].) The only allegation that is timely is Charging Party's acceptance of a lower-paying position at ETM in August of 2015; however this is not sufficient to "revive" his allegations regarding the 2010 job reclassification and his acceptance of the job does not constitute the same alleged violation that is otherwise untimely.

Charging Party appears to assert that the limitations period should be tolled because AFSCME could have created a "Pause" by entering into negotiations or taking other legal action. Equitable tolling is available to allow the parties to pursue a mutually agreed-upon dispute resolution procedure. (*Long Beach Community College District* (2009) PERB Decision No. 2002.) However, this doctrine does not apply to any of Charging Party's allegations because he has not identified any mutually agreed-upon dispute resolution procedure the parties were pursuing. Charging Party appears to argue that tolling applies because AFSCME wrongly abandoned and mishandled a grievance on his behalf; however, AFSCME informed Charging Party that it would not advance his grievance to arbitration on September 26, 2014, as no binding MOU was then in force. Even if the limitations period was tolled until

September 26, 2014, while the grievance procedure was being pursued, it would not save the original change that was filed on December 3, 2015—more than 14 months later.

Charging Party argues that AFSCME should have made use of his EEOC complaints and related allegations in the grievance process. Again, this conduct occurred outside the six-month statute of limitation and that charge has not alleged any new facts that would revive his claim or which would otherwise toll the limitations period.

The other claims of alleged misconduct by AFSCME (i.e., failure to negotiate or take legal action via PERB) do not implicate the duty of fair representation. (See e.g., (*SEIU Local 790 (Hein)* (2004) PERB Decision No. 1677) [a union's duty of fair representation only applies to the enforcement of contract-based remedies under the union's exclusive control, and therefore does not apply to actions in "extra-contractual forums," such as the pursuit of a civil lawsuit]; *County of Tehama* (2010) PERB Decision No. 2122-M [PERB is an extra-contractual forum].) Additionally, as discussed in the Warning Letter, AFSCME has discretion not to pursue matters at negotiations. (*California School Employees Association (Chacon)* (1995) PERB Decision No. 1108).

In the amended charges, Charging Party reasserts that AFSCME failed to provide him with the information he requested regarding a seniority list. However, these allegations are also untimely because Charging Party knew as early as February or March 2015 that the AFSCME representative (Mr. Tamayo) would not provide such information or respond further to his e-mail communications—nearly nine months prior to the filing of the charge. Further, in the Warning Letter, Charging Party was also advised that he cited to no legal authority supporting the claim that HEERA's representational duty legally obligates AFSCME to disclose information to an individual employee. Charging Party's amended charges fail to address this deficiency.

Charging Party's claim that AFSCME "compartmentalized" unit members, but did not prevent UCSF from doing so, fails to demonstrative a prima facie violation of the HEERA. AFSCME may not be held liable for UCSF's potential unfair practices. (*Compare* Gov. Code § 3571 *with* § 3571.1.) Charging Party further admits that this reclassification did not change his pay level. Because he has not suffered any individualized harm, he lacks standing, even assuming *arguendo* that he has alleged any cognizable unfair practice. (*United Teachers of Los Angeles (Hopper)* (2001) PERB Decision No. 1441 at p. 6.)

As more fully discussed in the Warning Letter, there is no evidence—based on the totality of the facts—to show that AFSCME acted arbitrarily, discriminatorily or in bad faith.

Conclusion

Accordingly, for the reasons set forth above, and those applicable in the October 12, 2016 Warning Letter, this charge is hereby dismissed.

Right to Appeal

Pursuant to PERB Regulations,[3] Charging Party may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code Regs., tit. 8, § 32635, subd. (a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code Regs., tit. 8, § 32635, subd. (b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, § 32135, subd. (c).)

[3] 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.

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 _____
Yaron Partovi
Senior Regional Attorney

Attachment

cc: Andrew Ziaja

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

May 2, 2017

David Caines

Re: *David Caines v. American Federation of State, County & Municipal Employees Local 3299*
Unfair Practice Charge No. SF-CO-208-H
WARNING LETTER

Dear Mr. Caines:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on December 3, 2015. David Caines (Charging Party) alleges that the American Federation of State, County & Municipal Employees Local 3299 (AFSCME or Respondent) violated section 3571.1 of the Higher Education Employer-Employee Relations Act (HEERA or Act)[1] by breaching its duty of fair representation. Respondent filed its position statement on January 15, 2016.

Relevant Facts

Charging Party was initially hired by the University of California, San Francisco (UCSF) as a Senior Electronic Technician, then in 2008 promoted to "Principal Electronic Technician." In 2010, he was reclassified to Electronic Technician II, but his rate of pay was not impacted. Charging Party includes several e-mail messages between AFSCME and UCSF in 2013, showing that the reclassification was not authorized by AFSCME mainly because it was not addressed through the "Labor Management Meeting Process" or subject to agreement by AFSCME. Additionally, there are e-mail messages showing that in 2013 and 2014, AFSCME requested a copy of any agreement regarding the job reclassifications. Charging Party asserts these requests "were never met!" Charging Party also asserts that AFSCME never responded to his own February 2015 information requests that sought copies of seniority lists. Respondent asserts that Charging Party was advised to make such requests through AFSCME's main office. On March 9, 2015, Charging Party resigned from UCSF without making the information request as directed.

Charging Party applied for outside job opportunities beginning September 2014. He asserts that he did not receive an offer from Tesla Motors because of his Electronic Technician II job

[1] HEERA is codified at Government Code section 3560 et seq. PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the HEERA and PERB Regulations may be found at www.perb.ca.gov.

title. He also claims he did not receive a job offer at "Getaround" because it confirmed with UCSF that Charging Party title was that of Electronic Technician II. Charging Party accepted an Electronics Technician position with ETM Electromatic in August 2015.

Discussion

I. Charging Party's 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 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 filed his charge on December 3, 2015. The statutory limitations period extends six months prior to the filing of the charge to June 3, 2015. Thus, any allegations regarding conduct by AFSCME occurring before June 3, 2015, are time-barred. Charging Party alleges that the Union failed to address his title change (i.e., from Principal Electronic Technician to Electronics Technician II) as part of its duty of fair representation. Charging Party had been aware of this reclassification nearly five years prior to the charge filing. The 2013 e-mail messages between AFSCME and UCSF concerning the title change was also known by Charging Party nearly two years prior to the filing of the charge. Further, Charging Party was made aware before his resignation in March 2015 to submit information requests directly to AFSCME's main office, but he failed to do so as directed. Lastly, Charging Party complains that his title reclassification allegedly adversely affected his ability to obtain employment elsewhere; however, it appears that he had been aware of this prior to June 3, 2015 given that

he began applying for outside positions in September of 2014.[2] Because Charging Party appears to have been aware of the aforementioned conduct before June 3, 2015, the above-described allegations are untimely under the Act's six month statute of limitations and must be dismissed.

II. Duty of Fair Representation

Charging Party has alleged that the exclusive representative denied him the right to fair representation guaranteed by HEERA section 3578 and thereby violated section 3571.1(b). The duty of fair representation imposed on the exclusive representative extends to grievance handling. (*Fremont Teachers Association (King)* (1980) PERB Decision No. 125; *United Teachers of Los Angeles (Collins)* (1982) PERB Decision No. 258.) In order to state a prima facie violation of this section of HEERA, Charging Party must show that the Respondent's conduct was arbitrary, discriminatory or in bad faith. In *United Teachers of Los Angeles (Collins)*, the Public Employment Relations Board stated:

> Absent bad faith, discrimination, or arbitrary conduct, mere negligence or poor judgment in handling a grievance does not constitute a breach of the union's duty. [Citations omitted.]
>
> A union may exercise its discretion to determine how far to pursue a grievance in the employee's behalf as long as it does not arbitrarily ignore a meritorious grievance or process a grievance in a perfunctory fashion. A union is also not required to process an employee's grievance if the chances for success are minimal.

In order to state a prima facie case of arbitrary conduct violating the duty of fair representation, a Charging Party:

> must at a minimum include an assertion of sufficient facts from which it becomes apparent how or in what manner the exclusive representative's action or <u>inaction</u> was without a rational basis or devoid of honest judgment.

(*Reed District Teachers Association, CTA/NEA (Reyes)* (1983) PERB Decision No. 332, p. 9, quoting *Rocklin Teachers Professional Association (Romero)* (1980) PERB Decision No. 124; emphasis in original.)

With regard to when "mere negligence" might constitute arbitrary conduct, the Board observed in *Coalition of University Employees (Buxton)* (2003) PERB Decision No. 1517-H that, under federal precedent, a union's negligence breaches the duty of fair representation in "cases in

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[2] Alternatively, by failing to allege the date on which an alleged violation occurred, a charging party fails to demonstrate that the charge was timely. (*City of Santa Barbara* (2004) PERB Decision No. 1628-M.)

which the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim." (Quoting *Dutrisac v. Caterpillar Tractor Co.* (9th Cir. 1983) 749 F.2d 1270, at p. 1274; see also, *Robesky v. Quantas Empire Airways Limited* (9th Cir. 1978) 573 F.2d 1082.)

Even assuming all of Charging Party's allegations were timely, he has still failed to state a prima facie case of a denial of the duty of fair representation under HEERA. Charging Party has not alleged for example, any facts showing that the Union should—or even could—have filed a grievance under the parties' memorandum of understanding (MOU) in response to the 2010 classification. Even if there is a factual basis for filing a grievance, AFSCME was not obligated to file a grievance under these circumstances. (See e.g., *Castro Valley Unified School District* (1980) PERB Decision No. 149 [a union may decline to pursue a grievance to arbitration that risks an adverse ruling that could have adverse effects on other in the bargaining unit; it is also free to prioritize stronger claims over less strong claims as the steward of limited union resources].) Charging Party's allegation that the reclassification was adverse to his interests appears conclusory because he did not suffer a reduction in compensation and he speculates that he could be earning greater compensation had his title remained unchanged. Given AFSCME's broad discretion to pursue a grievance, Charging Party's failure to assert facts showing that a grievance was warranted, and lack of evidence that the decision was without a rational basis or honest judgment, this allegation fails to demonstrate a prima facie case that AFSCME breached its representational duty.

It appears Charging Party is also alleging that AFSCME failed to engage in negotiations with UCSF over the reclassification decision. As a general rule, an exclusive representative enjoys a wide range of bargaining latitude. As the United States Supreme Court stated in *Ford Motor Co. v. Huffman* (1953) 345 U.S. 330, 338:

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to good faith and honesty of purpose in the exercise of its discretion.

Acknowledging the need for such discretion, PERB determined that an exclusive representative is not expected or required to satisfy all members of the unit it represents. (*California School Employees Association (Chacon)* (1995) PERB Decision No. 1108.) Moreover, the duty of fair representation does not mean an employee organization is barred from making an agreement which may have an unfavorable effect on some members, nor is an employee organization obligated to bargain a particular item benefiting certain unit members. (*Ibid.*; *Los Rios College Federation of Teachers (Violett)* (1991) PERB Decision No. 889.) The mere fact that Charging Parties were not satisfied with the agreement is insufficient to

demonstrate a prima facie violation. (*Los Rios College Federation of Teachers (Violett), supra*.)

Based on these controlling legal principles, it cannot be said that AFSCME's alleged failure to negotiate over the reclassification was arbitrary, discriminatory, or done in bad faith. There is no evidence that the reclassification specifically targeted Charging Party. The fact that Charging Party wishes Respondent had negotiated a different result for reclassification does not establish a prima facie violation of AFSCME's duty of fair representation.

Charging Party asserts that AFSCME failed to pursue an information request it allegedly submitted to UCSF on May 9, 2014. The duty of fair representation attaches only to contractual proceedings and contract administration. (*California State Employees Association (Sandberg)* (2004) PERB Decision No. 1694-S.) There is no evidence showing that the information requested by AFSCME was necessary to discharge AFSCME's representational duties, such as grievance processing or contract administration. Facts in the file show that in 2013, AFSCME successfully reached an agreement with UCSF to consider internal applicants for the Electronic Technician IV positions, as part of UCSF's decision to restructure job titles. Accordingly, the charge fails to allege facts showing that AFSCME's action or inaction was without a rational basis.

Charging Party also alleges that AFSCME failed to respond to his request for information regarding a seniority list. However, Charging Party cites to no authority supporting the claim that HEERA's representational duty legally obligates AFSCME to disclose information to an individual employee. Charging Party also fails to allege any facts showing that parties' MOU imposes a similar obligation on AFSCME. Upon receiving Charging Party's request for information, he was eventually advised to submit his request through the main AFSCME office. Charging Party failed to do this or follow up with AFSCME and instead resigned on March 9, 2015. Accordingly, the charge fails to show that AFSCME's action or inaction in this regard was without a rational basis or devoid of honest judgment.

Even if any one action by the exclusive representative, standing alone, would not constitute a breach of the duty of fair representation, a violation may be established under a "pattern of conduct" theory. (*Mt. Diablo Education Association (Scott)* 2010 PERB Decision No. 2127.) PERB will assess whether the cumulative actions of the exclusive representative, considered in their totality, are sufficient to constitute a prima facie showing of an arbitrary failure to fairly represent the employee. (*Service Employees International Union, Local 1021 (Schmidt)* (2009) PERB Decision No. 2080-M.) Based on the totality of the facts, there is no evidence that AFSCME acted arbitrarily, discriminatorily or in bad faith under a "pattern of conduct" theory.

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

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 October 21, 2016,[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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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.)