

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



REBECCA DAWN WU,

Charging Party,

v.

TWIN RIVERS UNITED EDUCATORS,

Respondent.

Case No. SA-CO-618-E

PERB Decision No. 2679

October 29, 2019

Appearance: Rebecca Dawn Wu, on her own behalf.

Before Banks, Krantz, and Paulson, Members.

DECISION¹

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal from the attached dismissal issued by PERB’s Office of the General Counsel (OGC). Rebecca Dawn Wu (Wu), an employee of Twin Rivers Unified School District (District), filed the underlying unfair practice charge against a union that exclusively represents District employees in specified certificated positions, Twin Rivers United Educators (TRUE). The charge, as amended, alleged that TRUE breached its duty of fair representation under the Educational Employment Relations Act (EERA)² by failing to represent Wu with regard to her claim that the District misclassified her as a substitute teacher,

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.” The Board has not designated the decision herein as precedential because it meets none of the criteria enumerated in the regulation. (PERB Regulations are codified at Cal. Code Regs., tit. 8, § 31001 et seq.)

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

as well as by retaliating against her based on protected activities. OGC dismissed the amended charge for failing to state a prima facie case. Wu filed a timely appeal.

The Board has reviewed the case file in its entirety. We find that the warning and dismissal letters accurately describe the allegations included in the amended charge and are in accordance with applicable law. We therefore adopt the warning and dismissal letters as the decision of the Board itself and affirm OGC's dismissal.

ORDER

The amended unfair practice charge in Case No. SA-CO-618-E is DISMISSED WITHOUT LEAVE TO AMEND.

Members Banks and Paulson joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1021
Fax: (510) 622-1027



July 3, 2019

Rebecca Dawn Wu

Re: *Rebecca Dawn Wu v. Twin Rivers United Educators*
Unfair Practice Charge No. SA-CO-618-E

DISMISSAL LETTER

Dear Ms. Wu:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on August 15, 2017. Rebecca Dawn Wu (Ms. Wu or Charging Party) alleges that the Twin Rivers United Educators (TRUE or Respondent) violated the Educational Employment Relations Act (EERA or Act)¹ by not representing her with respect to a misclassification issue.

TRUE filed a position statement on September 20, 2017. Charging Party filed a First Amended Charge on October 10, 2017.

Charging Party was informed in the attached Warning Letter dated December 14, 2018 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, the charge should be amended. Charging Party was further advised that, unless the charge was amended to state a prima facie case or withdrawn prior to January 4, 2019, the charge would be dismissed. Subsequently an extension of time was granted.

On March 26, 2019, Charging Party filed a Second Amended Charge. The Second Amended Charge does not cure the defects discussed in the Warning Letter, and does not state a prima facie case. Accordingly, the charge is dismissed for the reasons discussed herein and in the Warning Letter.

Summary of Facts

The Second Amended Charge consists of a twenty-two single-spaced narrative statement of the charge. The allegations are not organized or presented in a structured fashion. The allegations all appear to repeat allegations already made in the initial Charge and the First Amended

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.

Charge. In brief, Charging Party alleges that she was misclassified as a substitute, that TRUE should have represented her with respect to her allegations that she was misclassified, and that provisions of the applicable Collective Bargaining Agreement (CBA) (between TRUE and the Twin Rivers Unified School District [District]) covering hours and compensation were violated. She also alleges that TRUE retaliated against her.

Discussion

A. Standard of Review

As stated in the Warning Letter, 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.” The Second Amended Charge does not meet this standard. The allegations are not presented in a cohesive, clear or concise fashion, the document is not organized, and many of the individuals and events are not clearly identified.

Also as stated in the Warning Letter, the charging party’s burden 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.) The charge was filed on August 15, 2017, so any allegations occurring prior to February 15, 2017, are untimely filed. Many of the allegations in the Second Amended Charge occurred prior to February 15, 2017, and are therefore untimely.

B. The Bargaining Unit Represented by TRUE

As stated in the Warning Letter, Article 1.4 of the CBA between TRUE and the District² states as follows:

Recognition: The District recognizes the Association [i.e., TRUE] as the exclusive representative for all certificated employees not designated as management or confidential by action of the Board of Trustees of the District or otherwise agreed to by the Parties except as follows:

1.4.1 Substitute employees

1.4.2 Adult Education teachers employed less than 20 hours per week

Charging Party was classified as a substitute and therefore was excluded from the bargaining unit and was not represented by TRUE. Although Charging Party alleges the District

² The CBA is available at the following link: <https://trueassociation.org/2017/09/2016-2018-truetrusd-contract/> The effective dates are July 1, 2016 through June 30, 2018.

misclassified her, the facts are that she was classified as a substitute. Accordingly, TRUE did not owe Charging Party any duty to represent her.

C. Retaliation

The standard developed to analyze whether an employer retaliated against an employee for protected activity is also used where it is alleged that an employee organization retaliated against an employee. The charging party must show that: (1) the employee exercised rights under EERA; (2) the organization had knowledge of the exercise of those rights; (3) the organization took adverse action against the employee; and (4) the organization took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*); *Civil Service Division, California State Employees' Association (Eisenberg)* (2009) PERB Decision No. 2034-S; *Inlandboatmen's Union of the Pacific (OKeefe)* (2011) PERB Decision No. 2199-M.)

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 organization'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 organization's disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S); (2) the organization's departure from established procedures and standards when dealing with the employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104); (3) the organization's inconsistent or contradictory justifications for its actions (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S); (4) the organization'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 organization'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) 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 organization's unlawful motive (*North Sacramento School District, supra*, PERB Decision No. 264; *Novato, supra*, PERB Decision No. 210).

Charging Party alleges that TRUE retaliated against her by not representing her, not honoring her membership, and for her protected activity of attempting to get others to join the California Teachers Association (CTA). She alleges an adverse action occurred from May through August 2016, and beyond, when she did not receive membership in TRUE and on August 1, 2017 when she would have gone back to work. However, as discussed above, Charging Party was not a member of the bargaining unit represented by TRUE. Accordingly, TRUE had no duty to represent her. It cannot be determined how TRUE's refusal to represent a non-member could be an adverse action under the objective standard. Accordingly, a prima facie case for retaliation is not stated.

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) 327-9425

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 _____
Laura Z. Davis
Supervising Regional Attorney

Attachment

cc: Jacob F. Rukeyser, Attorney

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1021
Fax: (510) 622-1027



December 14, 2018

Rebecca Dawn Wu

Re: *Rebecca Dawn Wu v. Twin Rivers United Educators*
Unfair Practice Charge No. SA-CO-618-E
WARNING LETTER

Dear Ms. Wu:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on August 15, 2017. Rebecca Dawn Wu (Ms. Wu or Charging Party) alleges that the Twin Rivers United Educators (TRUE or Respondent) violated the Educational Employment Relations Act (EERA or Act)¹ by not representing her with respect to a misclassification issue.

TRUE filed a position statement on September 20, 2017. Charging Party filed a First Amended Charge on October 10, 2017.

Summary of Facts

A. Initial Charge

Charging Party was a Home Hospital Instructor (HHI) for up to three students at the Twin Rivers Unified School District (District). She worked three hours (presumably, per week) for one student and up to five hours for the other students, except for the last week of school when she worked up to five hours for all three students. However one student was not available most of the time due to illness and another student was graduating. So, Charging Party worked less than 15 hours per week.

Charging Party was misclassified as a substitute. TRUE knew that Charging Party was a misclassified substitute. However, TRUE chose not to follow the procedures in the Collective Bargaining Agreement (CBA)² and did not contact the District to meet and discuss the misclassification.

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 CBA is between TRUE and the District.

On May 6, 2017, TRUE President Kristin Finney sent Charging Party an e-mail message stating in part as follows:

The Twin Rivers Unified School District substitute teachers are not part of the TRUE bargaining unit, which means that TRUE cannot represent them.

On EdJoin we noticed that since March 30, 2017 the District has had posted openings for certificated staff positions as Home Hospital Instructors, for the 2017-2018 school year. We encourage you to apply, and if hired by the District for that position or any other certificated staff position, we would be happy to welcome you as a member of TRUE.

In April 2017, Charging Party filed a Williams Act Uniform Complaint with the District. She also sent e-mail messages to District officials, including the Governing Board, and spoke at a public comment period in May 2017. In July 2017, the District responded “they do not see it as a Vacancy or an issue.”

Charging Party alleges she is not substituting for anyone, and according to a PAF form she is substituting for a student. Her timesheet is not the type used by substitutes.

B. First Amended Charge

In spring 2016, Charging Party had two jobs – one position as a regular substitute and the second as an HHI teacher. She contends that she was misclassified as a substitute for the HHI position. The HHI teachers at the District do not work under a contract. However, Charging Party contends that under the Education Code these positions should be contracted.

In 2015, Charging Party joined the statewide organization of California Teachers Association (CTA). In September 2016 she notified CTA that her attorney was pressuring her to settle, and she asked CTA to pay her attorney’s retainer fee. CTA declined that request. Charging Party believed that the settlement offer was not sufficient. The attorney agreed to do only two depositions, evidently due to cost. Charging Party was informed that if she did not settle her case would be dropped.

Neither TRUE nor CTA told misclassified teachers to join CTA. TRUE also did not want Charging Party to communicate with misclassified teachers at KEEMA High School for the school year 2015-2016. At a meeting on February 8, 2016, she was told not to tell the teachers that they could get a contract and a settlement. However, she did tell them in April 2016.

Charging Party alleges that the certificated staff position mentioned in the May 6, 2017 e-mail message from TRUE is not a probationary position. Charging Party contends that TRUE should have represented her because she is misclassified as a substitute.

It appears a vacant position was posted on March 30 (the year is not specified) for an hourly, part-time position. This is not for a probationary position.

C. Applicable Contract Language

Article 1.4 of the CBA between TRUE and the District³ states as follows:

Recognition: The District recognizes the Association [i.e., TRUE] as the exclusive representative for all certificated employees not designated as management or confidential by action of the Board of Trustees of the District or otherwise agreed to by the Parties except as follows:

1.4.1 Substitute employees

1.4.2 Adult Education teachers employed less than 20 hours per week

Discussion

A. Standard of Review

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 charge and the amended charge do not meet this standard. The information is not presented in a cohesive, clear or concise fashion. Many of the individuals and incidents mentioned are not clearly identified, the events are not presented in chronological order, and the information is not organized.

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

³ The CBA is available at the following link: <https://trueassociation.org/2017/09/2016-2018-truetrusd-contract/> The effective dates are July 1, 2016 through June 30, 2018.

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 charge was filed on August 15, 2017, so any allegations occurring prior to February 15, 2017, are untimely filed.

B. The Bargaining Unit Represented by TRUE

Charging Party alleges she was classified as a substitute teacher, although she contends that the District misclassified her. As a substitute, according to the plain and unambiguous language of the CBA, she is not a member of the bargaining unit represented by TRUE.

A union only owes a duty of fair representation to members of the bargaining unit it represents. (*Professional Engineers in California Government (Lopez)* (1989) PERB Decision No. 760-S [“the duty of fair representation evolved out of the exclusive representative’s duty to represent each and every unit member ...”]; *Alameda County Management Employees Association (Harper)* (2011) PERB Decision No. 2198-M [no duty of fair representation owed to non-unit member].) If an individual is not a member of the bargaining unit, then the union is not under any obligation to represent that employee, and the duty of fair representation does not apply. Here, Charging Party quite plainly was excluded from the bargaining unit and thus TRUE owed her no duty of representation.

C. The Duty of Fair Representation

An exclusive representative owes no duty of fair representation to a unit member unless the exclusive representative possesses the exclusive means by which such member can vindicate an individual right, and the right in question derives from a collective bargaining agreement. (*National Education Association-Jurupa (Norman)* (2014) PERB Decision No. 2371.) Charging Party’s primary concern appears to be that she was misclassified as a substitute. Teacher classification is covered by the Education Code. (*Ibid.*) PERB lacks jurisdiction to enforce the Education Code. (*Ibid.*)

Charging Party has alleged that the exclusive representative denied Charging Party the right to fair representation guaranteed by EERA section 3544.9 and thereby violated section 3543.6(b). In order to state a prima facie violation of this section of EERA, Charging Party must show that the Respondent’s conduct was arbitrary, discriminatory, or in bad faith. In *United Teachers of Los Angeles (Collins)* (1982) PERB Decision No. 258, the 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. [Citations omitted.]

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 inaction 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 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, Ltd.* (9th Cir. 1978) 573 F.2d 1082.)

Thus, in order to state a prima facie breach of the union's duty of fair representation, a charging party must establish that the respondent's conduct was arbitrary, discriminatory or in bad faith. (*United Teachers of Los Angeles (Collins)*, *supra*, PERB Decision No. 258.) Charging Party has not alleged any facts to show that TRUE owed her a duty of fair representation and that TRUE breached this duty. Accordingly, a prima facie case is not stated.

D. Allegations Against the District and CTA

The instant charge names TRUE as the respondent. It is not filed against the District, and the District is not a respondent. Similarly, the charge is not filed against CTA, and CTA is not a respondent.⁴ Therefore, only allegations against TRUE have been considered herein. (*Ventura County Community College District* (2009) PERB Decision No. 2082; *Chula Vista Elementary School District* (2004) PERB Decision No. 1647 [only named respondents are subject to

⁴ CTA, a statewide organization, is a distinct entity from the local affiliate, and is not an exclusive representative. (*Orange Unified Education Association & California Teachers Association (Rossmann)* (2003) PERB Decision No. 1533.)

remedy in a PERB charge].) Accordingly, all of Charging Party's allegations concerning the District's failure to reclassify her, and her allegations concerning the conduct of CTA, cannot be addressed with respect to this charge.

For these reasons the charge, as presently written, does not state a prima facie case.⁵ 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 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 January 4, 2019,⁶ PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Laura Z. Davis
Supervising Regional Attorney

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⁵ 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.*)

⁶ 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.)