STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

LOS RIOS CLASSIFIED EMPLOYEES ASSOCIATION,	)	
Charging Party,	)	Case No. S-CE-1052
v.	)	PERB Decision No. 638
LOS RIOS COMMUNITY COLLEGE DISTRICT,	)	November 3, 1987
Respondent.	)	

Appearances; Kathy Felch, Attorney, for Los Rios Classified Employees Association; Susanne M. Shelley, General Counsel, for Los Rios Community College District.

Before Hesse, Chairperson; Craib, Shank, and Cordoba, Members.

DECISION

HESSE, Chairperson: This case is before the Public Employment Relations Board (PERB or Board) on appeal by charging party of the Board agent's dismissal, attached hereto, of its charge alleging that the Los Rios Community College District violated section 3543.5(a), (b), and (c) of the Educational Employment Relations Act (EERA).

We have reviewed the dismissal and, finding it free from prejudicial error, adopt it as the Decision of the Board itself, insofar as the Board agent concludes that the allegations in the instant charge fail to state a prima facie violation of EERA.[1]

[1]We note that Member Craib's dissenting opinion arises from a fundamental misperception of this case and the Board's

ORDER

The dismissal of the unfair practice charge in Case No. S-CE-1052 is hereby AFFIRMED.

Members Shank and Cordoba joined in this Decision.

Member Craib's dissent begins on page 3.

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longstanding adherence to the practice of dismissing charges which fail to state a prima facie case. Our dissenting colleague simply misreads the basis for the General Counsel's dismissal of the instant charge. He argues that the General Counsel erringly dismissed this charge by concluding that the notice provision was "reasonable" — thus reaching the merits of the case. However, the General Counsel's dismissal letter simply concluded that charging party failed to plead facts from which the legal conclusion establishing a past practice could be drawn. Absent charging party's allegation of facts supporting a past practice or "policy," there is nothing upon which a complaint alleging a unilateral change may issue.

Furthermore, we find our dissenting colleague's contention that PERB Regulations 32615(a)(5) and 32620(b)(5) are analogous to California Code of Civil Procedure section 425.10 most interesting, but misplaced. We first question the wisdom of comparing these standards. There is a critical procedural difference between filing a civil lawsuit and PERB's issuance of a complaint. Even when a plaintiff on his or her own initiative files a lawsuit, such pleading must conform to standards of factual sufficiency to support the cause of action pled. Before PERB, the General Counsel initially decides whether a complaint shall issue. The authority to issue a complaint is limited to those instances where the charge, on its face, states facts sufficient to demonstrate a prima facie case. (PERB Reg. 32620(b)(5) and (6).)

Craib, Member, dissenting: I have exercised my right to join this panel because I have serious misgivings about the majority's affirmance of the dismissal. In my view, the majority has erred both in assessing the factual pleadings in the instant case and in imposing a pleading requirement more rigorous than that demanded by the courts of this state.

The charge springs from the unilateral imposition by the director of the District's Public Safety Center of a requirement that mandates employees to present a written request for vacation leave a minimum of three months in advance of the requested leave. Allegedly, prior to enactment of this policy, the past practice with regard to vacation leave requests was to require employees to submit such a request a reasonable amount of time prior to the date of the requested leave.

PERB regulations require that an unfair practice charge contain a clear and concise statement of the facts and conduct alleged to constitute an unfair practice. PERB Regulation 32615(a)(5). The Board agent assigned to process the charge shall dismiss the charge if the charge or the evidence is insufficient to state a prima facie case. PERB Regulation 32620(b)(5). Further, Board precedent instructs that the factual allegations contained in the charge are considered true for purposes of stating a prima facie case. San Juan Unified

School District (1977) EERB Decision No. 12[1]; Cupertino Union Elementary School District (1986) PERB Decision No. 572.

In this case, the charging party has satisfied the Board's regulations. The charge clearly and concisely states that the director replaced the requirement of reasonable advance notice with a hard and fast rule requiring three months advance notice. There is no question in my mind that these facts are sufficient to establish a prima facie case that the three-month rule unilaterally changed the past practice requiring reasonable advance notice of vacation leave requests. The Board agent erred by weighing the evidence and reaching the factual conclusion that the three-month rule was not unreasonable and thus not a change. Clearly, whether or not this unilaterally imposed notice requirement comports with the past practice is a factual determination for the trier of fact to decide after hearing from all witnesses and reviewing all documentary evidence. It is, in my opinion, inappropriate for the Board agent to assess the merits of the charge during the investigatory process.

By affirming the dismissal, the majority is requiring the charging party to go beyond the elements of a prima facie case and is demanding that, at this juncture, it come forward with evidence sufficient to convince the Board agent that the three-month rule is unreasonable. The variables cited by the Board

[1]Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board.

agent such as department size and peak work periods may well be among the factors relied on by the trier of fact in reaching the final determination as to the reasonableness of the new advance-request rule. However, considering those items at the pleading stage and requiring charging party to, in effect, refute them to the satisfaction of the Board agent processing the charge is both unfair and unprecedented.

In concluding that the charging party has failed to provide sufficient factual allegations to establish a prima facie case, my colleagues apparently view the allegation that the three-month rule is unreasonable as a conclusion of law. This is in error. It is not the alleged unreasonableness of the new vacation leave rule itself that would constitute a violation of the statute. Rather, the imposition of the rule is a violation if it constitutes a unilateral change. The charging party's claim that the new rule is unreasonable is a factual assertion that cannot be decided without consideration of evidence regarding workloads, staffing levels and past application of the leave policy.[2] Under PERB precedent, allegations of fact must be accepted as true for purposes of this appeal of the dismissal. To require that more factual allegations be included in the charge would be to demand evidence in support of the factual claim of unreasonableness. The appropriate

[2]It is the majority's failure to grasp the distinction between a conclusion of law and an ultimate fact that has caused it to view the case with a jaundiced eye (or as the majority might say, has created a fundamental misperception of the case).

forum for the production of evidence is, of course, the evidentiary hearing.

Leaving aside the distinction between conclusions of law and allegations of ultimate fact, the Board's decision today departs from case law under a similar statute regarding pleading requirements. The California Code of Civil Procedure imposes a pleading requirement on civil complainants similar to that imposed by the Board's regulation. See CCP section 425.10. As interpreted by the courts, the critical question in judging the sufficiency of pleadings under that statute is whether the pleadings as a whole apprise the plaintiff's adversary of the factual basis of the claim upon which relief is sought. Perkins v. Superior Court (1981) 117 Cal.App.3d 1. Particularity of facts depends on the extent to which the defendant needs detailed information. Semole v. Sansoucie (1972) 28 Cal.App.3d 714. Specifically, the California courts have observed that the sufficiency of the pleadings is a question of fairness and it will permit the plaintiff to go forward to trial if the defendant is given sufficient notice to permit preparation of the case. Metzenbaum v. Metzenbaum (1948) 86 Cal.App.2d 750. It is not necessary to particularize matters that are presumptively within the knowledge of the defendant. Wise v. Southern Pacific Co. (1963) 223 Cal.App.2d 50.

In this case, the respondent is well aware that the factual basis of the charge is the imposition of the three-month notice

rule. There is no suggestion that the respondent's ability to prepare is in any way affected by the concise nature of the pleadings. Based on the information given the Board agent investigating this charge, the information likely to dispute the claim that the new rule is unreasonable appears to be readily available to the respondent. There is no question that this pleading, dismissed as an unfair practice charge under EERA, would be sufficient to permit the plaintiff in a civil case to proceed to litigate the merits of the claim. I find this an ironic result that ignores the purpose served by pleading requirements and, by denying charging parties a fair hearing of their claims, undermines the very purpose of the EERA. If the Board reads the existing regulations to require the charging party to include allegations amounting to an offer of proof as to how it intends to establish its claim, the Board should clearly enunciate that interpretation. Parties practicing before this agency are entitled to be put on notice of such a requirement. Otherwise, parties will continue to be left with the treacherous task of dealing with an agency which purports to apply one set of pleading requirements, but in fact applies another.

PUBLIC EMPLOYMENT RELATIONS BOARD
Headquarters Office
1031 18th Street
Sacramento, CA 95814-4174
(916) 322-3088

February 13, 1987

Ms. Kathy Felch, Esq.
915-21st Street
Sacramento, CA 95814

SUBJECT: Los Rios Classified Employees Association v. Los Rios Community College District, S-CE-1052.

I indicated to you in my attached letter dated February 4, 1987 that the above-referenced charge did not state a prima facie case. You were advised that if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge accordingly. You were further advised that unless you amended the charge to state a prima facie case, or withdrew it prior to February 12, 1987, it would be dismissed.

On February 13, 1987, a first amended unfair practice charge was filed with this office. The amended charge fails to raise any information not previously considered during the investigation of the original charge. The only material addition to the amended charge is paragraph four which states:

> This new requirement for a three-months-in-advance written notice changed the past practice of the District in that it requires that vacations requests must be submitted an unreasonable amount of time prior to the requested leave time.

This paragraph is a mere conclusion and does present any additional evidence on which to establish a prima facie violation. As stated in the letter of February 4, 1987, the alleged change in practice in the Public Safety Department did not amount to a change in policy under the Act in that the various departments of the District have had latitude in establishing what is a "reasonable" time for employees to submit vacation requests.

Accordingly, I am dismissing the charge based on the facts and reasons contained in my February 4, 1987 letter, a copy of which is attached.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, you 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 (California Administrative Code, title 8, section 32635(a)). To be timely filed, the original and five copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing (section 32135). Code of Civil Procedure section 1013 shall apply. The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

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 calendar days following the date of service of the appeal (section 32635(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 section 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail postage paid and properly addressed.

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 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 (section 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,

JEFFREY SLOAN
General Counsel

By
Michael Terris
Staff Attorney

cc: Attachment

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PUBLIC EMPLOYMENT RELATIONS BOARD
Headquarters Office
1031 18* Street
Sacramento. CA 95814-4174
(916) 323-3068

February 4, 1987

Ms. Kathy Felch, Esq.
9l5-21st Street
Sacramento, CA 95814

SUBJECT: Los Rios Classified Employees Association v. Los Rios Community College District, S-CE-1052.

Dear Ms. Felch:

On or about December 15, 1986, the Los Rios Classified Employees Association (LRCEA) filed the above-captioned charge alleging that the Los Rios Community College District (District) violated section 3543.5(a), (b), and (c) of the Educational Employment Relations Act (EERA) by failing to negotiate a change in the District's procedure for requesting vacation leave. The investigation revealed the following facts. The LRCEA is the exclusive representative of white collar classified employees in the District and has been a party with the District to successive collective bargaining agreements. The most recent agreement was ratified by the parties shortly after the instant charge was filed. The prior agreement expired on June 30, 1986. At the time of the alleged infraction, on or about November 21, 1986, no collective bargaining agreement was in effect. The expired agreement did not provide for binding arbitration and the LRCEA has never filed a grievance on the facts alleged in the instant unfair practice charge.

The recently expired agreement did not specifically provide for a procedure for requesting vacation leaves. Article 8, section 16.4.1 merely stated:

> Vacations must be approved in advance by the District. If the vacation requests of two or more employees in the same operating unit . . . are in conflict then the decision will be made by the supervisor in the best interest of the District's needs. All other things being equal the employee with the great(er)(est) seniority in class will be given preference.

The LRCEA alleges that the District has had a long-established past practice that employees need only submit their vacation requests a "reasonable time" prior to the dates for which vacations are requested. It asserts, however, that on or about November 21, 1986, the District, through Les Clark, dean of the Public Safety Department changed the above-described past practice by requiring the five classified employees in the department to make their vacation requests known at least three months prior to the requested dates and that requests made with less notice would be denied. The LRCEA asserts that it was offered neither notice of the change nor an opportunity to bargain over it prior to its implementation.

The District asserts that there has been no change in policy. While acknowledging that the standard in the past has been that requests must be made a reasonable time prior to the requested dates, it insists that reasonable time has been defined in a variety of ways by different departments within the District. For example, the financial aid office requires that vacation requests for the current calendar year be submitted by February 7, 1987. Beyond specific examples, the District contends that reasonable time, as defined by individual departments, is by necessity going to vary depending upon the department, the number of employees in that department, and the "peak work periods" of the department. It maintains that the Public Safety department has reasonably determined that its peak work period is the academic year and that three months' advance notice is reasonable under the circumstances. It finally asserts that the LRCEA's claim that vacations not made three months' in advance will be forfeited is not true and contends that no employee has had a vacation disallowed during the last six months.

The LRCEA counters that while this appears true on the surface, the Dean verbally scolded an employee on or about late October 1986 for making a late vacation request before stating "OK, go ahead and take it." The District denies these allegations.

Discussion

Based on the foregoing facts, the amended charge does not state a prima facie violation of the EERA in that it has failed to demonstrate that the District has made a change in established past practice. In determining whether a party has

violated section 3543.5(c) of EERA by committing a unilateral change, the Board considers whether the employer has implemented a change in policy concerning a matter within the scope of representation, and, if so, whether the employer notified and offered the exclusive representative an opportunity to bargain over the change prior to its implementation. Walnut Valley Unified school District (1981) PERB Decision No. 160; Grant Joint Union School District (1982) PERB Decision No. 196.

In the instant case, the evidence presented does not support the allegation that the District's action amounted to a change in policy. The past practice in the District has afforded the different departments flexibility in determining what is a reasonable time for employees to submit vacation requests. The oral announcement by the Dean of the Safety Department on or about November 21, 1986, appears to fall within the previously established parameters for what is a reasonable time in which to make requests. Although there are disputed facts surrounding the employee's request for vacation in late October, having concluded that the Safety Department's announced policy is not a change from past practice, it is unnecessary to resolve the dispute.

For these reasons, the charge as presently written does not state a prima facie case. If you feel that there are any factual inaccuracies in this letter or any additional facts which would correct the deficiencies explained above, please amend the charge accordingly. 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 the charging party. The amended charge must be served on the respondent and the original proof of service must be filed with. PERB. If I do not receive an amended charge or withdrawal from you before February 12, 1987, I shall dismiss your charge. If you have any questions on how to proceed, please call me at (916) 323-8015.

Sincerely^

Michael Terris
Staff Attorney

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