STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

REBECCA E. DURAN-CHUGON, Charging Party,	)	Case No. LA-CO-452
v.	)	PERB Decision No. 711
SAN MARCOS EDUCATORS ASSN., CTA/NEA, Respondent.	)	December 21, 1988

Appearance: Rebecca E. Duran-Chugon, on her own behalf.

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

DECISION AND ORDER

This case is before the Public Employment Relations Board (Board) on appeal by Charging Party of the Board agency's dismissal, attached hereto, of her charge that the Respondent violated section 3543.6 of the Education Employment Relations Act (EERA). We have reviewed the dismissal and affirm it insofar as the Board agent found that the instant charge was untimely filed pursuant to section 3541.5 of EERA. Inasmuch as we find the charge untimely, we find it unnecessary to address the issue of whether a prima facie case was stated by Charging Party.

The unfair practice charge in Case No. LA-CO-452 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

By the BOARD[1]

[1]Member Camilli did not participate in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD
Los Angeles Regional Office
3530 Wilshire Blvd. Suite 660
Los Angeles, CA 90010 2334
(213)736-3127

August 19, 1988

Rebecca E. Duran-Chugon

Re: DISMISSAL OF UNFAIR PRACTICE CHARGE AND REFUSAL TO ISSUE COMPLAINT
Rebecca E. Duran-Chugon v. CTA Regional Office, John Lepp (San Marcos Educators Association, CTA/NEA)[1]
Unfair Practice Charge No. LA-CO-45 2;

Dear Ms. Duran-Chugon:

The above-referenced unfair practice charge, filed on June 27, 1988, alleges that the CTA Regional Office and John Lepp failed to properly represent Charging Party in her grievance against the San Marcos Unified School District (District). This conduct is alleged to violate Government Code section 3543.6 of the Educational Employment Relations Act (EERA).

I indicated to you in my attached letter dated August 12, 1988 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 August 19, 1988, it would be dismissed.

In your letter dated August 16, 1988, you indicated certain statements in my August 12, 1988 letter to be in error. First, you take issue with the following language on page 1 of my letter:

> On one occasion the student teacher boasted that she would get an excellent evaluation despite any misgivings of Duran-Chugon. At approximately the same time, Duran-Chugon had exercised her discretion to remove certain students from the student teacher's class. This prompted a complaint by the student teacher to the principal.

You assert the following language should be substituted:

1/ See footnote 1, page 1, of August 12, 1988 letter.

> Despite Ms. Barnes attendance, performance and disrespect, she was able to receive an excellent score on an observation that never took place. She also managed to get her overall semester report I had given her, raised by Ms. Ehlert.

Second, you take issue with the following language on page 2 of my letter:

> [Duran-Chugon's personal attorney] then assisted her in correcting the errors.

You request that the following language be substituted:

> Ms. Duran-Chugon's personal lawyer had already written a response to June 2 and June 4, 1987 Ehlert memo's [sic] [. T]his attorney, Bill Sweeney, had already in this written response correctly recorded dates and articles prior to Step 1.

Third, you take issue with the following language from page 2 of my letter:

> [After being told to submit her claim in writing,] she was finally able to communicate her problem. Lepp responded by informing her that she lacked cause to have Ken Parker removed as her representative.
>
> On July 31, 1987, she contacted the statewide affiliate office in Burlingame, California. Again, she was referred to John Lepp.

You request that the following language be substituted:

> In total frustration she called Birmingham [sic], California, CTA headquarters, and upon the recommendation of her personal attorney, she then told Council [sic] Tris Gonzalez that SMEA had "breached their contract", at step 2 of grievance. CTA headquarters once again referred Duran-Chugon to John Lepp, who was still indesposed [sic]. John Lepp's secretary relayed to Ms. Duran-Chugon that Mr. Lepp would not assign anyone else to represent her, if he did not have a complaint in writing. Even though Ms. Duran-Chugon had

> told her to tell him the first time she'd call [sic], that time was of the essence and she was on a timeline and needed representation immediately.

Finally, you take issue with the wording of the following language on page 2 of the letter:

> The Association representatives stated their desire not to proceed with the grievance but did agree to represent here at the third step of the procedure.

You request that the word "reluctantly" be inserted between the words "but" and "did" of this sentence.

Even if the August 12, 1988 letter is corrected as noted above, no new facts have been alleged which would serve, along with the remaining allegations of your unfair practice charge, to state a prima facie violation of the EERA.

Since I have not received either a request for withdrawal or an amended charge I am therefore dismissing the charge based on the facts and reasons contained in my August 12, 1988 letter.

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 tor filing. Code of Civil Procedure section 1013 shall apply. (See section 32135.) 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 ana 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 snail 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,

CHRISTINE A. BOLOGNA
General Counsel

By _____
DONN GINOZA
Regional Attorney

Attachment

cc: John Lepp

PUBLIC EMPLOYMENT RELATIONS BOARD
Los Angeles Regional Office
3530 Wilshire Blvd . Suite 650
Los Angeles. CA 90010-2334
(213)736-3127

August 12, 1988

Rebecca E. Duran-Chugon

Re: WARNING LETTER
Rebecca E. Duran-Chugon v. CTA Regional Office, John Lepp **(San Marcos Educators Association, CTA/NEA)**[1]
Unfair Practice Charge No. LA-CO-452;

Dear Ms. Duran-Chugon:

The above-referenced unfair practice charge, filed on June 27, **1988, alleges that the CTA Regional** Office **and** John Lepp failed **to properly represent Charging Party in her grievance against the San Marcos Unified School District (District). This conduct is alleged to violate Government Code section 3543.6 of the Educational Employment Relations Act (EERA).**

My investigation revealed the following facts. Charging Party was employed in the District at the **San Marcos Elementary School as a bilingual teacher during the 1986-87 and 1987-88 school years. She received a favorable year-end evaluation for the 1986-87 school year. During this year and the following year she served in a non-permanent status.**

Duran-Chugon alleges that in the spring of 1987 her relationship with the principal of the school, Karen Ehlert, deteriorated as a result of a problem with a student teacher. The student teacher was allegedly absent frequently and criticized Duran-Chugon in statements made to others. On one occasion the student teacher boasted that she would get an excellent evaluation despite any misgivings of Duran-Chugon. At approximately the same time, Duran-Chugon **had** exercised her discretion to remove certain students from the student teacher's class. This prompted a complaint by the student teacher to the principal.

1/ Although Charging Party named the respondent as "CTA Regional Office, John Lepp," it appears that, in responding to Charging Party's request for a different representative in her grievance, Lepp was acting as an agent of the San Marcos Educators Association (Association) , the exclusive representative for Charging Party's bargaining unit. In addition, the charge contains numerous allegations directly involving the San Marcos Educators Association. Accordingly this charge has been investigated as if the proper respondent had been named.

Allegedly as a result of this incident, the principal threatened that she would recommend non-renewal of Duran-Chugon's teaching contract at the expiration of the 1987-88 school year. She also issued two negative memoranda to Duran-Chugon which were placed in her personnel file. One of these memoranda raised concerns over matters occurring over the course of the entire school year, despite the fact that she had obtained the favorable year-end evaluation in March 1987. In one of the memoranda, dated June 2, 1987, Ehlert suggests that Duran-Chugon seek employment in another district "as soon as possible." She also indicates that if significant improvement is not shown in certain areas, the memorandum could serve as evidence for dismissal. The memorandum dated June 4, 1987 summarizes a conference calling attention to Duran-Chugon's alleged failure to properly supervise her students. Duran-Chugon contends this memorandum also raised other matters which should have been brought to her attention immediately if they were of serious concern to the District. On June 18, 1987, Duran-Chugon filed a grievance seeking removal of the principal's memoranda. She alleges that the Association, through its local representative, Ken Parker, had repeatedly discouraged her from filing the grievance.

She further alleges that the District denied the grievance at the first step of the procedure because the form had not been properly completed by the Association. Duran-Chugon's personal attorney then assisted her in correcting the errors.

Duran-Chugon alleges that the Association failed to provide representation at the second step of the grievance, which involved a meeting on July 28, 1987. On the following day, Duran-Chugon contacted an Association affiliate office in San Diego to complain about her lack of representation. She was referred to John Lepp at the regional office of the California Teachers Association. After being told to submit her claim in writing, she was finally able to communicate her problem. Lepp responded by informing her that she lacked cause to have Ken Parker removed as her representative.

On July 31, 1987, she contacted the statewide affiliate office in Burlingame, California. Again, she was referred to John Lepp. Duran-Chugon alleges that a meeting was held on August 3, 1987 to discuss further the issue of her representation in the grievance. The Association representatives stated their desire not to proceed with the grievance but did agree to represent her at the third step of the procedure.

By letter dated August 17, 1987, Duran-Chugon requested that her grievance be elevated to arbitration. She submitted materials in support of her request by letter dated August 25, 1987. Charging Party attended a meeting of the Association's

Executive Board to argue for the granting of her request. The Association declined her request in its letter dated August 26, 1987, signed by Gerald Franklin, President of the Association. The letter explains the Association's reasons for rejecting Duran-Chugon's request for arbitration. Among other reasons cited, the Association states that (1) no adverse action had been taken against her within the meaning of the collective bargaining agreement, (2) the District did not breach the contract in regard to negative information in the employee's personnel file, and (3) the District's superintendent offered a reasonable settlement in response to Duran-Chugon's requested remedy.

Finally, the charge alleges that Duran-Chugon contacted the vice-president of the Association on September 24, 1987 tor advice concerning job harassment. She further alleges that the Association has failed to respond to her request.

Based on the facts stated above, the charge as presently written fails to state a prima facie violation of the EERA for the reasons that follow.

Government Code section 3541.5 provides that PERB shall not "issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." Government Code section 3541.5(a). In this case, Charging Party has alleged that the Association has (1) failed to properly represent her in the grievance she filed to contest the negative memoranda issued by her principal on June 2 and June 4, 1987. (2) refused to elevate her grievance to arbitration, and (3) failed to respond to an inquiry concerning job harassment.

Initially, there is a question as to when the charge is to be deemed filed. The allegations contained in this charge were virtually identical to those contained in the charge filed by Charging Party against the District on April 14, 1988 (LA-CE-2740) , except that the employer charge also included additional allegations concerning an adverse action by the District. Charging Party believed that she could file against both the District and the Association in a single charge. When it was discovered during the investigation of the charge that Charging Party also sought relief against the Association, the undersigned informed her that a separate charge would have to be filed, which she did file on June 27, 1988. In any event, the charge originally filed naming the District was not served on the Association and did not include the name of the Association under section no. 2 on the face of the unfair charge form. Under these circumstances it would not be proper to deem this charge to be constructively filed on April 14, 1988 because the Association was not afforded notice of the allegations against it at that time. Therefore the undersigned finds that the instant charge was filed on June 27, 1988.

With respect to the claim that the Association committed errors and failed to provide representation in the steps of her grievance preceding her request for arbitration, all of the conduct occurred before August 17, 1987, or the date she requested arbitration. This conduct occurred more than six months before the filing of the charge.

Similarly, the allegation that the Association refused to elevate her grievance to arbitration is based on conduct more than six months prior to the filing of the charge. The Association communicated its decision not to arbitrate the matter in its letter dated August 25, 1987.

Finally, the allegation that the Association failed to respond to an inquiry concerning job harassment also occurred more than six months prior to the filing of the charge. Calculating when the statute of limitations period begins to run in a duty of fair representation case is determined by when the charging party, in the exercise of reasonable diligence, knew or should have known that further assistance from the union was unlikely. International Union of Operating Engineers, Local 501 (Reich) (1986) PERB Decision No. 591-H. Charging Party should have known that the Association was not going to respond to her request for information within a reasonable period of time after her request was made on September 24, 1987. To be timely, the discovery of the alleged violation could have occurred no earlier than December 27, 1987. But three months is more than a reasonable amount of time for Charging Party to have discovered that the Association had failed to respond. There are no other facts to indicate that Charging Party pursued the information after her request was made. Therefore, this allegation, too, arose more than six months prior to the filing of the charge.

Moreover, even assuming Charging Party acted within a reasonable time, no other facts are alleged to indicate that the failure of the Association to respond states a prima facie violation of the duty of fair representation. In order to state a prima facie violation, the allegations must establish that the Association's conduct was arbitrary, discriminatory or in bad faith. Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124. A prima facie case alleging arbitrary conduct violative of the duty of fair representation,

> 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. The charge does not contain facts from which it can be concluded that the Association's conduct was arbitrary, discriminatory or in bad faith. This is also the case for the allegations involving the failure to properly represent Charging Party in the pre-arbitration grievance process and to proceed to arbitration of her grievance.

Charging Party contends that she was not aware of her right to file a charge with PERB until March 1988, and that she filed her allegations within six months of discovering that she had a possible legal remedy before this agency. However, PERB has held that the six month period begins to run from the discovery of the conduct which constitutes the alleged unfair practice, not from the discovery of the legal significance of that conduct. Fairfield-Suisun Unified School District (1985) PERB Decision No. 547. See also: International Union of Operating Engineers, Local 501 (Reich), supra (limitations period begins to run from date employee receives notice that union will proceed no further with grievance, not from date employee discovers union acted erroneously). Therefore, the charge cannot be considered timely for the reasons noted above.

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 August 19, 1988, I shall dismiss your charge. If you have any questions on how to proceed, please call me at (213) 736-3127.

Sincerely,

DONN GINOZA
Regional Attorney