STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

FRANK T. MEGO, JR., Charging Party,	)	Case No. LA-CE-3059
v.	)	PERB Decision No. 894
LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondent.	)	July 29, 1991

Appearance: Frank T. Mego, Jr., on his own behalf.

Before Shank, Camilli and Carlyle, Members.

DECISION AND ORDER

CARLYLE, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Frank T. Mego, Jr. (Mego) of a Board agent's dismissal (attached hereto) of a charge that the Los Angeles Unified School District committed an unfair practice by violating section 3543.5(a) of the Educational Employment Relations Act (EERA).[1] The Board has reviewed the

[1]EERA is codified at Government Code section 3540 et seq. Section 3543.5 states, in pertinent part:

> It shall be unlawful for a public school employer to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

dismissal, and finding it to be free of prejudicial error, adopt it as the decision of the Board itself.[2]

The unfair practice charge in Case No. LA-CE-3059 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Shank and Camilli joined in this Decision.

[2]In his complaint, Mego alleges a violation of Education Code section 45116. However, it should be noted that PERB is without jurisdiction to enforce provisions of the Education Code,

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Boulevard, Suite 650
Los Angeles, CA 90010-2334
(213) 736-3127

May 1, 1991

Frank T. Mego Jr.

Re: Frank T. Mego Jr. v. Los Angeles Unified School District. Unfair Practice Charge No. LA-CE-3059, First Amended Charge, DISMISSAL OF CHARGE AND REFUSAL TO ISSUE COMPLAINT

Dear Mr. Mego:

The above-referenced charge was filed on January 30, 1991. It alleges that the Los Angeles Unified School District (District) took adverse action against you and committed an unfair practice by violating Education Code, Section 45116.[1] I am treating this matter as a reprisal/discrimination case alleging a violation of

[1]This section is found at Exhibit B, attached to the charge, and provides,

> A notice of disciplinary action shall contain a statement in ordinary and concise language of the specific acts and omissions upon which the disciplinary action is based, a statement of the cause for the action taken and, if it is claimed that an employee has violated a rule or regulation of the public school employer, such rule or regulation shall be set forth in said notice.
>
> A notice of disciplinary action stating one or more causes or grounds for disciplinary action established by any rule, regulation, or statute in the language of the rule, regulation, or statute, is insufficient for any purpose.
>
> A proceeding may be brought by, or on behalf of, the employee to restrain any further proceedings under any notice of disciplinary action violative of this provision.
>
> This section shall apply to proceedings conducted under the provisions of Article 6 (commencing with Section 45240) of this chapter.

the Education Employment Relations Act (EERA), Government Code section 3543.5(a).

I indicated to you in my attached letter dated April 12, 1991 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 that 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 April 19, 1991, the charge would be dismissed.

You filed a First Amended Charge on April 17, 1991 (Certified Mail). It is identical to the initial unfair practice charge in all respects except that you have added Exhibit "E" and the following paragraph:

> In accordance with stipulated grievance procedures contained in Article 5, section 1.1 of the Unit E (Skilled Crafts) Agreement of the Los Angeles Unified School District and Los Angeles County Building and Construction Trades Council, my appeals procedure for disciplinary action was exhausted on November 21, 1990 (See exhibit E). In conformity with EERA section 3541.5a, where it states in pertinent part, 'The Board shall, in determining whether the charge was timely filed, consider the six-month limitation set forth in this subdivision to have been tolled during the time it took the charging party to exhaust the grievance machinery,' the unfair practice charge, referred to as Charge No. LA-CE-3059, was timely filed in the Los Angeles Regional Office of the Public Relations Board on January 30, 1991, approximately three months within the tolling consideration. If it is the intention of the Board Agent, Marc Hurwitz, to obstruct in this matter by dismissing this Unfair Practice Charge, No. LA-CE-3059, then I must appeal that determination to the Board.

Your Amended Charge fails to state a prima facie case. As indicated in the April 12, 1991 letter, you received the Notice of Unsatisfactory Service or Act and notice of the recommended

three day suspension on or about May 2, 1990. See Exhibits "A" and "D" attached to the First Amended Charge. The statute of limitations began to run on or about May 3, 1990 and expired six month later unless there was statutory tolling[2] through the filing of a grievance. See California State University, Fullerton (1986 and 1987) PERB Decision Nos. 605-H and 605a-H.

Your First Amended Charge incorrectly states or implies that the statute began to run on November 21, 1990 when your appeal to the Personnel Commission was in effect denied or exhausted. Contrary to your assertion, tolling in this case is inappropriate. First, the Agreement does not permit a grievance to be filed in a case, such as this one, involving discrimination/reprisal for your union activity (conduct arguably prohibited by Article VII of the Agreement).[3] Article V, Grievance Procedure, section 1.0, Grievance Defined, and section 1.1 provide:

> 1.0 A 'grievance' is defined as a claim by an employee covered by this Agreement that the District has violated an express term of this Agreement and that by reason of such violation the employee's rights under this Agreement have been adversely affected.
>
> 1.1 All other matters and disputes of any nature are beyond the scope of this grievance procedure, including but not limited to those matters for which other methods of adjustment are provided by the District, such as reductions in force, examination results and references, performance evaluations, disciplinary matters.[4] and complaints by one employee about another. Also excluded from this grievance procedure are those matters so

---

[2]Tolling only occurs if the Agreement provides for binding arbitration, which in this case it arguably does (Article V, section 16.0), and only during the period it takes to exhaust the grievance machinery. EERA section 3541.5(a). The April 12, 1991 letter indicated that there is no equitable tolling.

[3]See Footnote No. 3 of the April 12, 1991 letter.

[4]Notices of Unsatisfactory Service or Act are handled at Article X, Evaluation Procedures, of the Agreement.

> indicated elsewhere in this Agreement. Claimed violations of Article VII (Non-Discrimination) are to be handled under appropriate statutory procedures rather than under this grievance procedure. (Emphasis added.)

Second, you in fact did not file a grievance or utilize the grievance machinery under the Article V, Grievance Procedure. Instead, you contested this matter through an appeals procedure ending with the decision of the Personnel Commission on November 21, 1990, Exhibit "E" attached to the First Amended Charge. Thus, the First Amended Charge does not state sufficient facts for the statute to have been tolled. As you received the Notice of Unsatisfactory Service or Act on or about May 2, 1990, the statute began to run on May 3, 1990 and thereafter ran out on or about November 2, 1990. Therefore, PERB has no jurisdiction. I am therefore dismissing the charge without leave to amend based on the facts and reasons contained in this letter and my April 12, 1991 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 Code of Regulations, 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 (California Administrative Code, title 8, 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 (California Code of Regulations, title 8, 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 California Code of Regulations, title 8, 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 (California Code of Regulations, title 8, 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,

JOHN W. SPITTLER
General Counsel

By _
Marc S. Hurwitz
Regional Attorney

Attachment
cc: Ms. Rochelle J. Montgomery, Asst. Legal Adviser

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Boulevard, Suite 650
Los Angeles, CA 90010-2334
(213) 736-3127

April 12, 1991

Frank T. Mego Jr.

Re: Frank T. Mego Jr. v. Los Angeles Unified School District. Unfair Practice Charge No. LA-CE-3059
WARNING LETTER

Dear Mr. Mego:

This will confirm, in relevant part, our telephone conversation on April 10, 1991. The above-referenced charge was filed on January 30, 1991. It alleges that the Los Angeles Unified School District (District) took adverse action against you and committed an unfair practice by violating Education Code, Section 45116.

1

section is found at Exhibit B, attached to the charge, and provides,

This

> A notice of disciplinary action shall contain a statement in ordinary and concise language of the specific acts and omissions upon which the disciplinary action is based, a statement of the cause for the action taken and, if it is claimed that an employee has violated a rule or regulation of the public school employer, such rule or regulation shall be set forth in said notice.
>
> A notice of disciplinary action stating one or more causes or grounds for disciplinary action established by any rule, regulation, or statute in the language of the rule, regulation, or statute, is insufficient for any purpose.
>
> A proceeding may be brought by, or on behalf of, the employee to restrain any further proceedings under any notice of disciplinary action violative of this provision.
>
> This section shall apply to proceedings conducted under the provisions of Article 6 (commencing with Section 45240) of this chapter.

I am treating this matter as a reprisal/discrimination case alleging a violation of the Education Employment Relations Act (EERA), Government Code section 3543.5(a).

My investigation of the charge revealed the following facts. You have been and are currently employed by the District as a permanent Heating and Air Conditioning Fitter.[2] In 1989, you received a below standard performance evaluation. In or about June 1989, you contested the evaluation in writing. The District subsequently corrected this matter by issuing you a satisfactory evaluation instead. In or about March 1990, you received a conference memorandum which generally alleged that you submitted exaggerated mileage claims (for about $40.00) and that you took an unauthorized, extended lunch period on or about March 8, 1990. You challenged these matters in part by contesting in writing any mileage deduction being taken from your paycheck. On or about May 2, 1990, you received a Notice of Unsatisfactory Service or Act and a Statement of Charges (attached as Exhibit A and D to your charge) involving the above alleged unauthorized absence from work and for claiming pay for time not worked. It was recommended that you be suspended for three (3) working days, from August 13 through 15, 1990, which suspension you served. Your appeal to the Personnel Commission was ultimately denied on November 21, 1990.

You generally contend that the four causes for disciplinary action indicated were copied word-for-word from the District's Personnel Commission Law and Rules No. 902, Section A., Actions Subject to Discipline, Items 3, 4, 7 and 13, and are in violation of Education Code Section 45116. Therefore, you contend that such a notice of disciplinary action is insufficient for any purpose. You requested that a proceeding be brought to restrain further action against you, but you were instead subjected to a mock appeals trial, placed at a disadvantage, and thereafter lost the appeal, which was contrary to the Education Code. You have advised me that due to the alleged violation of Education Code Section 45116, your right to represent yourself on the case was harmed.

The allegations in your Statement of Charge do not state a prima facie case. EERA section 3541.5(a) does not allow a complaint to issue regarding a charge based upon an alleged unfair practice

---

[2]There is a collective bargaining agreement (Agreement) between the District and the Los Angeles County Building and Construction Trades Council (Council), Unit E (Skilled Crafts) with effective dates of June 1, 1987 through July 1, 1992.

occurring more than six months prior to the filing of the charge. It is the charging party's burden as part of the prima facie case to prove the charge was timely filed. Furthermore, there is no longer any equitable tolling of the six month limitations period. The Regents of the University of California (1990) PERB Decision No. 826-H. Under EERA, the statute is only tolled during the time it took for the charging party to exhaust the grievance machinery. EERA section 3541.5(a). You did not file a grievance in this matter.[3] Therefore, the statute began to run on or about May 2, 1990, and thereafter ran out on or about November 2, 1990. Thus, this charge is untimely and PERB has no jurisdiction.

For these reasons, the charge as presently written does not state a prima facie case. If there are any factual inaccuracies in this letter or any additional facts that 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 must be signed under penalty of perjury by the charging party. The amended charge must be served on the respondent[4] and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before April 19, 1991, I shall dismiss your charge. If you have any questions, please call me at (213) 736-3127.

Sincerely,

Marc S. Hurwitz
Regional Attorney

---

[3]Article VII of the Agreement, Non-Discrimination, prohibits discrimination based upon union affiliation. Article V of the Agreement, Grievance Procedure, does not allow you to grieve a violation of Article VII. Thus, even if the Agreement did not allow a grievance to be filed, the fact you may have exhausted your administrative remedies under the appeals procedure did not toll the statute for purposes of the EERA.

[4]Ms. Rochelle J. Montgomery, Assistant Legal Adviser, Office of the Legal Adviser, Los Angeles Unified School District, 450 North Grand Avenue, Rm. A-337, Los Angeles, CA 90012.