STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

GEORGE P. DYOGI, Charging Party,	)	Case No. SF-CE-1656
v.	)	PERB Decision No. 1034
MT. DIABLO UNIFIED SCHOOL DISTRICT, Respondent.	)	January 13, 1994

Appearances: George P. Dyogi, on his own behalf; Breon, O'Donnell, Miller, Brown & Dannis by Nancy B. Bourne, Attorney, for Mt. Diablo Unified School District.

Before Blair, Chair; Caffrey and Carlyle, Members.

DECISION AND ORDER

BLAIR, Chair: This case is before the Public Employment Relations Board (Board) on appeal by George P. Dyogi (Dyogi) to a Board agent's dismissal (attached) of his charge. In the charge, Dyogi alleged that the Mt. Diablo School District violated section 3543.5(a) of the Educational Employment Relations Act[1] (EERA) by terminating him and refusing to rehire him.

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[1]**EERA** is codified at Government Code section 3540 et seq. EERA 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.

The Board has reviewed the entire record in this case and finds the Board agent's dismissal to be free of prejudicial error and adopts it as the decision of the Board itself.

The unfair practice charge in Case No. SF-CE-1656 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Caffrey and Carlyle joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916)322-3198

November 3, 1993

George P. Dyogi

Re: George P. Dyoai v. Mount Diablo Unified School District
Case No. SF-CE-1656
DISMISSAL LETTER

Dear Mr. Dyogi:

On September 22, 1993, you filed a charge in which you allege **that the** Mount Diablo Unified School District (District) violated section 3543.5 of the Educational Employment Relations Act **(EERA)** . Specifically, you allege that the District has failed to **reinstate** you to a position in the classified bargaining unit **represented** by Public Employees Union Local 1(Local 1). From the **material you** provided in support **of** your charge, I was able to **extract** the following information. You were absent from your probationary job beginning August 20, 1990, due to a bereavement **leave. While** on leave you were being treated by a physician in **the** Philippines who indicated you were not able to travel. On October 3, 1990, you were terminated by the District for being absent without leave.

In 1991 you contend that a Local 1 representative and the District reached an agreement to rehire you whenever there was an opening in a custodian position. You learned in March, 1993, from a friend at Northgate High School that a new custodian had been hired. You contacted Joe Garcia, Local 1 Representative, to inquire about a job for you. Mr. Garcia was told there was nothing to be done with your case.

I indicated to you, in my attached letter dated October 8, 1993, 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. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to October 20, 1993, the charge would be dismissed.

On October 20, 1993, I received your request for an extension of time in order to allow you to gather more facts in support of your charge. Your request was granted. On November 2, 1993 your first amended charge was received. Your amended charge alleges

that the employer breached a verbal agreement to rehire you upon a job opening up and that the employer unlawfully terminated you on September 30, 1990. Further, you contend that the six month statute of limitations should begin when you were advised by the union representative that the District was definitely not going to rehire you.

Your amended charge provides no additional facts or legal theories to overcome the deficiencies as spelled out in my October 8, 1993, letter. You have not demonstrated that you engaged in protected conduct, that your employer had knowledge of your protected conduct and that based on this your employer took adverse action toward you.

As to the timeliness of your charge, as I pointed out, the six-month period runs from the date the charging party knew or reasonably should have known of the alleged unfair practice. Fairfield Suisun Unified School District (1985) PERB Decision No. 547. You have attached a letter dated October 3, 1990, from your employer which advises you of your termination. If you believed that your termination was unlawful you needed to submit a charge within six months of your receipt of that letter.

As to your theory that you didn't learn that the District would not definitely rehire you until August 26, 1993, you overlook the fact that you knew as of March 1993, that the District had hired a new custodian in a position that you believed had been promised to you. You knew as of March 1993, that a possible unfair practice had occurred. The timeline begins when you learned of the alleged violation. For these reasons, you have not stated a prima facie case and as advised in my October 8, 1993, letter your charge is dismissed.

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. (Cal. Code of Regs., tit. 8, sec. 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 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing. (Cal. Code of Regs., tit. 8, sec. 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 (20) calendar days following the date of service of the appeal. (Cal. Code of Regs., tit. 8, sec. 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 Cal. Code of Regs., tit. 8, sec. 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 (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 of Regs., tit. 8, sec. 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,

ROBERT THOMPSON
Deputy General Counsel

By _____
Labor Relations Specialist

Attachment

cc: Nancy B. Bourne

STATE OF CALIFORNIA PETE WILSON, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916)322-3198

October 8, 1993

George P. Dyogi

Re: George P. Dyocri v. Mount Diablo Unified School District
Case No. SF-CE-1656
WARNING LETTER

Dear Mr. Dyogi:

On September 22, 1993, you filed a charge in which you allege that the Mount Diablo Unified School District (District) violated section 3543.5 of the Educational Employment Relations Act (EERA). Specifically, you allege that the District has failed to reinstate you to a position in the classified bargaining unit represented by Public Employees Union Local 1(Local 1). From the material you provided in support of your charge, I was able to extract the following information. You were absent from your probationary job beginning August 20, 1990, due to a bereavement leave. While on leave you were being treated by a physician in the Philippines who indicated you were not able to travel. On October 3, 1990, you were terminated by the District for being absent without leave.

In 1991 you contend that a Local 1 representative and the District reached an agreement to rehire you whenever there was an opening in a custodian position. You learned in March, 1993, from a friend at Northgate High School that a new custodian had been hired. You contacted Joe Garcia, Local 1 Representative, to inquire about a job for you. Mr. Garcia was told there was nothing to be done with your case.

Although you did not specifically state what employee rights were violated for purposes of this investigation, I will infer that you believe that the District has violated EERA section 3543.5(a) which states that

> (i)t shall be unlawful for a public school employer to... (i)mpose or threaten to impose reprisals on 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.

To demonstrate a violation of EERA section 3543.5(a), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210; Carlsbad Unified School District (1979) PERB Decision No. 89; Department of Developmental Services (1982) PERB Decision No. 228-S; California State University (Sacramento) (1982) PERB Decision No. 211-H.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor, 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 employer's disparate treatment of the employee; (2) the employer's departure from established procedures and standards when dealing with the employee; (3) the employer's inconsistent or contradictory justifications for its actions; (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; or (6) any other facts which might demonstrate the employer's unlawful motive. (Novato Unified School District, supra: North Sacramento School District (1982) PERB Decision No. 264.) As presently written, this charge fails to demonstrate any of these factors and therefore does not state a prima facie violation of EERA section 3543.5(a).

In addition, you contend that you learned in March, 1993, that, another custodian had been hired at Northgate High School. In order to state a prima facie case a Charging Party must allege and ultimately establish that the conduct complained of either occurred or was discovered within the six-month period immediately preceding the filing of the charge. San Dieguito Union High School District (1982) PERB Decision No. 194, Government Code section 3514.5(a) states in relevant part:

> Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following: (1) 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,...

Your charge was filed with the Public Employment Relations Board on September 22, 1993, which means that any alleged unfair

practice by the District should have occurred during the six-month statutory period which began on March 22, 1993.

The six-month limitation period runs from the date the charging party knew or reasonably should have known of the alleged unfair practice, if the knowledge was obtained after the conduct occurred. Fairfield Suisun Unified School District (1985) PERB Decision No. 547. As currently filed, I am unable to determine whether your charge would be timely.

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 additional facts which would correct the deficiencies explained above, please 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 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 October 20, 1993, I shall dismiss your charge. If you have any questions, please call me at (916) 322-3198.

Sincerely,

Roger Smith
Labor Relations Specialist