

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



SERVICE EMPLOYEES INTERNATIONAL)
UNION, LOCAL 99,)
)
Charging Party,) Case No. LA-CE-3898
)
v.) PERB Decision No. 1266
)
LOS ANGELES UNIFIED SCHOOL) June 5, 1998
DISTRICT,)
)
Respondent.)
_____ }

Appearances: Posner & Rosen by Howard Z. Rosen, Attorney, for Service Employees International Union, Local 99; O'Melveny & Myers by Steven M. Cooper, Attorney, for Los Angeles Unified School District.

Before Caffrey, Chairman; Johnson and Jackson, Members.

DECISION AND ORDER

CAFFREY, Chairman: This case is before the Public Employment Relations Board (Board) on an appeal by the Service Employees International Union, Local 99 (SEIU) of a Board agent's dismissal (attached) of SEIU's unfair practice charge. SEIU alleges that the Los Angeles Unified School District (District) violated section 3543.5(c) of the Educational Employment Relations Act (EERA)¹ when the District changed terms of

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

It shall be unlawful for a public school employer to do any of the following:

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

employment relating to the District's substance abuse policy without providing SEIU with notice or the opportunity to bargain.

The Board has reviewed the entire record in this case including SEIU's original unfair practice charge, the Board agent's warning and dismissal letters, SEIU's appeal and the District's response. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself.

The unfair practice charge in case No. LA-CE-3898 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Johnson and Jackson joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415) 439-6940



April 6, 1998

Howard Z. Rosen, Esq.
Posner & Rosen LLP
3600 Wilshire Boulevard, Suite 1800
Los Angeles, CA 90010

Re: **DISMISSAL OF CHARGE/REFUSAL TO ISSUE COMPLAINT**
Service Employees International Union, Local 99 v. Los
Angeles Unified School District
Unfair Practice Charge No. LA-CE-3898

Dear Mr. Rosen:

The above-referenced unfair practice charge, filed January 30, 1998, alleges the Los Angeles Unified School District (District) unilaterally implemented a "Zero Tolerance" alcohol and drug policy. The Service Employees International Union, Local 99 (SEIU) alleges this conduct violates Government Code section 3543.5(c) of the Educational Employment Relations Act (EERA or Act).

I indicated to you, in my attached letter dated March 11, 1998, 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 March 18, 1998, the charge would be dismissed.

On March 20, 1998, two days after the above-stated deadline, you sent me a facsimile requesting an extension until March 31, 1998. By telephone, I granted you an extension until March 25, 1998. I have not received either an amended charge or a request for withdrawal. Therefore, I am dismissing the charge based on the facts and reasons contained in my March 11, 1998, 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. (Cal. Code of Regs., tit. 8, sec. 32635(a).) To be timely filed, the original and five copies

Dismissal Letter
LA-CE-3898
Page 2

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.)

Dismissal Letter
LA-CE-3898
Page 3

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
Kristin L. Rosi
Regional Attorney

Attachment

cc: Stephen M. Cooper

PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415) 439-6940



March 11, 1998

Howard Z. Rosen, Esq.
Posner & Rosen LLP
3600 Wilshire Boulevard, Suite 1800
Los Angeles, CA 90010

Re: **WARNING LETTER**
Service Employees International Union, Local 99 v. Los
Angeles Unified School District
Unfair Practice Charge No. LA-CE-3898

Dear Mr. Rosen:

The above-referenced unfair practice charge, filed January 30, 1998, alleges the Los Angeles Unified School District (District) unilaterally implemented a "Zero Tolerance" alcohol and drug policy. The Service Employees International Union, Local 99 (SEIU) alleges this conduct violates Government Code section 3543.5 (c) of the Educational Employment Relations Act (EERA or Act).

Investigation of the charge revealed the following. SEIU is the exclusive representative of the District's classified bargaining unit. At issue in this charge is the District's Alcohol and Drug policy, first adopted in January 1995.

In January 1995, the District unilaterally adopted a policy which provided for the termination of employees who reported to work or remained on duty while having a blood/alcohol content of 0.02 or greater. Employees were required to sign forms stating they understood this policy.

In May 1996, SEIU filed an unfair practice charge (LA-CE-3672) with PERB alleging the District's unilateral implementation of the alcohol policy violated the EERA. On July 24, 1996, Regional Director Tammy L. Samsel issued a Warning Letter to SEIU. In the letter, Ms. Samsel stated PERB lacked jurisdiction over the charge as SEIU was aware of the alcohol and drug policy as early as November 1994. In its amended charge, filed August 6, 1996, SEIU asserted that it did not know the policy's language stating employees are "subject to dismissal" subjected an employee to mandatory dismissal. On August 9, 1996, Ms. Samsel dismissed unfair practice charge LA-CE-3672 as untimely.

Warning Letter
LA-CE-3898
Page 2

On or about August 16, 1996, SEIU filed an appeal in the dismissal of LA-CE-3672. In its brief to PERB, SEIU stated in pertinent part:

On August 5, 1996, the Union filed a first amended charge contending that the Union did not know prior to December 12, 1995, that the District maintained **a zero tolerance policy with respect to a violation of the Program.** (Appeal at p.2; emphasis added)

Further in its brief to the Board, SEIU noted:

In the instant case, it was not until Freeman's discharge that the District demonstrated its clear intent with respect to the consequences of having alcohol level in excess of .02. The District's intent was manifested by showing that **a violation of the policy subjected an employee to mandatory dismissal.** The District never communicated to the Union prior to Freeman's discharge that an employee would be automatically terminated for violating the random alcohol testing policy. (Appeal at p.4; emphasis added)

On December 10, 1996, PERB issued Decision No. 1181, which found SEIU had actual and/or constructive knowledge that employees may be terminated as early as January 1995, and thus the charge was untimely filed.

In the instant charge, SEIU contends that in September 1997, the District adopted a "revised" Drug and Alcohol Testing Policy, which mandates the dismissal of an employee testing .02 or greater. SEIU contends the unilateral adoption of the "Zero Tolerance" policy violates the EERA.

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

Government Code section 3541(a) provides that the Board 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." A charging party must file a charge when it has actual or constructive notice of a clear intent to implement the action which constitutes the basis for the unfair practice, provided that nothing subsequent to that date evinces a wavering of that intent. (West Valley-Mission Community College

Warning Letter
LA-CE-3898
Page 3

District (1995) PERB Decision No. 1113.) The statute of limitations begins to run when the Charging Party becomes aware of the conduct constituting the unfair practice, not when the Charging Party discovers the legal significance of that conduct. (California State Employees' Association (1985) PERB Decision No. 546-S.)

In its representations to Regional Director Samsel and the Board, SEIU contended as early as August 1996, that the District had adopted a "Zero Tolerance" policy with regard to alcohol and drug testing. Indeed, the Board noted this assertion by stating it Decision 1181:

SEIU contends that not until the dismissal of an employee on December 12, 1995, did it become clear that the District had adopted a zero tolerance policy that mandated dismissal of employees found to have .02 percent or higher alcohol levels. (p.3)

Thus, by SEIU's own admissions, it had knowledge of the District's "zero tolerance" policy with regard to alcohol and drug testing more than six months prior to the filing of this charge. As such, the charge fails to state a prima facie violation within the jurisdiction of PERB.

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 March 18 1998. I shall dismiss your charge. If you have any questions, please call me at (415) 439-6940.

Sincerely,

Kristin L. Rosi
Regional Attorney