**STATE OF CALIFORNIA**
**DECISION OF THE**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

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| LINDA KENNIS, | ) | |
| | ) | |
| Charging Party, | ) | Case No. SF-CE-2019 |
| | ) | |
| v. | ) | PERB Decision No. 1324 |
| | ) | |
| OAKLAND UNIFIED SCHOOL DISTRICT, | ) | April 9, 1999 |
| | ) | |
| Respondent. | ) | |
| | ) | |

Appearance: Linda Kennis, on her own behalf.

Before Caffrey, Chairman; Dyer and Amador, Members.

DECISION

CAFFREY, Chairman: This case is before the Public Employment Relations Board (Board) on appeal by Linda Kennis (Kennis) of a Board agent's dismissal (attached) of her unfair practice charge against the Oakland Unified School District (District). In her charge, Kennis alleges that the District violated section 3543.5(a) of the Educational Employment Relations Act (EERA)[1] by retaliating against her for her

[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.

participation in protected activities and discriminating against her because of her race.

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

ORDER

The unfair practice charge in Case No. SF-CE-2019 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Dyer and Amador joined in this Decision.

STATE OF CALIFORNIA PETE WILSON, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1 77 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415) 439-6940

February 8, 1999

Linda Kermis

Re: **DISMISSAL OP UNFAIR PRACTICE CHARGE/REFUSAL TO ISSUE COMPLAINT**
Linda Kennis v. Oakland Unified School District
Unfair Practice Charge No. SF-CE-2019

Dear Ms. Kennis:

The above-referenced unfair practice charge, filed on December 18, 1998, alleges that the Oakland Unified School District (District) retaliated against Charging Party because of her union activities and her race. This conduct is alleged to violate Government Code section 3543.5 of the Educational Employment Relations Act (EERA).

I indicated to you, in my attached letter dated January 22, 1999, that the above-referenced charge was subject to deferral to arbitration. 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 or withdrew it prior to January 29, 1999, it would be dismissed. On February 4, 1999, you provided the following additional information.

The charge alleges that the District, through Principal Emily Gaddis, improperly assigned Kennis to teach a class of limited-English-speaking students, which Kennis was not qualified to teach. This assignment was made despite the fact that Kennis did not have an appropriate bilingual teaching certificate. Kennis alleges that Gaddis was aware that the assignment was inappropriate when she made it and that the assignment was made in retaliation for her support of a school budget audit made by her colleague on the Fremont High School Faculty Council, Frederick Kay. The charge alleges further retaliatory acts on Gaddis' part, as well as the two vice-principals at the school. These acts constituted harassment. They are described in the undersigned's letter of January 22, 1999.

Kennis challenged the unlawful teacher assignment, and other

related issues, prior to filing the instant charge by processing a grievance against the District. She attempted several times to convene an informal conference with Gaddis to satisfy the first step of the procedure. Each time, Gaddis claimed she would arrange a time for a meeting, but it was clear to Kennis that she had no intention of meeting after several failed attempts to meet. On or about September 21, 1998, Kennis filed a written grievance. Gaddis did not respond at Level 1. The grievance was forwarded to Al Acuna, Secondary Director for High Schools. He responded at Level 2 by memorandum dated October 16, 1998. Acuna acknowledged that Kennis was not credentialed to teach primary language students. Acuna stated that he would direct Gaddis to change the assignment. He indicated he would check her credentials to determine what new assignments would be appropriate and whether the District could accommodate Kennis's particular demand.

Kennis responded by letter dated October 23, 1998. She advised Acuna that she had greater seniority and therefore greater priority to a teaching assignment of her choice than other uncredentialed, temporary and substitute teachers. After a conversation with Acuna, Kennis followed with a letter to him dated October 28, 1998, on Oakland Education Association (Association) letterhead and signed in her capacity as an executive board member. The letter was co-signed by Richard E. Boyd, Executive Director of the Association. Kennis reiterated her demand for an appropriate reassignment. She stated, "My patience in waiting for responses at Levels I and II have far exceeded the contractual limits." She indicated that she was prepared to elevate the grievance to Level 3 if a satisfactory resolution was not achieved.

By letter dated November 6, 1998, Acuna responded. He requested additional time to permit completion of the analysis of her credentials. By letter dated November 17, 1998, Kennis responded, again on Association letterhead. She indicated that in addition to the teacher assignment issue there were other issues which were not resolved. She also raised the claim that the District's action involved retaliation for "union activity."

By memorandum issued on or about November 19, 1998, a District Labor Relations Analyst responded to Acuna by indicating that the grievance would be resolved by transferring Kennis to a ninth grade social studies teaching position at Fremont. Kennis did not pursue this grievance any further.

Kennis continues to maintain that not all of the issues raised in her grievance were resolved to her satisfaction. Her grievance

refers to the violation of her "civil rights," which Kennis claims, includes her right to be free from retaliation for union activities.

Kennis alleges that as an executive board member she has come to recognize that the Association fails to pursue some meritorious grievances simply because their number exceed the organization's resources.

The allegation that the District retaliated against Kennis by giving her an improper class assignment must be dismissed because the grievance machinery of the collective bargaining agreement covers the dispute raised by the unfair practice charge and culminates in binding arbitration. Therefore, PERB is without jurisdiction to address the issue. Although Kennis filed a grievance challenging the improper class assignment, her case could only become within PERB's jurisdiction if processing the grievance had proven to be futile, or if she had proceeded to arbitration and was seeking review of the arbitrator's award. But she has not demonstrated either of these grounds. (See State of California (Department of Corrections) (1986) PERB Decision No. 561-S [charge dismissed where employee failed to pursue case to arbitration]; Eureka City School District (1988) PERB Decision No. 702 [union abandoning its own grievance just prior to a scheduled arbitration does not permit issuance of complaint where matter is deferrable].)

The allegations that the District retaliated against Kennis through a pattern of harassment, apart from the improper class assignment, must be dismissed, again because the grievance machinery covers the dispute. Kennis has not demonstrated that any grievance was filed challenging this conduct[1], or that, if it had been filed, processing it would have been futile. The fact that Kennis may have believed that the Association would not pursue this case to arbitration, or that she herself was unaware of the requirement to pursue a grievance based on the non-discrimination language in the contract, are insufficient to demonstrate futility.

Based on the facts and reasons stated above, as well as those contained in my January 22, 1999 letter, I am therefore dismissing the charge.

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[1]Even assuming that it did include these issues, this does not overcome the jurisdictional defect because Kennis has not demonstrated futility nor does she seek review of an arbitrator's decision.

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 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 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 (2 0) calendar days following the date of service of the appeal. (Cal. Code 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 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 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

DONN GINOZA
Regional Attorney

Attachment

cc: Jane Bond Moore

PUBLIC EMPLOYMENT RELATIONS BOARD

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

January 22, 1999

Linda Kennis

Re: **WARNING LETTER**
Linda Kennis v. Oakland Unified School District
Unfair Practice Charge No. SF-CE-2019

Dear Ms. Kennis:

The above-referenced unfair practice charge, filed on December 18, 1998, alleges that the Oakland Unified School District (District) retaliated against Charging Party because of her union activities and her race. This conduct is alleged to violate Government Code section 3543.5 of the Educational Employment Relations Act (EERA).

Investigation of the charge revealed the following. Linda Kennis is employed as a teacher by the District. She is assigned to Fremont High School. The principal of Fremont High School is Emily Gaddis. The assistant principal is Carlos Gonzalez.

The certificated unit is exclusively represented by the Oakland Education Association (Association). The District and the Association are parties to a collective bargaining agreement, effective from July 1, 1996 through June 30, 1999. The agreement provides that the District shall not discriminate against any teacher on the basis of "membership or participation in the activities of the Association." (Art. IV, "Non-discrimination," sec. 1.) The contract also prohibits reprisals for processing grievances. (Art. XIV, "Grievance Policy," sec. 11(B).) The grievance procedure provides for binding arbitration. (Art. XIV, "Grievance Policy," sec. 11(D).)

The Faculty Council is a local representative body composed of teachers. The council addresses employer-employee relations issues and gives input to the principal. The councils at each of the schools are recognized and sponsored by the Association. (Art. VII, "Employee Rights," sec. 6.) Kennis was a member of the 1997-98 Faculty Council. Kennis has also filed grievances. She identifies herself as a "union" representative and former member of the Association governing board. She has supported another member of the Faculty Council, Frederick Kay, who demanded that Gaddis produce an audit of school funds.

Kennis alleges that Gaddis and Gonzalez embarked on a campaign of harassment and retaliation because of Kennis's protected

activities. This included an inappropriate teaching assignment, a public reprimand, unannounced criticism in front of Kennis's students, surveillance, and restrictions on use of the restroom.

Section 3541.5(a) of the Educational Employment Relations Act states, in pertinent part, that PERB shall not:

> Issue a complaint against conduct also prohibited by the provisions of the [collective bargaining] agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration.

In Lake Elsinore School District (1987) PERB Decision No. 646, PERB held that this section established a jurisdictional rule requiring that a charge be dismissed and deferred if: (1) the grievance machinery of the agreement covers the matter at issue and culminates in binding arbitration; and, (2) the conduct complained of in the unfair practice charge is prohibited by the provisions of the agreement between the parties. PERB Regulation 32620(b)(5) (Cal. Code of Regs., tit. 8, sec. 32620(b)(5)) also requires the investigating Board agent to dismiss a charge where the allegations are properly deferred to binding arbitration.

These standards are met with respect to this case. First, the grievance machinery of the agreement/MOU covers the dispute raised by the unfair practice charge and culminates in binding arbitration. Second, the conduct complained of in this charge that the District, through Gaddis and Gonzalez, retaliated against Kennis because of her activities on the Faculty Council and her filing of grievances is arguably prohibited by Article IV, section 1 and Article XIV, section 11(B) of the MOU.

Accordingly, this charge must be deferred to arbitration and will be dismissed. Such dismissal is without prejudice to the Charging Party's right, after arbitration, to seek a repugnancy review by PERB of the arbitrator's decision under the Dry Creek criteria. (See PERB Reg. 32661 [Cal. Code of Regs., tit. 8, sec. 32661] ;,. Los Angeles Unified School District (1982) PERB Decision No. 218; Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81a.)

To the extent the charge alleges that the retaliation occurred due to Kennis race, the charge fails to state a prima facie violation of the EERA because PERB has no jurisdiction to address such claims.

Finally, the charge fails to indicate the dates on which Kennis suffered the alleged retaliation. In a letter dated January 5, 1999, the undersigned requested that Kennis provide this information, but the dates were not provided. Therefore, PERB may lack jurisdiction for the additional reason that the charge was not filed in a timely fashion. Government Code section 3541.5(a) states that the Public Employment Relations Board (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." PERB has held that the six-month period commences to run when the charging party knew or should have known of the conduct giving rise to the alleged unfair practice. (Regents of the University of California (1983) PERB Dec. No. 359-H.)

If there are any factual inaccuracies in this letter or any additional facts which would require a different conclusion than the one 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 filed with PERB. If I do not receive an amended charge or withdrawal from you before **January 29, 1999,** I shall dismiss your charge without leave to amend. If you have any questions, please call me at (415) 439-6940.

Sincerely,

DONN GINOZA
Regional Attorney