STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ELIZABETH KISZELY, Charging Party, v. NORTH ORANGE COUNTY COMMUNITY COLLEGE DISTRICT, Respondent.	)	Case No. LA-CE-3965 PERB Decision No. 1342 August 19, 1999

Appearances: Elizabeth Kiszely, on her own behalf; Parker, Covert & Chidester, by Cathie L. Fields, Attorney, for North Orange County Community College District.

Before Caffrey, Chairman; Dyer and Amador, Members.

DECISION AND ORDER

AMADOR, Member: This case is before the Public Employment Relations Board (Board) on appeal by Elizabeth Kiszely (Kiszely) to a Board agent's dismissal (attached) of the unfair practice charge. In the charge, Kiszely made a request for repugnancy review of an arbitration award, and also alleged that the North Orange County Community College District (District) retaliated against her for her participation in protected activities, in violation of section 3543.5(a) and (b) of the Educational Employment Relations Act (EERA).[1]

[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

The Board has reviewed the entire record in this case, including the Board agent's warning and dismissal letters, the original and amended unfair practice charge, Kiszely's appeal,[2] 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-3965 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Caffrey and Member Dyer joined in this Decision.

> 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.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

Kiszely's 6/27/99 request to provide additional materials is hereby denied.

PUBLIC EMPLOYMENT RELATIONS BOARD

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

May 4, 1999

Elizabeth Kiszely

Re: Elizabeth Kiszely v. North Orange County Community College District
Unfair Practice Charge No. LA-CE-3965--Amended Charge
DISMISSAL AND REFUSAL TO ISSUE A COMPLAINT

Dear Ms. Kiszely:

You have alleged that the North Orange County Community College District (District) violated the Educational Employment Relations Act (EERA) Section 3543.5 (a) and (b) by retaliating against you for your participation in protected activities. The original charge in this case was a request for repugnancy review of the "arbitration hearing on April 15, 1997, that pertained to unfair practice charges LA-CE-3699 and LA-CO-714"[1] that you filed on July 23, 1998. You further requested to reactivate unfair practice charge LA-CE-3699.

As I indicated to you in my letter dated December 7, 1998, (attached) the above-referenced charge requesting repugnancy review of the arbitrator's award was untimely and the Public Employment Relations Board (PERB) lacked jurisdiction to do anything other than dismiss it. Further, the December 7, 1998, warning letter stated that you have no issues before PERB which have not been either settled, withdrawn, or dismissed without leave to amend. You were advised that if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in the warning 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 December 17, 1998, the charge would be dismissed. I later extended that deadline to December 28, 1998. On December 27, 1998, you filed your amended charge by certified mail.

[1] Unfair practice charge LA-CO-714 was addressed in a separate letter as it concerns the United Faculty Association of North Orange County (Association), and not the employer, North Orange County Community College District, the subject of this charge.

In regard to the timeliness of your filing, you assert that your repugnancy review request should be considered timely because you could not confirm that the arbitration proceedings were unfair and irregular until April 1998, when you discovered the American Arbitration Association had no record of the arbitration. You believe the unlawful conduct is a continuing act of retaliation and a continuing breach of the contract because you have been denied the right to properly grieve the retaliation against you and in this regard the arbitration process has proven futile.

After additional investigation, I conclude that the amended charge fails to state a prima facie violation of the EERA within the jurisdiction of PERB for the reasons that follow.

The Charge is Untimely

As stated in the warning letter, the Board's jurisdiction is limited by a six-month statute of limitations period. EERA section 3541.5 (a) (1) provides the Board shall not "[i]ssue 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." You state that you could not confirm that the arbitration process was "unfair and irregular" until April 1998, suggesting that that date should be used in determining whether your filing of July 23, 1998, is timely. Page 4 of the warning letter sets forth the statutory limitations period of six months for unfair labor practices. If we consider the date of the arbitration hearing, or even the date of receipt of the arbitrator's award as the date of the unlawful conduct for your repugnancy review, the charge is still untimely. (You received the arbitrator's opinion of the April 15, 1997, hearing on June 3, 1997, and filed the repugnancy review request on July 23, 1998.). Your inability to find counsel or to "confirm" your belief that the arbitrator's opinion was repugnant to EERA does not toll the statute of limitations as discussed in the warning letter.

Not a Continuing Violation

In your amended charge you assert that "the unlawful conduct is a continuing act of retaliation and a continuing breach of the contract because [you] have been denied the right to grieve the retaliation against [you], and in this regard, the arbitration process proved futile."

PERB has recognized "continuing violations" of certain types of claims to bring them within its jurisdiction even if the original conduct was outside the six-month period. In San Dieguito Union High School District (1982) PERB Decision No. 194 (San Dieguito) the Board found that a continuing violation would only be found

where active conduct or grievances occurred within the limitations period that independently constituted an unfair practice. [Citations omitted.] Examples of continuing violations include the monthly withholding of union dues from the union "since the failure of the employer to transmit the dues to the union was repeated each month upon receiving the union's request for the dues." (San Dieguito at page 9.) A continuing violation is not found where the employer's conduct during the limitations period constituted an unfair practice only by its relation to the original offense. (El Dorado Union High School District (1984) PERB Decision No. 382 at p. 4.) Here the conduct you complained of against the District concerns the original filing of the unprofessional conduct notice and is not a continuing violation.

Repugnancy Review

You also make several additional statements on why you disagree with the arbitrator's decision and conclude that it was repugnant to the EERA. However, you have failed to produce facts which demonstrate that the arbitrator's decision is "clearly repugnant" or "palpably wrong" as required. (Fremont Unified School District (1994) PERB Decision No. 1036 at p. 5) Your allegations do not demonstrate defects in the arbitration process or award which rise to the level of making the arbitration repugnant to the EERA.

Warning Letter "Errors"

In addition to the above, your amended charge states that there are three "errors" in the warning letter. However, a review of these alleged errors indicates the following: In the first "error", you explain what portions of the collective bargaining agreement (CBA) the Association instructed you to include in the informal notice of in-house grievance. You do not describe an error but merely indicate why you filed what you did. The second alleged "error" explains how unfair practice charge LA-CE-3837 resulted from your attempt to amend your earlier charge, LA-CE-3699. The third "error" you describe would only have an impact on charges against the Association and will not be addressed in this dismissal letter regarding charges against the District.

Summary

Unfair Practice Charge LA-CE-3965 was not filed in a timely manner. Therefore, PERB does not have jurisdiction to issue a complaint. There was no continuous violation, the arbitration award was not irregular and is not considered repugnant to the EERA. For these reasons the charge, as presently written, does

not meet the standards for a viable unfair practice against the District and is dismissed; Therefore no compliant will be issued.

Right to Appeal

Pursuant to PERB 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).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, sec. 32135(a); see also Cal. Code Regs., tit. 8, sec. 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Cal. Code Regs., tit. 8, sec. 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code. Regs., tit. 8, secs. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

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 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. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, sec. 32135(c).)

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

JANICE F. HILL
Board Agent

Attachment

cc: Margaret Chidester, Esquire

PUBLIC EMPLOYMENT RELATIONS BOARD

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

December 7, 1998

Elizabeth Kiszely

Re: Elizabeth Kiszely v. North Orange County Community College District
Unfair Practice Charge No. LA-CE-3965
Warning Letter

Dear Ms. Kiszely:

On July 23, 1998, you filed unfair practice charge No. LA-CE-3965, a request for repugnancy review of the "arbitration hearing on April 15, 1997, that pertained to unfair practice charges LA-CE-3699 and LA-CO-714."[1] You further requested that unfair practice charge LA-CE-3699 be reactivated. My investigation revealed the following information relevant to this charge.

On July 30, 1996, you filed unfair practice charge LA-CE-3699 alleging that the North Orange County Community College District (District) retaliated against you for your participation in protected activities. Among other allegations, you asserted that you received a Notice of Unprofessional Conduct (Notice) in your file on July 3, 1996. On November 21, 1996, a warning letter/deferral to arbitration was issued by the Public Employment Relations Board (PERB) regional director.[2] On

[1] Unfair practice charge LA-CO-714 will be addressed in a separate letter as it concerns the union, United Faculty, and not the employer, North Orange County Community College District, the subject of this charge.

[2]Page three of the November 21, 1996, Warning Letter/Deferral to Arbitration addressed to you states the following:

> 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, [citations omitted]

January 24, 1997, the PERB regional director dismissed and deferred to arbitration the following allegations of adverse action by the District: letters of complaint by department members and the college president in January and March 1996; and the June 27, 1996, Notice, received by you on July 3, 1996. The complaint which had issued on other allegations in the charge was settled and withdrawn on June 10, 1997.

On August 23, 1996, you filed an informal notice of in-house grievance against the District for violating District Board Policy Sec. 3003 on Academic Freedom and Shared Governance Rights, the Policy on Academic Personnel (24.2.3), and for reprisal (24.7). Attempts to resolve the matter on September 10 and October 7, 1996, were not successful. On October 8, 1996, you submitted your formal grievance against the District. In it, you protested that the Notice received by you on July 3, 1996, was "unwarranted and unjust" because it violated your "academic freedom" under District policy and that it "impinged" upon your First Amendment rights. You further asserted that the Notice violated the collective bargaining agreement (CBA) in several respects. First, you claimed you were not "reprimanded within a reasonable time of the incident(s) giving rise to the reprimand in violation of CBA section 4.6 [Complaint Against a Unit Member] and CBA section 24.3.4.3 [Failure to respond at a step in the Grievance Procedure]. You also alleged that you did not participate in "determination of the facts related to complaints used by the District to make its judgment," in violation of CBA sections 4.6.2 and 4.7.3.2 [right to respond to derogatory statement]. Finally you complained of "gender discrimination" for displaying a pattern of assertiveness and outspokenness on controversial issues in violation of CBA section 4.4.1 and "Affirmative Action Policies".[3]

On November 6, 1996, the District denied the grievance. The arbitration hearing was held on April 15, 1997, and the arbitrator's opinion and award was issued on May 29, 1997. The arbitrator found that the grievance was not arbitrable under the CBA because although the notice of unprofessional conduct was akin to a reprimand subject to review under Article 4.5 of the CBA, the record revealed that you had already been afforded an opportunity to review and comment on the notice of unprofessional

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[3]Your grievance did not allege that the District had violated CBA section 4.4.2 which states in pertinent part:

> No Unit Member shall be in any way discriminated against, intimated, restrained or coerced because of affiliation with or participation in the Association, or the exercise of rights guaranteed by Chapter 10.7, sections 3540-3549 of the Government Code.

conduct which satisfied the requirements under that section of the CBA.[4] You indicated that you had received a copy of the arbitrator's opinion and award on June 3, 1997.

On September 2, 1997, you filed unfair practice charge LA-CE-3837. The charge stated several allegations including the previous allegation that the District issued a Notice against you in June 1996. The allegations in your charge were determined to be untimely and the charge was dismissed by the regional attorney on February 27, 1998, and appealed to the Board on March 24, 1998. You asserted in LA-CE-3837 that a grievance had been filed regarding the July 3, 1996, Notice; that the grievance was initiated October 8, 1996[5] and ruled inarbitrable on May 30, 1997; and that the arbitration was binding. On June 18, 1998, the Board adopted the Board agent's warning and dismissal letters as the decision of the Board itself and dismissed unfair practice charge LA-CE-3837 without leave to amend.

On July 23, 1998, you filed this request for repugnancy review of the May 29, 1997, arbitrator's opinion and award. As we have discussed, the above-stated allegations do not state a prima facie violation within the jurisdiction of PERB for the reasons that follow.

PERB Jurisdiction

Untimeliness

PERB has discretionary jurisdiction pursuant to section 3541.5(a)(2) of the Educational Employment Relations Act (EERA) to review the arbitration award reached pursuant to the grievance machinery solely for the purpose of determining whether it is repugnant to the purposes of this chapter. If the Board finds that the arbitration award is repugnant to the purposes of this chapter, it shall issue a complaint on the basis of a timely

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[4]The parties had stipulated to putting the following three issues before the arbitrator: Is the grievance of Elizabeth Kiszely, dated October 8, 1996, arbitrable? If so, did the notice of unprofessional conduct issued to Elizabeth Kiszely, dated June 27, 1996, violate the Collective Bargaining Agreement? If so, what is the appropriate remedy?

[5]In your amended charge filed on February 23, 1998, you changed your response to section 5 of the Unfair Practice Charge form regarding the grievance procedure to "initiated May 13, 1996 & August 23, 1996". August 23, 1996 will be considered the beginning of your grievance process for tolling purposes based on your letter to the District dated August 23, 1996, setting forth your intent to grieve your concerns regarding the July 3, 1996, notice.

filed charge, and hear and decide the case on the merits. Otherwise, it shall dismiss the charge.

The Board's jurisdiction is limited by a six-month statute of limitations period. EERA section 3541.5(a)(1) provides the Board shall not, "[i]ssue 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." It is your burden, as the charging party to demonstrate that the charge has been timely filed. (See Tehachapi Unified School District (1993) PERB Decision No. 1024.)

On July 23, 1998, you filed this repugnancy review (Unfair Practice Charge LA-CE-3965) of the arbitrator's opinion and award which you received on June 3, 1997. The statute of limitations begins running on the day of the alleged unlawful conduct, in this case, July 3, 1996. This charge was filed July 23, 1998. More than two years have passed since the complained-of conduct and the filing of this charge. The statute provides for tolling during the time the grievance is in process. Here you initiated the grievance process on August 23, 1996, and it concluded with your receipt of the arbitrator's award on June 3, 1997. The grievance machinery processing took approximately nine and one-half months. Even after subtraction of the nine and one-half months, more than six months have elapsed between the alleged unlawful conduct and the filing of this charge. Your repugnancy review of the arbitrator's award is untimely and PERB lacks jurisdiction to do anything other than dismiss it.

However, the statute of limitations is tolled only if the grievance raises the same issues with the arbitrator as would have been raised by the charging party at PERB. (North Orange County Community College District (1998) PERB Decision No. 1268.)[6] Your grievance did not raise the proper issues. Your request for repugnancy review is thus even more untimely since tolling does not apply in your case.

But even if your charge had been timely filed, the arbitration award would not be considered repugnant to the Act for the following reasons.

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[6]The original charge (LA-CE-3699) was filed July 30, 1996, and deferred to arbitration on January 24, 1997. The issues deferred to arbitration were not included in your grievance or your arbitration request. This was discussed in detail in the dismissal and warning letters of unfair practice charge LA-CE-3837 which concluded that "Thus, the October 8, 1996 grievance did not toll the statute of limitations period. . . ."

Repugnancy Review

An unfair practice charge concerning conduct subject to final and binding arbitration for parties governed by EERA, may be filed based on a claim that the settlement or arbitration award is repugnant to the applicable Act.

Section 3541.5 entitled "Unfair practice; jurisdiction; procedures for investigation, hearing and decision" sets out PERB jurisdiction in claims of repugnancy review and states in pertinent part:

> The board shall have discretionary jurisdiction to review the settlement or arbitration award reached pursuant to the grievance machinery solely for the purpose of determining whether it is repugnant to the purposes of this chapter. If the board finds that the settlement or arbitration award is repugnant to the purposes of this chapter, it shall issue a complaint on the basis of a timely filed charge, and hear and decide the case on the merits. Otherwise, it shall dismiss the charge. 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.

PERB Regulation 32661 covers repugnancy claims and states in pertinent part:

> (a) An unfair practice charge concerning conduct subject to Government Code Section 3514.5(a)(2) or 3541.5(a)(2) . . . may be filed based on a claim that the settlement or arbitration award is repugnant to the applicable Act.
>
> (b) The charge shall comply with the requirements of Section 32615.

PERB will uphold an arbitration award if: (1) the matters raised in the unfair practice charge were presented to, and considered by the arbitrator; (2) the arbitration proceedings were fair and regular; (3) the parties agreed to be bound by the award; and (4) the award is not repugnant to the purposes and policies of the EERA. (Yuba City Unified School District (1995) PERB Decision No. 1095; Lake Elsinore School District (1987) PERB Dec. No. 646.)

This case is anomalous in that the issues deferred to arbitration were never grieved or presented to the arbitrator. On January 24, 1997, the PERB regional director dismissed and deferred the following allegations to arbitration: "That letters of complaint by department members and the College President in January and March 1996 and a July 3, 1996 notice of unprofessional conduct were issued in retaliation for engaging in activity protected under the EERA."

As noted previously above and in the PERB agent's dismissal of LA-CE-3837, the issues grieved by you did not include the issue of retaliation against you for participation in activities protected by the EERA. The issues deferred to arbitration by PERB were not arbitrated. Therefore, there is no appropriate arbitration award to be reviewed at this time.

Request to reactivate LA-CE-3699

You have also requested that PERB "reactivate" that portion of unfair practice charge LA-CE-3699 that had been deferred to binding arbitration. PERB followed the jurisdictional rule set out in the EERA and deferred that portion of the charge to an arbitrator. You did not arbitrate that issue. To allow you to reactivate that charge now would be a circumvention of the jurisdictional limitations of the EERA. Therefore, this request for reactivation of a portion of charge No. LA-CE-3699 is also denied.[7]

Summary

In summary, you did not file Unfair Practice Charge LA-CE-3965 in a timely manner. Therefore, PERB does not have jurisdiction to review the case. You have no issues before PERB which have not been either settled in your June 10, 1997, notice of withdrawal or dismissed without leave to amend. For these reasons the charge, as presently written, does not meet the standards for a viable unfair practice against the District.

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 have the

[7]This is not a situation with special circumstances in which one party fraudulently concealed operative facts underlying an alleged violation and prevented a timely filing. (Ducane Heating Corporation and International Union of Electrical, Radio and Machine Workers. AFL-CIO (1985) 273 NLRB 1389.)

case number written on the top right-hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before December 17. 1998. I shall dismiss your charge. If you have any questions, please call me at (916) 322-3198 ext. 322.

Sincerely,

Janice F. Hill
Board Agent