STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

DOLAN LEE BRADLEY, Charging Party, v. SANTA MONICA-MALIBU UNIFIED SCHOOL DISTRICT, Respondent.	)	Case No. LA-CE-4152 PERB Decision No. 1389 May 31, 2000

Appearances; Dolan Lee Bradley, on his own behalf; Atkinson, Andelson, Loya, Ruud & Romo by James Baca, Attorney, for Santa Monica-Maiibu Unified School District.

Before Dyer, Amador and Baker, Members.

DECISION

BAKER, Member: This case comes before the Public Employment Relations Board (Board) on appeal by Dolan Lee Bradley (Bradley) from the Board agent's dismissal (attached) of his unfair practice charge.

The charge alleges that the Santa Monica-Malibu Unified School District (District) violated the Educational Employment Relations Act (EERA)[1] by changing Bradley's classification from lead custodian to day custodian and by reducing his salary by five percent, in retaliation for his activity as a job steward for Service Employees International Union Local 660. This conduct is alleged to violate EERA section 3543.5(a).[2]

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

[2]Section 3543.5 provides, in part:

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

ORDER

The unfair practice charge in Case No. LA-CE-4152 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Dyer and Amador joined in this Decision.

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.

PUBLIC EMPLOYMENT RELATIONS BOARD

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

February 2, 2 0 00

Dolan Lee Bradley

Re: **DISMISSAL OF CHARGE/REFUSAL TO ISSUE COMPLAINT**
Dolan Lee Bradley v. Santa Monica-Malibu Unified School District
Unfair Practice Charge No. LA-CE-4152; First Amended Charge

Dear Mr. Bradley:

The above-referenced unfair practice charge, filed January 14, 2000, alleges the Santa Monica-Malibu Unified School District (District) violated federal labor law by revoking your job classification. This conduct is alleged to violate Government Code section 3543.5 of the Educational Employment Relations Act (EERA or Act).

I indicated to you, in my attached letter dated January 24, 2000, 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 January 31, 2000, the charge would be dismissed.

On January 31, 2000, Charging Party filed a first amended charge in the Los Angeles Regional Office. In my January 24, 2000, letter, I informed Charging Party that his allegation of discrimination was time barred. The amended charge adds the following facts.

On July 17, 1995, Charging Party received a letter from District Personnel Director, Jane Ellison, stating that the 5% lead stipend was being terminated. Ms. Ellison stated the District's new classification study determined Charging Party should not be in a Lead Custodian position, as he had no subordinates to supervise. Thus, on or about July 24, 1995, the District reclassified Charging Party back to a Day Custodian.

On August 15, 1995, Charging Party wrote a letter to Ms. Ellison regarding the reclassification. In this letter, Charging Party

states his belief that the reclassification violates the Merit Rules.

On January 10, 1996, Charging Party filed a Level I grievance over the reclassification. The grievance alleges the District did not follow the classification study in removing him from his Lead Custodian position. The grievance does not, however, cite any specific collective bargaining provisions or Merit Rules.

On January 18, 1996, the grievance was denied at Level I without comment. On January 24, 1996, the grievance was denied at Level II. The Level II response is not attached to the original or amended charge. Pursuant to Article 13.7.2.3 of the Agreement between SEIU and the District, Charging Party had fifteen (15) days after receipt of the Level II response to request Level III binding arbitration. Apparently, Charging Party did not request binding arbitration.

On March 23, 1999, Charging Party sent a letter to SEIU Business Agent Ron Ferrara, requesting assistance from SEIU in this matter. Specifically, it appears Charging Party sought a Personnel Commission hearing on alleged violation of the Merit Rules.

In or about May, 1999, Charging Party met with SEIU representative, Jack Roberts. During this meeting, Charging Party was informed that SEIU had worked out a settlement with the District regarding the reclassification issue. The settlement called for the District and SEIU to each pay one-half of the seven (7) month salary for Lead Custodian. Charging Party refused to sign this settlement agreement, believing it did not conform to Merit Rule 3.3.3.[1]

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[1] Merit Rule 3.3.3 is a recitation of Education Code section 45285, which states in relevant part:

> A. The reclassification of positions to a higher salary level shall have the following effect on incumbents:
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> > 1. when all of the positions in a class or when one or more positions in a class are reclassified to a higher classification, an incumbent who has a continuous employment record of three or more years in the position shall be reclassified with the position, without examination and shall serve a

On May 25, 1999, Mr. Roberts filed an appeal letter with the President of the Personnel Commission, initiating a Personnel Commission hearing. The appeal letter alleged the District violated Merit Rule 3.3.3.

On September 24, 1999, a Personnel Commission hearing was held regarding Charging Party's reclassification. On November 15, 1999, the Personnel Commission denied Charging Party's claim, and informed him of his right to file in Superior Court.

Based on the facts presented in the original and amended charges, the charge fails to state a prima facie violation of the EERA, for the reasons provided below.

As noted in my January 24, 2000, letter, Government Code section 3541.5(a)(1) prohibits the Board from issuing 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. The statute of limitation begins to run on the date Charging Party knew or should have known of the conduct underlying the charge. In this instance, Charging Party knew of the termination of his Lead Custodian position on July 24, 1995, and as such the charge is untimely.

Charging Party asserts the charge should be considered timely filed as he was pursuing his Personnel Commission hearing. However, PERB does not recognize the doctrine of "equitable tolling," under which a charging party will not be precluded from proceeding on an untimely charge if he or she has pursued an alternative legal remedy in good faith. (San Diego Unified School District (1991) PERB Decision No. 885.) As such, the statute of limitations was not tolled while Charging Party pursued the Personnel Commission hearing.

It is arguable that Charging Party is entitled to the tolling under Government Code section 3541.5(a)(2).[2] Pursuant to that section, PERB must consider the limitations period tolled during the time it took charging party to exhaust any contractual grievance machinery. However, Charging Party's contractual

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probationary period. . .

[2] However, it appears Charging Party failed to raise the issue of discrimination either in the contractual grievance or the Personnel Commission hearing. As the issue presented in the PERB unfair practice charge is different than the issue presented in the contractual grievance, tolling would not be appropriate. (North Orange County Community College District (Kiszely) (1998) PERB Decision No. 1268.)

grievance was terminated in January 1996, when Charging Party and SEIU did not pursue binding arbitration in this matter. As such, the charge, even with tolling, is untimely.

At the end of the amended charge, Charging Party asserts his removal from the Lead Custodian position was discriminatory, as Charging Party was a Job Steward. However, Charging Party fails to provide any facts regarding this allegation. Moreover, this allegation is also untimely filed.

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).) 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

By
Kristin L. Rosi
Regional Attorney

Attachment

cc: Jim Vaca

PUBLIC EMPLOYMENT RELATIONS BOARD

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

January 24, 2000

Dolan Lee Bradley

Re: **WARNING LETTER**
Dolan Lee Bradley v. Santa Monica-Maiibu Unified School District
Unfair Practice Charge No. LA-CE-4152

Dear Mr. Bradley:

The above-referenced unfair practice charge, filed January 14, 2000, alleges the Santa Monica-Malibu Unified School District (District) violated federal labor law by revoking your job classification. This conduct is alleged to violate Government Code section 3543.5 of the Educational Employment Relations Act (EERA or Act).[1]

Investigation of the charge revealed the following. Charging Party is employed by the District as a Day Custodian at Santa Monica High School. As a classified employee, Charging Party is exclusively represented by the Service Employees International Union, Local 660 (SEIU). Facts provided also state Charging Party was a job steward for SEIU at all times relevant herein.

In July 1994, Principal Sylvia Rousseau informed Charging Party that she was going to initiate a personnel action to have Charging Party's position as a Day Custodian reclassified to a Lead Custodian position. On September 22, 1994, Charging Party was reclassified as a Lead Custodian. This reclassification had the result of increasing Charging Party's salary by 5%.

On July 17, 1995, Charging Party received a letter from District Personnel Director, Jane Ellison, stating that the 5% lead stipend was being terminated. Ms. Ellison stated the District's new classification study determined Charging Party should not be in a Lead Custodian position, as he had no subordinates to

[1] PERB lacks jurisdiction over claims that the District violated federal labor law. However, this charge will be analyzed as if Charging Party alleged violations of the EERA.

supervise. Thus, on or about July 24, 1995, the District reclassified Charging Party back to a Day Custodian.

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

Government Code section 3541.5(a)(1) prohibits the Board from issuing 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. In the instant charge, Charging Party knew of the adverse action in July of 1995, more than four years prior to the filing of the unfair practice charge. As such, the charge is untimely and must be dismissed.

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 have the 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 January 31, 1999, I shall dismiss your charge. If you have any questions, please call me at (415) 439-6940.

Kristin L. Rosi
Regional Attorney