STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

KIRK ANTHONY ROBINSON, Charging Party, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-4232-E PERB Decision No. 1431 April 30, 2001

Appearance: Kirk Anthony Robinson, on his own behalf.

Before Amador, Baker and Whitehead, Members.

DECISION

BAKER, Member: This case is before the Public Employment Relations Board (Board) on appeal by Kirk Anthony Robinson (Robinson) of a Board agent's dismissal (attached) of his unfair practice charge.

The charge alleged that the Los Angeles Unified School District (District) violated section 3543.5(a) of the Educational Employment Relations Act (EERA)[1] by dismissing Robinson from his position with the District.

[1] EERA 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:
>
> (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

After reviewing the entire record in this case, including the unfair practice charge, the dismissal and warning letters, and Robinson's appeal, the Board finds the dismissal letter to be free from prejudicial error and adopts it as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. LA-CE-4232-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Amador and Whitehead joined in this Decision.

---

purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1515 Clay Street, Suite 2201
Oakland, CA 94612
(510) 622-1016

December 11, 2000

Kirk Anthony Robinson
1540 W. 186th Street
Gardena, CA 90248

Re: **DISMISSAL OF CHARGE/REFUSAL TO ISSUE COMPLAINT**
Kirk Anthony Robinson v. Los Angeles Unified School District
Unfair Practice Charge No. LA-CE-4232; First Amended Charge

Dear Mr. Robinson:

The above-referenced unfair practice charge, filed October 25, 2000, and amended on November 9, 2000, alleges the Los Angeles Unified School District (District) discriminated against Charging Party because of his protected activity. Charging Party alleges this conduct violates Government Code section 3543.5(a) of the Educational Employment Relations Act (EERA or Act).[1]

I indicated to you, in my attached letter dated November 15, 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 November 22, 2000, the charge would be dismissed.

On November 22, 2000, Charging Party requested a one-week extension to file an amended charge. That extension was granted to November 29, 2000. No amended charge was filed by November 29, 2000. On December 4, 2000, five days after the amended charge was due, Charging Party telephoned this office requesting

---

[1] Charging Party also alleges the District's conduct violated the California Education Code, the California Constitution, the United States Constitution, the Freedom of Information Act, and the parties collective bargaining agreement. However, PERB only has jurisdiction over violations of the EERA. Allegations regarding the California Education Code and all other statutes must be pursued in state or federal court. Additionally, Charging Party does not have standing to allege the District unilaterally changed its past practice or written policy. (Oxnard School District (1988) PERB Decision No. 667.)

a second extension. During this nearly one hour telephone conversation, I explained to Charging Party the deficiencies in his charge and further informed Charging Party that I would dismiss the charge if I did not receive an amended charge by 5:00 p.m., December 8, 2000. During a second telephone conversation on December 4, 2000, I again explained the deficiencies in the charge and reiterated that any amended charge must be on my desk by 5:00 p.m. on December 8, 2000.

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 November 15, 2000, 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 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: Jesus Estrada-Melendez

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1515 Clay Street, Suite 2201
Oakland, CA 94612
(510) 622-1016

November 15, 2000

Kirk Anthony Robinson
1540 W. 186th Street
Gardena, CA 90248

Re: **WARNING LETTER**
Kirk Anthony Robinson v. Los Angeles Unified School District
Unfair Practice Charge No. LA-CE-4232; First Amended Charge

Dear Mr. Robinson:

The above-referenced unfair practice charge, filed October 25, 2000, and amended on November 9, 2000, alleges the Los Angeles Unified School District (District) discriminated against Charging Party because of his protected activity. Charging Party alleges this conduct violates Government Code section 3543.5(a) of the Educational Employment Relations Act (EERA or Act).[1]

Investigation of the charge revealed the following. Charging Party was employed by the District as a Campus Aide at King/Drew Magnet High School. As a Campus Aide, Charging Party was exclusively represented by the Service Employees International Union (SEIU), Local 99. The District and SEIU are parties to a collective bargaining agreement (Agreement) which expires on June 30, 2000.

On October 15, 1999, Charging Party was verbally counseled by Dr. Ernie Roy, Principal, regarding the proper procedures for reporting absences. Charging Party was reminded of the requirement to notify the school if he was going to be absent.

---

[1] Charging Party also alleges the District's conduct violated the California Education Code, the California Constitution, the United States Constitution, the Freedom of Information Act, and the parties collective bargaining agreement. However, PERB only has jurisdiction over violations of the EERA. Allegations regarding the California Education Code and all other statutes must be pursued in state or federal court. Additionally, Charging Party does not have standing to allege the District unilaterally changed its past practice or written policy. (Oxnard School District (1988) PERB Decision No. 667.)

On January 21, 2000, Charging Party was again verbally counseled by Dr. Roy regarding the proper procedures for reporting absences. Charging Party was also informed that his absences were excessive and unacceptable.

On February 3, 2000, Charging Party was verbally counseled for a third time regarding his excessive absences and the proper procedures for reporting absences. Charging Party was told to call no later than 7:30 a.m. on the day of the intended absence. Charging Party was also informed that his excessive absences could result in dismissal.

On February 4, 2000, Charging Party called the school to report his absence. In a conversation with Mr. Edwards, Charging Party asked Mr. Edwards to tell his supervisor Ms. Woods that Charging Party needed some time off and would call when he was ready to return to work.

On February 10, 2000, Charging Party called the school and left a message for Ms. Woods stating he needed more time off, and would call back at a later date. It appears that Charging Party was homeless during this time period and may have been seeking assistance for a drug or alcohol problem.

On March 22, 2000, Charging Party went to SEIU's office to discuss his situation with a union official. While at SEIU, Charging Party spoke with Labor Relations Representative Terry Palmer. Charging Party informed Mr. Palmer that he had "relapsed" but was now "clean" and ready to return to work. Mr. Palmer informed Charging Party that he should report back to work and stay "clean."

In the evening of March 22, 2000, Charging Party spoke to his mother, who informed him that he had received a letter from the District. Charging Party instructed his mother to open the letter. Inside the envelope was a Notice of Unsatisfactory Conduct recommending Charging Party be dismissed. Specifically, the District cited Charging Party's twenty-four (24) absences from October 14, 1999 to February 18, 2000. On eighteen (18) of those occasions, Charging Party failed to inform the school of his absence. The District also cited the three verbal counselings Charging Party received.

On March 23, 2000, Charging Party went to see Mr. Palmer at SEIU. Mr. Palmer photocopied the notice and informed Charging Party that the notice appeared to conform to the due process requirements. Mr. Palmer also instructed Charging Party to return to work.

On March 28, 2000, Charging Party telephoned his supervisor, Ms. Woods, and expressed his desire to return to work. Ms. Woods asked Charging Party why he didn't call the school. Charging Party stated he wasn't thinking clearly at the time and that he needed to "clear" his head before calling. Ms. Woods then informed Charging Party that his position had been filled by someone from Youth Services, but that he should come in on March 31, 2000, to speak with Dr. Roy.

On March 31, 2000, Charging Party met with Ms. Woods. Ms. Woods questioned Charging Party's absences, and then left to speak with Dr. Roy. Upon returning, Ms. Woods presented Charging Party with a March 6, 2000, letter from Dr. Roy requesting a meeting with Charging Party for March 14, 2000. Although the letter was mailed to Charging Party's address of record, Charging Party states he did not receive the letter and saw the March 6, 2000, letter for the first time during this meeting. When Charging Party again inquired about his job status, Ms. Woods told him to call Sheryl Negash next week to see about returning to work.

Upon returning home on March 31, 2000, Charging Party found he had received a second Notice of Unsatisfactory Conduct from Dr. Roy, dated March 29, 2000. This notice notes Charging Party's excessive absences without leave and other dereliction of duty, concluding with a recommendation that Charging Party be dismissed.

On April 4, 2000, Charging Party telephoned Ms. Woods to discuss his job status. Charging Party was then referred to Dr. Roy, who in turn instructed Charging Party to telephone Sheryl Negash. On April 5, 2000, Charging Party spoke with Dr. Roy, who instructed Charging Party to meet with him on April 7, 2000.

On April 7, 2000, Charging Party met with Dr. Roy. Dr. Roy stated the meeting was a "formal meeting" and that Charging Party would be dismissed due to his excessive absences and unsatisfactory conduct. Upon leaving the school, Charging Party went to Local 99 headquarters to speak with a representative. Charging Party was met by Mr. Palmer who explained what Mr. Palmer believed to be Charging Party's rights under the contract. Mr. Palmer then telephoned District Staff Relations representative John Brasfield to inquire about Charging Party's employment status. Mr. Brasfield stated Charging Party was a "restricted" employee and had no rights under the Personnel Code.[2] Charging Party disagreed with Mr. Brasfield and stated

---

[2] Education Code section 45105 and District Personnel Commission Rule 518 state the following with regard to a "restricted" employee:

that he believed he was a permanent employee with rights under the contract.[3]

On April 11, 2000, Charging Party went to Local 99's office to discuss his employment status and any options he might have. Mr. Palmer stated he could not assist Charging Party, because as a restricted employee, Charging Party was not afforded the appeal rights of a permanent employee. Charging Party then inquired about the Employee Assistance Program. Mr. Palmer stated Charging Party was not eligible for the assistance program because he did not have Kaiser insurance.

On April 12, 2000, Charging Party went to the District's Classified Personnel Office to request a copy of his personnel status report. The report identifies Charging Party as a restricted instructional aide. Charging Party believes the report was changed recently to make him a restricted employee. On April 13, 2000, Charging Party visited several District offices seeking information regarding his rights. Additionally, Charging Party visited Local 99's office where he received a pamphlet on discipline rights.

On April 19, 2000, Charging Party met with SEIU representative Kenya Posten and Mr. Palmer. During this meeting, Ms. Posten explained that in order to combat Charging Party's Notices of Unsatisfactory Conduct, they must demonstrate Charging Party was

---

> (2) Persons employed in a position properly classified as "restricted" shall be classified employees for all purposes except:
>
> (A) They shall not be accorded employment permanency under Section 45113 or Section 45301 of this code, whichever is applicable.
>
> * * * * *
>
> (D) They shall not be eligible for promotion into the regular classified service or, in districts that have adopted the merit system, shall not be subject to the provisions of Section 45241, until they have complied with the provisions of subdivision (c).

[3] Although Charging Party disputes this fact, each Notice of Unprofessional Conduct Charging Party received notes his status as a restricted employee, and not permanent or probationary. Additionally, Charging Party's personnel record with the District clearly states his status as "restricted."

"clean" and rehabilitated. Additionally, Ms. Posten explained that they would have to deal with Charging Party's absent without leave (AWOL) status, and as such, Charging Party should compile paperwork indicating he was in a rehabilitation facility during his prolonged absence from work.

On April 20, 2000, SEIU informed Charging Party that they had set up a meeting with Dr. Roy for April 21, 2000. On April 21, 2000, Charging Party telephoned Dr. Roy to ask what kind of meeting had been arranged. Dr. Roy stated Charging Party should call SEIU about the meeting since they had arranged it. Charging Party did not attend the meeting with Dr. Roy.

On April 24, 2000, Charging Party met with Mr. Palmer, Ms. Posten and Senior Labor Relations Representative Tim Tomas. Mr. Tomas explained that in order to assist Charging Party, Charging Party would have to provide medical records demonstrating his absence was due to a medical condition. Charging Party refused to provide this information, stating instead that he believe the Personnel Code entitled him to hearings in front of the Personnel Commission. Additionally, Charging Party asked SEIU to explain the AWOL charge he had received for not calling into work. Ms. Posten then questioned why Charging Party did not attend the meeting she had set up for April 21, 2000. Charging Party stated he needed more notice.

At this point, Labor Relations Representative Mr. Tatum entered the conversation and explained that he would try to contact Dr. Roy for a second time regarding continued employment with the District. Mr. Tatum telephoned Dr. Roy in Charging Party's presence and attempted to secure employment for Charging Party. After this apparently heated conversation, Mr. Tatum explained that Charging Party would have to take a urine test to demonstrate he was not currently using controlled substances. Charging Party stated he would speak to his doctor about taking the test.

On April 26, 2000, the District dismissed Charging Party from his employment pursuant to Education Code section 45240 and 45320. Charging Party received a letter confirming this fact on April 29, 2000. After receiving this letter, Charging Party telephoned Mr. Tatum to inform him of the dismissal and to request assistance. Mr. Tatum stated Charging Party should have allowed the union access to his medical file so they could fight the charges.

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

Charging Party does not specify an alleged violation of the EERA, so it is assumed that Charging Party is alleging the District violated the EERA by dismissing him. However, facts provided fail to demonstrate an EERA violation. 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.)

Herein, Charging Party's only protected activity consists of contacting his union regarding his Notices of Unsatisfactory Conduct. Facts provided fail to demonstrate that the District terminated Charging Party because of his contact with SEIU. Instead, facts provided demonstrate Charging Party was terminated because of excessive absences and his AWOL status. As such, this charge fails to state a prima facie case.

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 November 22, 2000, I shall dismiss your charge. If you have any questions, please call me at (510) 622-1016.

Sincerely,

Kristin L. Rosi
Regional Attorney