

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



RODNEY CUMMINGS,

Charging Party,

v.

LOS ANGELES COUNTY OFFICE OF
EDUCATION,

Respondent.

Case No. LA-CE-4394-E

PERB Decision No. 1743

January 26, 2005

Appearances: Rodney Cummings, on his own behalf; Atkinson, Andelson, Loya, Ruud & Romo by Joshua E. Morrison, Attorney, for Los Angeles County Office of Education.

Before Duncan, Chairman; Whitehead and Shek, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Rodney Cummings (Cummings) of a Board agent's dismissal (attached) of his unfair practice charge. The unfair practice charge alleged that the Los Angeles County Office of Education (COE) violated the Educational Employment Relations Act (EERA)¹ by discriminating against him after he filed a grievance.

The Board has reviewed the entire record in this matter, including the unfair practice charge, the corrected unfair practice charge, the Board agent's warning and dismissal letters, Cummings' appeal, and COE's response to Cummings' appeal. As a result of our review, the Board adopts the Board agent's warning and dismissal letters as a decision of the Board itself.

¹EERA is codified at Government Code section 3540, et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

DISCUSSION

COE alleged that Cummings' appeal was untimely. An appeal was due June 16, 2004. An unsigned document lacking signature and proof of service was filed with the Board on June 15. The Appeals Office, by letter dated June 22, 2004, gave Cummings until July 6, 2004 to perfect the filing. Instead, the perfected filing contained a date stamp of July 8, 2004. Under the Board's version of the mailbox rule (PERB Regulation 32130(c))², Cummings obtains an additional five days beyond the deadline stated in the June 22 letter to file his appeal. Thus, July 11, 2004 becomes the actual deadline. In a recent PERB decision, the Board held that the mailbox rule applied to extensions of time to file documents that were granted by the Board. (*State of California f State Personnel Boards (2004) PERB Order No. Ad-343-S.*) Therefore, the Board finds the appeal timely filed. Next, we turn to issues raised by Cummings on appeal.

Under PERB Regulation 32615(a)(5), the charge must contain a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice," i.e., the "who, what, when, where and how" of an unfair practice. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S; *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Cummings' charge basically comprises an outline that includes a list of state and federal statutory sections, Personnel Commission Rules, and collective bargaining agreement sections alleged to have been violated. None of these alleged violations pertains to statutes under the Board's jurisdiction. The charge contains general complaints about student disciplinary problems, Cummings' complaints about these problems, complaints about site Principal Arthur McCoy and Vice Principal Lanny Mayer, a lack of due

²PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq.

process from COE in not providing oral warnings for poor performance appraisals and reprimands left in Cummings' mailbox, and issuance of the Performance Improvement Plan. There is little detail that shows any facts stating a prima facie case of discrimination. The warning letter provided much more detail about the nature of Cummings' allegations than the unfair practice charge and fully advised him of the deficiencies in the unfair practice charge. However, Cummings did not file an amended charge.

Cummings' appeal and the attached outline contain a few more specifics and add new allegations and evidence, items with dates preceding the issuance of the warning letter. First, attached to the appeal is a letter dated February 14, 2003 from the Los Angeles County Education Association, CTA/NEA (Association) stating that arbitration on a grievance involving Cummings was placed in abeyance pending discussions and possible resolution of the grievance by the Association and COE. Cummings states that there has been no action on his grievance pursuant to this letter. Second, he attaches a copy of a fax dated July 10, 2001 regarding a chemical leak. Third, attached is a confusing timeline of Cummings' "issues" beginning July 2001. Fourth, he states that COE is in violation of the FRISK documentation model. There is no description of what this is.

Under PERB Regulation 32635(b), "unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." The new allegations and evidence predated the warning letter and so were known to Cummings before filing the appeal but Cummings did not file an amended charge. Cummings failed to provide any evidence in his appeal showing good cause to raise these new items therefore they are dismissed.

In light of the above, the Board finds that Cummings has failed to state a prima facie violation of EERA.

ORDER

The unfair practice charge in Case No. LA-CE-4394-E is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Shek joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



Office of the General Counsel
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8381
Fax: (916) 327-6377



May 7, 2004

RODNEY CUMMINGS
P.O. Box 93757
Pasadena, CA 91109

Re: Rodney Cummings v. Los Angeles County Office of Education
Unfair Practice Charge No. LA-CE-4394-E
DISMISSAL LETTER

Dear Mr. Cummings:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 11, 2002. Rodney Cummings alleges that the Los Angeles County Office of Education violated the Educational Employment Relations Act (EERA)¹ by discriminating against him after he filed a grievance.

Ms. Robertson indicated to you in the attached letter dated April 13, 2004, 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 April 22, 2004, the charge would be dismissed.

You requested and Ms. Robertson granted an extension of time in which to file an amended charge to April 29, 2004. 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 Ms. Robertson's April 13, 2004 letter.

Right to Appeal

Pursuant to PERB Regulations,² 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. (Regulation 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.

¹ EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

² PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Regulations 32135(a) and 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 Regulation 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. (Regulations 32135(b), (c) and (d); see also Regulations 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. (Regulation 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 Regulation 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. (Regulation 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. (Regulation 32132.)

LA-CE-4394-E

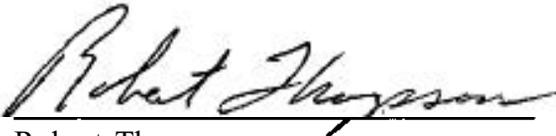
May 7, 2004

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Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

A handwritten signature in cursive script that reads "Robert Thompson". The signature is written in black ink and is positioned above a horizontal line.

Robert Thompson
General Counsel

Attachment

cc: Steve Andelson

PUBLIC EMPLOYMENT RELATIONS BOARD



Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-7242
Fax: (916) 327-6377



April 13, 2004

Rodney Cummings, Teacher
P.O. Box 93757
Pasadena CA 91109

Re: Rodney Cummings v. Los Angeles County Office of Education
Unfair Practice Charge No. LA-CE-4394-E
WARNING LETTER

Dear Mr. Cummings:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 11, 2002. Rodney Cummings alleges that the Los Angeles County Office of Education violated the Educational Employment Relations Act (EERA)¹ by discriminating against him after he filed a grievance.

The Collective Bargaining Agreement (CBA) between the District and the Association contains a binding arbitration provision. On September 18, October 26, and in November of 2001, the District declined to enforce Mr. Cummings recommended suspensions of three misbehaving students. Additionally, Mr. Cummings resented the District's use of his classroom to store broken equipment, its failure to provide adequate teaching materials, and its failure to take action when Mr. Cummings classroom was inundated with toxic fumes.

In efforts to enforce provisions of the CBA, Mr. Cummings filed a grievance on September 25, and November 27, of 2001. On November 27, 2001 the Association met with the District to resolve the problems raised in Mr. Cummings grievance. Present at the meeting were Mr. Cummings, Assistant principal Lanny Mayer, and LACEA representatives Kathy O'Neil and Bob Elkins. On December 6, 2001, Ms. O'Neil gave Mr. Cummings a summary letter of the meeting which expressed the District's intentions to resolve issues raised by Mr. Cummings

On December 17, 2001, and February 14, 15, and 26 of 2002, The District placed letters in Mr. Cummings' mailbox. Mr. Cummings received no oral warnings of the notices. However, the CBA does not specify oral communication is owed by the District to employees it wishes to address. In a meeting on February 26, 2002, the District warned Mr. Cummings he would be placed on a 90 day Performance Improvement Plan (PIP). On March 29, 2002, the District placed Mr. Cummings on PIP. During the meeting the District provide Mr. Cummings with a form explaining reasons for his placement on PIP. The form also requested that Mr. Cummings schedule a date for his performance plan review, and stated that the District would

¹ EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

meet with Mr. Cummings weekly to discuss progress and issues. The District and Mr. Cummings signed the form acknowledging its receipt.

Based on the following analyses, your charge fails to state a prima facie case showing that the District violated section 3543.5(a).

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 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (North Sacramento School District (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District (1979) PERB Decision No. 104.); (3) the employer's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S; (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; (6) employer animosity towards union activists (Cupertino Union Elementary School District) (1986) PERB Decision No. 572.); or (7) any other facts which might demonstrate the employer's unlawful motive. (Novato; North Sacramento School District, supra, PERB Decision No. 264.)

Evidence of adverse action is also required to support a claim of discrimination or reprisal under the Novato standard. (Palo Verde Unified School District (1988) PERB Decision No. 689.) In determining whether such evidence is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (Ibid.) In a later decision, the Board further explained that:

The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment. [Newark Unified School District (1991) PERB Decision No. 864; emphasis added; footnote omitted.]

I. *Mr. Cummings exercised his right under EERA at 3543.5(a) by filing a grievance against the District.*

A violation of EERA section 3543.5(a) requires that Mr. Cummings exercised a protected right. Pursuant to the parties' CBA, an employees' filing of a grievance is a protected right. (North Sacramento School District (1982) PERB Dec. No. 264.) Mr. Cummings filed grievances against the District on September 25, and November 27, 2001. Thus, Mr. Cummings' charge satisfies the requirement that he exercised a protected right.

II. *The District knew that Mr. Cummings filed the two grievances.*

A violation of EERA section 3543.5(a) requires that the District had knowledge that Mr. Cummings exercised a protected right. The District attended a meeting on November 27, 2001, with Mr. Cummings and LACEA representatives Kathy O'Neil and Bob Elkins to address Mr. Cummings' grievances. Therefore, the District, as required in section 3543.5(A), knew that Mr. Cummings filed two grievances against the District.

III. *The charge fails to demonstrate that the District sent Mr. Cummings' letters and placed him on PIP because Mr. Cummings had filed grievances.*

a) *Letters in Mr. Cummings mailbox*

The charge fails to provide sufficient evidence showing that the District sent the letters to Mr. Cummings in retaliation to his filed grievances. Mr. Cummings filed grievances against the District on September 25, and November 27, 2001. The District placed the first letter in Mr. Cummings mailbox on December 17, 2001, only one month after Mr. Cummings filed the grievance. This establishes that the Mr. Cummings' exercise of his protected right occurred close in time to the District's placement of letters in his mailbox.

However, although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (North Sacramento School District (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Since the charge fails to provide additional evidence showing that the District sent the letters to Mr. Cummings in retaliation to his filed grievances the nexus requirement is unsatisfied. Mr. Cummings argues he was wronged by the District's failure to orally notify him of the letters. However, the CBA contains no requirement that the District communicate orally with employees it wishes to address. Additionally, the charge fails to plead with specificity the letter's contents and reasons why they evidence that the District was retaliating against Mr. Cummings. Therefore, the charge fails to establish a nexus between Mr. Cummings' protected right and the District's actions.

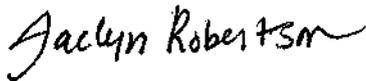
b) Mr. Cummings' placement on PIP

The charge fails to establish a sufficiently close proximity in time between Mr. Cummings filed grievance and the District's placement of him on PIP. Mr. Cummings filed grievances against the District on September 25, and November 27, 2001. In a meeting on February 26, 2002, the District warned Mr. Cummings he would be placed on a 90 day Performance Improvement Plan.(PIP). On March 29, 2002 the District placed Mr. Cummings on PIP. This passage of three months before the District told Mr. Cummings he would be placed on PIP, followed by an additional month before he was officially placed on PIP, attenuates the connection between Mr. Cummings' filed grievance and his placement on PIP. Therefore, the nexus between the protected activity and the District's reactions is unsatisfied.

Moreover, the charge fails to identify additional factors to evidence that the District placed Mr. Cummings on PIP in retaliation to his filed grievances. The charge alleges the District failed to follow the procedure of providing Mr. Cummings with a performance plan review. However, the PIP form signed by Mr. Cummings details reasons for his placement on PIP and requests that Mr. Cumming schedule a date for his performance plan review. The form also explained that the District would meet with Mr. Cummings on a weekly basis to discuss progress and issues.

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 that 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 **April 22, 2004**, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,



Jaclyn Robertson
Board Agent

JJR