STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

TONY PETRICH, Charging Party, v. RIVERSIDE UNIFIED SCHOOL DISTRICT, Respondent.	)	Case No. LA-CE-2129 PERB Decision No. 512 June 21, 1985

Appearance; Tony Petrich, on his own behalf.

Before Hesse, Chairperson; Jaeger, Morgenstern, Burt and Porter, Members.

DECISION

This case is before the Public Employment Relations Board (Board) on appeal by the Charging Party of the Board agent's dismissal, attached hereto, of his charge that the Riverside Unified School District violated section 3543.5(a), (b) and (d) of the Educational Employment Relations Act (Government Code section 3540 et seq.).

We have reviewed the Board agent's dismissal and, finding it free from prejudicial error, adopt it as the Decision of the Board itself.

ORDER

The unfair practice charge in Case No. LA-CE-2129 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

By the BOARD

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

LOS ANGELES REGIONAL OFFICE
3470 WILSHIRE BLVD., SUITE 1001
LOS ANGELES, CALIFORNIA 90010
(213) 736-3127

April 10, 1985

Tony Petrich

Re: LA-CE-2129, Tony Petrich v. Riverside Unified School District

Dear Mr. Petrich:

The above-referenced charge alleges that your classified bargaining unit of the Riverside Unified School District unlawfully contains members who are supervisory employees. This situation is alleged to violate Government Code section 3543.5(a), (b) and (d) of the Educational Employment Relations Act (EERA).

I indicated to you in my letter dated March 25, 1985 that certain allegations contained in the 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 accordingly. You were further advised that unless you amended these allegations to state a prima facie case, or withdrew them prior to April 8, 1985, they would be dismissed.

I have not received either a request for withdrawal or an amended charge and am therefore dismissing those allegations which fail to state a prima facie based on the facts and reasons contained in my March 25, 1985 letter which is attached as Exhibit 1.

Pursuant to Public Employment Relations Board regulation section 32635 (California Administrative Code, title 8, part III), you may appeal the refusal to issue a complaint (dismissal) to the Board itself.

Right to Appeal

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 (section 32635(a). To be timely filed, the original and five (5) copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) on April 30, 1985, or sent by telegraph or certified United States mail postmarked

not later than April 30, 1985 (section 32135). The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

If you file a timely appeal of the refusal, any other party may file with the Board an original and five (5) copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal (section 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 the document filed with the Board itself. (See section 32140 for the required contents and a sample form.) The documents 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 the position of each other party regarding the extension and shall be accompanied by proof of service of the request upon each party (section 32132).

Final Date

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

Very truly yours,

Dennis Sullivan
General Counsel

Barbara T. Stuart
Regional Attorney

Attachment

cc: Charles Field, Esq.

BTS:djm

STATE OF CALIFORNIA GEORGE DEUKMEJIAN. *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD
LOS ANGELES REGIONAL OFFICE
3470 WILSHIRE BLVD., SUITE 1001
LOS ANGELES, CALIFORNIA 90010
(213) 736-3127

March 25, 1985

Mr. Tony Petrich

Re: LA-CE-2129, Tony Petrich v. Riverside Unified School District

Dear Mr. Petrich:

The above-referenced charge alleges that your classified bargaining unit of the Riverside Unified School District unlawfully contains members who are supervisory employees. This situation is alleged to violate Government Code section 3543.5(a), (b) and (d) of the Educational Employment Relations Act (EERA).

Facts

My investigation based on a review of the charge and our conversations on February 7 and 19, 1985, revealed the following facts. You have been employed as a gardener for the District since 1971. This job classification has been contained in the classified unit exclusively represented by the California School Employees Association,Riverside Chapter 506 (CSEA), since the bargaining unit was established in 1976 or 1977 by agreement between the District and CSEA. The unit has also contained the following job classifications since it was established:

Head Custodian I, Elementary School
Cooking Kitchen "Leadperson", Elementary School
Producing Kitchen "Leadperson", Elementary School
Receiving Kitchen "Leadperson", Elementary School
Satellite "Leadperson" and Delivery Person, Elementary School
Cooking Kitchen "Leadperson", Middle School
Producing Kitchen "Leadperson", Middle School
Receiving Kitchen "Leadperson", Middle School
Secretary III, all schools
Secretary IV, all schools
Air Conditioning and Refrigeration Mechanic II

Carpenter II
Electrician II
Electronics Technician II
Groundsperson II
Office Machine Repairperson II
Painter II
Plumber II
Special Maintenance Person II
Welder Mechanic II
Programmer Analyst II

It is the position of CSEA that these job classifications pertain to lead positions and are not supervisory. CSEA does not wish to change the composition of the bargaining unit. You believe some or all of the classifications are supervisory within the meaning of EERA section 3540.l(m) and ask PERB to investigate them for potential exclusion from the bargaining unit.

You have personal knowledge of the job duties of the Head Custodian I, Elementary School, classification because you have worked for a person in this classification since 1979. You state that he exercises independent judgment in supervising other employees. You also have personal knowledge of the job duties of the Satellite Leadperson and Groundsperson. II positions and state that they exercise independent judgment in directing the work of subordinate employees. You do not have knowledge of the duties of employees in the other classifications, but believe they are supervisory because they have the II designation.

You have filed grievances pursuant to the negotiated contract, probably beginning in 1982, but have had no success in removing the alleged supervisors from the unit. You wish the classifications removed because you believe they are not lawfully in the unit according to EERA section 3545 which sets standards for the determination of appropriate bargaining units. You note that most of the materials placed in your personnel file which you consider derogatory have been based on information provided by the Head Custodian I at your school.

Lack of Standing

The charge fails to allege a prima facie case of a violation of the EERA because you do not have "standing" to file an unfair

practice charge alleging the unlawful inclusion of supervisors in your bargaining unit. This is because the Board has provided only one mechanism for changing the composition of a unit once it has been established. This mechanism is a unit modification petition filed pursuant to the Board's regulations. (California Administrative Code, title 8, sections 32780, et seq.)

According to Regulation 32781, only an employer or recognized or certified employee organization may file a petition to delete supervisory classifications from an established bargaining unit. Subsection (b)(l) of section 32781 provides that an employer or employee organization may file a petition to delete from a unit classifications or positions no longer in existence or which by virtue of changes in circumstances are no longer appropriate to the unit. Subsection (b)(5) of the same section provides that supervisory classifications or positions which are "not appropriate to the unit" may be deleted from the unit provided the petition is filed jointly by the employer and employee organization, or there is no lawful written agreement or memorandum of understanding in effect, or the petition is filed during the "window period" of the agreement or memorandum of understanding. (The window period is defined in Regulation 33020 as "the 29-day period...which is less than 120 days, but more than 90 days, prior to the expiration date of a lawful written agreement".)

Under these regulations, any incorrect placement of supervisors in a non-supervisory bargaining unit cannot be corrected by an individual employee filing a unit modification petition. There is no reason to believe the Board intended an individual might file an unfair practice charge to accomplish the same result precluded by the unit modification regulations.

In promulgating the unit modification regulations, the Board must have considered the possibility that the parties might err in their initial unit placement of certain classifications. Nevertheless, it chose to foreclose the possibility of deleting existing supervisory classifications from a unit absent a change of circumstances or a petition jointly filed by the employer and employee organization

This conclusion is consistent with federal law. Rule 102.60(b) of the National Labor Relations Board (NLRB) provides that petitions for "clarification" of an existing bargaining unit may

be filed by a "labor organization or by an employer." The federal cases do hold that unit clarification petitions may be filed during the term of a collective bargaining agreement, but the NLRB will act on such petitions only where it will not be disruptive to the bargaining relationship. Wallace-Murray Corp. (1971) 192 NLRB No. 160, 78 LRRM 1046; Northwest Publications, Inc. (1972) 197 NLRB No. 32, 80 LRRM 1296; Arizona Electric Power Cooperative. (1980) 250 NLRB No. 110, 104 LRRM 1464. All the petitions in these cases were filed by an employer or employee organization and not by an individual employee in the unit.

Absent precedent for the filing of an unfair practice charge by an individual alleging the incorrect placement of supervisors in a rank and file bargaining unit, it must be found that you lack standing to pursue the instant charge and the charge should be dismissed.

Untimely Filing

This charge also appears to be untimely filed. Under Government Code section 3541.5(a), the Board will 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." The only action taken by the District regarding placement of the job classifications listed above in your bargaining unit occurred in 1976-1977, more than seven years before the charge was filed.

Adopting the National Labor Relations Board's "continuing violation" doctrine, the PERB Board has recognized that conduct occurring more than six months before a charge is filed may become the basis for issuance of a complaint if the conduct is repeated within six months of the filing date of the charge. However, where there is no identifiable repetition of the allegedly violative conduct within the six months proceeding the filing of the charge, no complaint will issue. San Dieguito Union High School District (2/25/82) PERB Decision No. 194. In that case a school district unilaterally implemented a policy requiring teachers to sign out every time they left the campus. This policy was implemented during the fall of 1977. An unfair practice charge was not filed by the union until May 1979, two years later. The union argued that the time bar should not apply because a new violation occurred each day that the district enforced its policy, making it a

continuing violation. The Board found no violation because the original action was not "revived" by subsequent unlawful conduct within the six-month period.

As in San Dieguito, the violation you allege is not "continuing". There is no showing of any action by the District within the six months proceeding filing of the charge.

The six-month statute of limitations may be tolled while a charging party pursues alternative procedures for obtaining relief, such as filing grievances pursuant to a negotiated contract. (Ibid.) Thus, the time taken in pursuing related grievances would not be counted in determining the six-month period. There is no showing in the instant case that the grievances you filed have taken since 1976 to process. Therefore, the six-month statute of limitations still applies.

It might be argued that the continuing violation doctrine should not apply where a situation repugnant to the purposes of the EERA exists. However, the inclusion of supervisors in bargaining units is not such a situation. If it were, the Board would allow the filing of a unit modification petition at any time and absent the conditions of changed circumstances or joint filing required by Regulation 32781. Further, the federal cases would similarly entertain all unit clarification petitions involving supervisors without consideration of whether the petition undermine the parties' collective bargaining relationship.

Lack of Facts Regarding Supervisory Duties

The charge fails to allege facts describing the duties of the various classifications claimed to be supervisory. PERB does not have personnel to investigate the duties of such classifications as you have requested. The charging party must allege facts sufficient to state a prima facie case to support supervisory exclusion from the bargaining unit pursuant to EERA section 3540.l(m) which provides as follows:

> "Supervisory employee" means any employee, regardless of job description, having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the

> responsibility to assign work to and direct them, or to adjust their grievances, or effectively recommend such action, if, in connection with the foregoing functions, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The facts alleged must show that the employees in the classifications claimed to be supervisory exercise with independent judgment at least one of the duties and responsibilities set forth in section 3540.1(m). Sweetwater Union High School District (11/23/76) EERB Decision No. 4. For example, with regard to the Head Custodian I, PERB has found employees with the same or similar classifications to be either included in or excluded from the unit as supervisory, depending upon their duties and responsibilities. See Sweetwater, supra. Head Custodians excluded from unit; Marin Community College District (6/26/78) PERB Decision No. 55, Custodial Supervisor included; Campbell Union High School District (8/17/78) PERB Decision No. 66, Lead Custodian excluded; Compton Unified School District (10/26/79) PERB Decision No. 109, Head Custodian I excluded; Atascadero Unified School District (12/30/81) PERB Decision No. 191, Head Custodian I excluded. In these cases the Board considered the various functions of custodians, such as their role in "hiring and training, ability to give oral and written reprimands, documentation of performance problems, ability to recommend discipline, role in discipline and evaluations, preparation of work schedules, establishment of priorities, alteration of regular assignments and assignment of overtime, inspection and correction of subordinates' work, number of subordinates, the supervisory chain of command above the classification in issue, and pay differentials.

Thus, even if you had standing to file a charge alleging the unlawful inclusion of supervisors in your bargaining unit, and there were no time bar to the filing of the charge, the charge still fails to allege a prima facie case because it lacks sufficient facts to show that the classifications in issue are indeed supervisory.

Opportunity to Amend

For the reasons stated above, the charge as presently written does not state a prima facie violation of the EERA. If you

feel that there are facts or legal arguments which would require different conclusion, an amended charge should be prepared on a standard PERB unfair practice charge form clearly labeled First Amended Charge, should contain all the allegations you wish to make and be signed under penalty of perjury. The amended charge must be served on the respondent and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you by April 8, 1985, I shall dismiss your charge. If you have any questions on how to proceed, please call me at (213) 736-3127.

Sincerely,

Barbara T. Stuart
Regional Attorney

BTS:bw