STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

| | | |
|---|---|---|
| TONY PETRICH, | ) | |
| | ) | |
| Charging Party, | ) | Case Nos. LA-CE-2112 |
| | ) | LA-CE-2130 |
| v. | ) | |
| | ) | PERB Decision No. 553 |
| RIVERSIDE UNIFIED SCHOOL DISTRICT, | ) | |
| | ) | December 23, 1985 |
| Respondent. | ) | |
| | ) | |

Appearance; Tony Petrich, on his own behalf.

Before Morgenstern, Burt and Porter, Members.

## DECISION

MORGENSTERN, Member: This matter is before the Public Employment Relations Board (PERB or Board) on appeal by Charging Party, Tony Petrich, of a PERB administrative law judge's (ALJ) refusal to allow a pre-hearing amendment to the complaint issued in the above-listed cases. While noting various "technical problems" with the proposed amendment, the ALJ based her decision primarily on her conclusion that allowance of the amendment would circumvent the investigatory procedures established by PERB.

On appeal, Charging Party asserts that there were no technical problems with the proposed amendment, and that the ALJ erred by not determining herself whether the amendment stated a prima facie case.

For the reasons that follow, we affirm the disallowance of the proffered amendment.

## PROCEDURAL SUMMARY

Both cases were before the Board earlier as appeals of partial dismissals. The partial dismissals were affirmed in Riverside Unified School District (1985) PERB Decision No. 510 and Riverside Unified School District (1985) PERB Decision No. 513. The remaining allegations, listed below, were the subject of complaints against the Riverside Unified School District (District). The complaints alleged various acts of reprisal for engaging in activities protected under the Educational Employment Relations Act (EERA).[1] The cases were later consolidated.

Case No. LA-CE-2112

1. Placement of a letter from Principal Mary Ann Sund, regarding work keys, in Charging Party's personnel file on December 10, 1984.

2. Placement of a letter from Sund, regarding Charging Party's absence from work, in his personnel file on December 11, 1984.

3. Placement of a letter from Sund, regarding obtaining work keys prior to beginning work, in Charging Party's personnel file on December 19, 1984.

Case No. LA-CE-2130

A. Placement of a correction memo by Sund, erroneously dated January 8, 1984 (should be 1985), in Charging Party's

---

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

personnel file. The memo concerned Charging Party's alleged refusal to follow instructions regarding removal of leaves.

B. Sund's recommendation that Charging Party be dismissed as a result of the January 8, 1985 meeting with Charging Party, memorialized in Sund's January 17, 1985 memo.

C. Assistant Superintendent Frank Tucker's January 30, 1985 letter to Charging Party (placed in the personnel file and sent to payroll) advising him that his pay would be docked for any day he is absent due to illness from February 8, 1985 to June 30, 1985, unless he provided a doctor's written verification of illness.

On June 18, 1985, Charging Party filed a proposed "First Amended Charge" alleging that, on June 5, 1985, when viewing his personnel file, he found that the following documents had been placed there:

I. December 3, 1984 letter from Charging Party to Sund confirming the results of a meeting on November 20, 1984 concerning the union's right to a bulletin board at the worksite, and response from Sund on same date.

II. January 8, 1985 letter from Tucker to Charging Party explaining why it would be improper for Sund to accept a Christmas gift (a hubcap) from Charging Party, and asking that it be picked up at his office.

III. November 6, 1984 letter from Sund to Charging Party's union representative, Alan Aldrich, regarding Charging Party's

failure to schedule a meeting within the time Sund requested. The meeting concerned a complaint against Charging Party made by another employee.

Charging Party does not specifically allege that the contents of the documents constitute reprisal, but that the placement of documents in his personnel file without prior notice to him constitutes the unlawful conduct. He claims that the placement of these documents in his personnel file was in reprisal for his various protected activities, and that the lack of prior notice violated the existing agreement between the District and the California School Employees Association, as well as past practice. Further, he asserts that such violation constitutes an unlawful unilateral change.

## DISCUSSION

PERB Regulation 32647[2] provides for amendments to complaints at the pre-hearing stage. The regulation directs the Board agent

---

[2]PERB Regulations are codified at California Administrative Code, title 8, section 31001 et seq. At the time in question, Regulation 32647 provided as follows (effective November 9, 1985, this Regulation was changed):

> Amendment of Complaint Before Hearing.
>
> (a) The charging party may move to amend the complaint. Before hearing, the charging party may move to amend the complaint by filing an amended charge and request to amend complaint with the Board agent in compliance with Section 32615. If the Board agent determines that amendment of the complaint is appropriate, the Board agent shall issue

to issue an amended complaint if he or she deems such amendment to be "appropriate." The Board agent is further directed to refuse to issue an amended complaint if the proposed amendment does not state a prima facie case.

In the instant case, the ALJ based her disallowance of the amendment primarily on her view that allowing the amendment would circumvent the investigatory procedures established by the Board.[3] She was presumably referring to the procedures for the processing of original charges established by PERB Regulation 32620. While it is certainly preferable that charging parties include all possible allegations in their original charges prior to the issuance of a complaint, the existence of Regulation 32647

---

> an amended complaint in accordance with Section 32640.
>
> (b) If the Board agent finds that the pre-hearing amendment to the charge does not result in the establishment of a prima facie case, the Board agent shall refuse to amend the complaint. The charging party may appeal a refusal to amend the complaint in accordance with Section 32635.

[3]The ALJ also noted other perceived deficiencies, most notably, (1) the failure of Charging Party to serve the proposed amendment on the District's attorney of record, and (2) that some of the allegations seem to merely set forth arguments in support of the pending complaint. We find no merit in these contentions. While it may have been courteous to serve the District's attorney of record rather than the District superintendent (who was served), Regulation 32142 provides that, in the case of a public school employer, the superintendent is a proper recipient of service. The allegations in the proposed amendment are of no direct relevance to the allegations in the pending complaint. Further, Charging Party clearly asserts that the new allegations constitute independent violations of the Act.

reflects that post-complaint amendments are specifically contemplated by the Board and are not inherently improper.

If the ALJ meant to imply that post-complaint amendments are inherently improper, that view is erroneous. The ALJ, instead, may have been asserting that economy and fairness would be better served by the filing of a new and separate charge. The amendment was timely on its face, therefore, it could have been filed as a new charge. Regardless of what the ALJ actually intended, her stated reason for disallowing the amendment is too vague to allow us to conclude whether or not she properly entertained the amendment pursuant to Regulation 32647(a), i.e., whether the amendment was "appropriate." However, it is not necessary to remand for clarification of the disallowance, for the record is sufficient to allow an independent review of the propriety of the amendment.

Certainly, potential prejudice to the opposing party is a major consideration in determining whether an amendment is to be allowed.[4] Absent undue prejudice to the opposing party, where a timely amendment is closely related to the allegations in the

---

[4]The National Labor Relations Board (NLRB) generally allows post-complaint amendments where such amendments do not prejudice the respondent. See, e.g., Arkansas Best Freight System, Inc. (1981) 257 NLRB No. 63 [107 LRRM 1496] and Clinton Corn Processing Co. (1980) 253 NLRB No. 84 [106 LRRM 1039]. Potential prejudice to the opposing party is also the critical factor used by both the California and federal courts in determining the allowance of amendments. Witkin, California Procedure, 3d Ed., V. 5, p. 537; Wright and Miller, Federal Practice and Procedure, V. 6, section 1484.

pending complaint, the amendment should be allowed. However, where a timely amendment has only a tenuous relation to the pending complaint or is wholly unrelated, prejudice is more likely because the respondent would have to defend against an unanticipated claim. Where new allegations arise out of the same facts and circumstances as those in a pending complaint, the allowance of an amendment serves the principles of economy and finality. In contrast, where an amendment is unrelated to a pending complaint, these principles are not necessarily served. Under some circumstances, an unrelated amendment may be better characterized as a new charge and best filed as such.[5]

In the instant case, the circumstances surrounding Charging Party's proffered "amendment" militate against its allowance. The new allegations do not have any direct relevance to those in the complaint. While some of the allegations in the complaint also involve placement of particular documents in Charging Party's personnel file, the gravamen of the allegations in the amendment differs in that it is the placement without prior notice that allegedly constitutes reprisal. Further, the existing allegations relate to actions taken in December 1984 and January 1985. The amendment relates to actions discovered in June 1985. All three of the documents referenced in the

[5]We do not mean to imply that all post-complaint amendments which are not closely related to the pending complaint should be disallowed. In some circumstances, such amendments do serve the principles of fairness, economy and finality and, therefore, should be allowed.

amendment were mentioned in Charging Party's original charges, but in conjunction with allegations later dismissed.

We note that the hearing on the existing complaint has been completed and the matter has been submitted to the ALJ for decision. We also note that the proffered amendment is apparently timely, independent of the filing date of the original charge. Further, if the attempted amendment is treated as a new and separate charge, rather than as an amendment to the existing complaint, Charging Party will have the opportunity to clarify his allegations and, should they be deemed insufficient, he will have the opportunity to amend. Given these considerations and the lack of relatedness to the existing complaint, we conclude that the proffered amendment should be disallowed. However, we will consider Charging Party's filing as a new and separate charge, constructively filed as of June 18, 1985, the date of its filing as an attempted amendment.

## ORDER

We hereby AFFIRM the disallowance of the proffered amendment. The general counsel is instructed to process the proffered amendment as a new and separate charge, in accordance with PERB Regulation 32620.

Members Burt and Porter joined in this Decision.