

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



MARILYN L. KESKEY,)	
)	
Charging Party,)	Case No. LA-CE-3044
)	
v.)	PERB Decision No. 887
)	
LOS ANGELES UNIFIED SCHOOL)	June 17, 1991
DISTRICT,)	
)	
Respondent.)	

Appearance: Marilyn L. Keskey, on her own behalf.
Before Hesse, Chairperson; Shank and Carlyle, Members.

DECISION AND ORDER

SHANK, Member: This case is before the Public Employment Relations Board (Board) on appeal by Marilyn L. Keskey to a Board agent's dismissal (attached hereto) of her charge that the Los Angeles Unified School District violated section 3543.5(a) of the Educational Employment Relations Act (EERA).¹ The Board has reviewed the dismissal, and finding it to be free of prejudicial error, adopt it as the decision of the Board itself.

¹EERA is codified at Government Code section 3540 et seq. Section 3543.5(a) states, 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 purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

The unfair practice charge in Case No. LA-CE-3044 is hereby
DISMISSED WITHOUT LEAVE TO AMEND.

Chairperson Hesse and Member Carlyle joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



Los Angeles Regional Office
3530 Wilshire Boulevard, Suite 650
Los Angeles, CA 90010-2334
(213) 736-3127



March 20, 1991

Marilyn L. Keskey

Re: DISMISSAL AND REFUSAL TO ISSUE COMPLAINT
Unfair Practice Charge No. LA-CE-3044
Marilyn L. Keskey v. Los Angeles Unified School District

Dear Ms. Keskey: _____

I indicated to you in my attached letter dated March 7, 1991, 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 that would correct the deficiencies explained in that letter, you should amend the charge accordingly. You were further advised that unless you amended the charge to state a prima facie case, or withdrew it prior to March 15, 1991, the charge would be dismissed.

On March 19, 1991, I received from you an amended charge sent by certified mail on March 14, 1991. The amended charge contains three allegations relevant to the six-month jurisdictional limitation discussed in my March 7 letter:

1. "My present charge and the February of 1990 grievance I filed against LAUSD [the District] involve the same issue of discrimination."
2. "PERB's Attorney Mr. Thomas Allen repeatedly told me [that] until June 9, 1990, [when you were informed that your grievance would not go to arbitration] 'was dead time.'"
3. "[T]he UTLA union convinced me not to file additional grievances. I asked UTLA if I could file a grievance to the April letter of termination."

The amended charge still does not state a prima facie case within PERB's jurisdiction, for the reasons that follow.

Your conclusion that your present charge and your earlier grievance involve "the same issue of discrimination" is contrary to the undisputed facts outlined in my March 7 letter. Your charge alleges that the District retaliated against you in April 1990 for your union activity in February 1990. Your grievance, on the other hand, challenged an Inadequate Service Report you

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received prior to your alleged union activity, and your grievance did not allege retaliation.

It is true that I informed you that the six-month limitation is tolled while a charging party pursues a grievance procedure ending in binding arbitration. (I did not use the phrase "dead time.") As indicated in my March 7 letter, however, this tolling takes place only when a charge and a grievance involve the same issues. Until after you filed your charge, I did not know that your charge and your grievance involved different issues.

The fact that you were not fully informed on the tolling doctrine and the fact that UTLA convinced you not to file additional grievances in April 1990 do not alter the operation of the six-month limitation. Because that limitation is jurisdictional (as noted in my March 7 letter); it is not subject to equitable tolling on the basis of such facts. I am therefore dismissing the charge based on the facts and reasons contained in this letter and in my March 7 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 (California Code of Regulations, title 8, section 32635(a)). To be timely filed, the original and five copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing (California Administrative Code, title 8, section 32135). Code of Civil Procedure section 1013 shall apply. The Board's address is:

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

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 calendar days following the date of service of the appeal (California Code of Regulations, title 8, section 32635(b)).

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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 California Code of Regulations, title 8, section 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.

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 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 (California Code of Regulations, title 8, 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.

Sincerely,

JOHN W. SPITTLER
General Counsel

By _____
Thomas J. Allen
Regional Attorney

Attachment

cc: Kerry Cunningham

PUBLIC EMPLOYMENT RELATIONS BOARD



Los Angeles Regional Office
3530 Wilshire Boulevard, Suite 650
Los Angeles, CA 90010-2334
(213) 736-3127



March 7, 1991

Marilyn L. Keskey

Re: WARNING LETTER, Unfair Practice Charge No. LA-CE-3044
Marilyn L. Keskey v. Los Angeles Unified School
District

Dear Ms. Keskey:

In the above-referenced charge, you allege that the Los Angeles Unified School District (District) retaliated against you for union activity. This conduct is alleged to violate Government Code section 3543.5(a) of the Educational Employment Relations Act (EERA).

My investigation of this charge revealed the following facts.

You were employed by the District as a substitute teacher, in a unit for which United Teachers-Los Angeles (UTLA) is the **exclusive representative*** On February 13, 1990, you received an **Inadequate Service Report for Day-to-Day Substitute Teacher (Report)**, dated February 9, 1990, and referring to service you provided on February 6, 1990. On February 21, 1990, you filed a grievance challenging the Report and asserting that it "was issued without cause or benefit of progressive discipline and does not accurately reflect the services rendered by grievant on that date." The grievance did not allege any retaliation for union activity.

The charge alleges that Robert J. Fisher, District Coordinator, Certificated Substitute Assignments, was aware of your grievance. On March 17, 1990, Fisher was guest speaker at a UTLA meeting, and you asked him "a question or two." On April 12, 1990, Fisher sent you the following letter:

This letter concerns your service availability as a substitute teacher. Our records indicate that you have been unavailable for substitute service for 5 days since February 5, 1990. This is your official notification that if you receive 5 more unavailables you will be placed on standby status.

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The purpose of this letter is to alert you to the potential consequences of continued service unavailability. Article XIX, Section 5.6 of the District/UTLA Agreement states:

"A substitute may be changed from a higher priority to the Certificated Personnel Office's "standby list" for having ten (10) "unavailables" in any one semester or four (4) during summer session from July 1 through the start of the Fall semester."

Placement on standby status is for a period of six (6) working months. Substitutes on standby are called after all other available substitutes have been assigned. Name requests will not be honored for a substitute while on standby. This letter is advisory in nature. If you wish to review your substitute record please contact the substitute unit supervisor for the unit you are currently serving at the named [sic] listed below.

North Certificated Unit	. .	(213)	625-6114
Central Certificated Unit	. .	(213)	625-6117
South Certificated Unit	. .	(213)	625-6126

In previous years you had not received such a letter even when you had more than 5 "unavailables."

On April 24, 1990, Irene G. Yamahara, District Associate Superintendent, Personnel Division, sent you the following letter:

As a result of the Inadequate Service Report issued to you on February 9, 1990, for substitute service you provided at Yorkdale Elementary School on February 6, 1990, a review of your day-to-day substitute status was conducted. This review of your service with the District indicated that you had previously been issued Inadequate Service Reports as follows:

<u>School from Which Issued</u>	<u>Date Issued</u>
Glenfeliz Elementary School	May 2, 1988
El Sereno Elementary School	March 2, 1988

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After careful evaluation of the conduct enumerated in each Inadequate Service Report, it was determined that you are to be dismissed from your substitute status effective the date of this letter.

If you have any questions, please feel free to contact Mr. Blatter at (213) 625-6591.

You allege that the letters of April 12, 1990, and April 24, 1990, are both retaliatory in nature. You did not file grievances challenging those letters.

The collective bargaining agreement between the District and UTLA provides (at Article V, Section 11.0) that if a grievance is not settled in Step Two of the grievance procedure UTLA may, with the concurrence of the grievant, submit the matter to binding arbitration. Your grievance of February 21, 1990, challenging the Report of February 9, 1990, was not settled at Step Two of the procedure. On June 9, 1990, you were informed that UTLA would not submit the matter to arbitration.

The unfair practice charge was filed on November 24, 1990.

Based on the facts stated above, the charge does not state a prima facie violation of the EERA within the jurisdiction of the Public Employment Relations Board (PERB), for the reasons that follow.

Government Code section 3541.5(a) of the EERA provides in relevant part that PERB "shall 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." PERB has ruled that this limitation is jurisdictional. California State University, San Diego (1989) PERB Decision No. 718-H.

Government Code section 3541.5(a) also provides in part, "The board [PERB] shall, in determining whether the charge was timely filed, consider the six-month limitation set forth in this subdivision to have been tolled during the time it took the charging party to exhaust the grievance machinery." This proviso does not apply to the present charge, however, because the present charge and the grievance of February 21, 1990, do not involve the same issues. While the charge challenges the letters of April 12, 1990, and April 24, 1990, and alleges that these letters were in retaliation for union activity, the grievance challenges only the Report of February 9, 1990, and does not

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allege any retaliation for union activity.¹ The grievance thus did not give the District notice of the claims made later in the charge. United Teachers-Los Angeles (1985) PERB Decision No. 526.

Because the proviso does not apply, the present charge is subject to the six-month jurisdictional limitation. Because the charge was filed on November 24, 1990, the alleged retaliation that occurred more than six months earlier (on April 12, 1990, and April 24, 1990) is outside PERB's jurisdiction.

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 any additional facts that would correct the deficiencies explained above, please amend the charge accordingly. 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 must be signed under penalty of perjury by the charging party. 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 before March 15, 1991, I shall dismiss your charge. If you have any questions, please call me at (213) 736-3127.

Sincerely,

Thomas J. Allen
Regional Attorney

¹In fact, the only union activity identified in the charge, the grievance filing on February 21, 1990, and the questioning of Fisher on March 17, 1990, occurred after the Report of February 9, 1990. The Report could not have been issued in retaliation for union activity that had not yet occurred.