STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

DOMINGO P. GUERRA, Charging Party,	)	Case No. LA-CE-3710
v.	)	PERB Decision No. 1191
BAKERSFIELD CITY SCHOOL DISTRICT, Respondent.	)	April 3, 1997

Appearances; Domingo P. Guerra, on his own behalf; Breon, O'Donnell, Miller, Brown & Dannis by Joan Birdt, Attorney, for Bakersfield City School District.

Before Caffrey, Chairman; Johnson and Dyer, Members.

DECISION

DYER, Member: This case comes before the Public Employment Relations Board (Board) on appeal from a Board agent's dismissal (attached) of Domingo P. Guerra's (Guerra) unfair practice charge. As amended, the charge alleges that the Bakersfield City School District (District) violated section 3543.5(a) and (c) of the Educational Employment Relations Act (EERA)[1] by harassing,

[1]EERA is codified at Government Code section 3540 et seq. Section 3543.5 provides, in relevant 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.

retaliating, and discriminating against Guerra.

The Board has reviewed the entire record in this case, including Guerra's original and amended unfair practice charge, the warning and dismissal letters, Guerra's appeal, and the District's response thereto. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. LA-CE-3710 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Caffrey and Member Johnson joined in this Decision.

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

PUBLIC EMPLOYMENT RELATIONS BOARD

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

January 9, 1997

Domingo P. Guerra

Re: Domingo P. Guerra v. Bakersfield City School District
Unfair Practice Charge No. LA-CE-3710
Dismissal and Refusal to Issue a Complaint

Dear Mr. Guerra:

In the above-referenced charge you allege the Bakersfield City Unified School District (District) violated the Educational Employment Relations Act (EERA or Act) section 3543.5(a) and (c) by discriminating against you.

On November 20, 1996, I spoke with you regarding the above-referenced charge. I explained the Public Employment Relations Board's (PERB or Board) jurisdiction is limited. I indicated to you, in my attached letter dated December 12, 1996, that the above-referenced charge did not state a prima facie violation. 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 violation or withdrew it prior to December 19, 1996, the charge would be dismissed. At your request I extended that deadline to December 27, 1996.

On December 31, 1996, I received two amended charges postmarked December 30, 1996. These amended charges were labeled, "bilingual teachers rights," and "promotional opportunities." On January 2, 1997, I received a third amended charge labeled, "file tampering." I received a fourth amended charge labeled, "problem resolution," on January 6, 1997.[1]

My December 12, 1996, letter indicated many of the allegations of the original charge were untimely filed. The bilingual teacher charge similarly presents untimely allegations. The charge includes allegations and/or events dating back to 1993. As previously discussed, allegations of conduct falling outside of the six month statute of limitations period, in this case prior to February 22, 1996, must be dismissed. Although the amended

[1]Although partially amended four times, I considered the partially amended charges together as one amended charge. The combined total of these amendments is approximately 400 pages.

charge provided additional facts, the amended charge did not correct the deficiencies noted in the warning letter.

In the bilingual teacher rights section of your amended charge you alleged the District transferred you unfairly. However, according to the amended charge, the District notified you of your transfer away from Stella Hills on May 25, 1994. A complaint may not issue on this allegation because the conduct occurred prior to February 22, 1996, and is therefore time-barred.

The bilingual rights section of your amended charge also alleges the District refuses to pay you a bonus for being a bilingual teacher, while also locking you into a bilingual position. However, the charge does not provide facts indicating the District was unlawfully motivated by your participation in protected activities when refusing to pay you the bilingual bonus and refusing to allow you to transfer out of the bilingual class you were teaching. The collective bargaining agreement between the District and the Bakersfield Elementary Teachers Association requires unit members seeking a bilingual bonus to have a bilingual certificate.[2] You do not possess such certification.

As for your allegation that the District is locking you into the bilingual position, my investigation revealed the following information. The charge indicates the District notified you of your transfer away from Stella Hills school on May 25, 1994. You wanted to teach kindergarten but assignment selection was based on seniority. Your charge provides, "When my turn came, the lowest grade to kindergarten was a third grade class at McKinley school. I chose it." Later in 1994, you accepted a position to teach a bilingual kindergarten class at the Pauly School instead of the 3d grade class at McKinley. Because you chose to teach the kindergarten class at Pauly instead of staying at McKinley

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[2]Section 14.4.1 Bilingual/Special Education Bonus states, in pertinent part:

> . . . unit members assigned to a bilingual position who hold one or more of the following clear California credentials and/or full California certification required for their assigned position shall receive a bonus of Seven Hundred Fifty Dollars ($750.00). . .

the District alleges you are not eligible under the contract to transfer out of the Pauly position until July 8, 1997.[3]

As explained above, your allegation that the transfer away from Stella Hills in 1994 was unlawfully motivated is untimely and therefore not within the jurisdiction of PERB. Even if timely filed, the allegation would be dismissed and deferred to binding arbitration as explained in the warning letter. Nor does your allegation that the District has locked you into a bilingual position present a prima facie violation of the EERA.

In addition to the limitation on your ability to transfer until July 8, 1997, you also allege the District will not let you transfer out of the bilingual position until the district can replace you with a bilingual teacher. The charge does not provide facts establishing this limitation on bilingual teachers is a violation of the EERA. Your amended charge indicates a 1984 Desegregation Consent Decree by the Office of Civil Rights resulted in this limitation on bilingual teachers. The charge does not present facts indicating the District was unlawfully motivated by your protected activities. The charge does not include facts demonstrating the District departed from this policy by applying it exclusively to you. Nor did the charge provide any other facts indicative of nexus.

In the promotional opportunities section of your amended charge you allege the District discriminated against you by refusing to hire you as a principal and/or vice-principal. You also allege the District denied you due process.

The charge did not indicate how the District's refusal to conduct the hiring of principals and vice-principals in accordance with your requests was a violation of the EERA. Hiring decisions are a matter of management prerogative. (See Redwoods Community College District (1994) PERB Decision No. 1047; Newman-Crows Landing Unified School District (1982) PERB Decision No. 223.) As stated previously, PERB's jurisdiction is limited. Your due process rights under other state and/or federal law cannot be addressed by PERB. Thus, these allegations must be dismissed.

The file tampering section of your amended charge alleges on April 12, 1995, you discovered two positive letters had been deleted and four negative letters had been added to your personnel file. You failed to file this unfair practice charge

[3]The collective bargaining agreement Section 8.4.1 limits voluntary transfers to one per a three year period.

within six months of your discovery of the District's conduct. Thus, this allegation must be dismissed.

In the section of your charge labeled problem resolution, it is unclear what type of unfair practice you are alleging. The charge makes several allegations: (a) the District does not provide employees with a booklet listing their rights, (b) the CBA does not contain a discrimination clause, (c) the District's process for filing complaints against District employees, Policy 300.13, is inadequate, and (d) the District and exclusive representative ignore issues.[4]

These allegations do not factually demonstrate a prima facie violation of the EERA. The EERA does not require the District to provide employees a booklet listing their rights. Nor does the District have an obligation to include a discrimination clause in the collective bargaining agreement. Moreover, as an individual employee you would not have standing to file an unfair practice against the District for failing to negotiate in good faith. (Oxnard School District (Gorcey/Tripp) (1988) PERB Decision No. 667.)

Although you allege the District has not properly resolved your complaints via District Policy 300.13, it is unclear which section of the EERA you believe the District violated. If you are alleging PERB should be enforcing District Policy 300.13, that allegation is dismissed. PERB does not have jurisdiction to enforce the District's policy. EERA section 3541,5(b) states:

> The board shall not have the authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of any agreement that would not also constitute an unfair practice under this chapter.

Nor would you have standing as an individual employee to allege the District implemented a unilateral change, if your charge seeks redress for any alleged change in Policy 300.13.

The final allegation stated above, the District and union's failure to address issues is similarly dismissed. This letter

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[4]This section of the charge included approximately 150 pages, many of which were included in the three other sections of the amended charge. As such many of the allegations have already been considered in the preceding pages of this letter and will not be discussed hereafter.

only addresses conduct by the District, it does not address any alleged unfair practices by the exclusive representative.[5] With regard to the District's conduct the allegations in this section repeat allegations covered in other sections of the amended charge.

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 of Regs., tit. 8, sec. 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 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing. (Cal. Code of Regs., tit. 8, sec. 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 (20) calendar days following the date of service of the appeal. (Cal. Code of 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 of 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.

Extension of Time

[5]Allegations of unfair practices by the exclusive representative were considered in Unfair Practice Charge No. LA-CO- 707, and dismissed on November 21, 1996.

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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 of 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
Tammy L. Samsel
Regional Director

Attachment

cc: David G. Miller

PUBLIC EMPLOYMENT RELATIONS BOARD

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

December 12, 1996

Domingo P. Guerra

Re: Domingo P. Guerra v. Bakersfield City School District
Unfair Practice Charge No. LA-CE-3710
Warning Letter

Dear Mr. Guerra:

In the above-referenced charge you allege the Bakersfield City Unified School District (District) violated the Educational Employment Relations Act (EERA or Act) section 3543.5(a) and (c) by discriminating against you. You separated the charge into three sections: (a) race, (b) professional workplace violations, and (c) harassment and retaliation. I will address each section separately below.

On November 20, 1996, I spoke with you regarding the above-referenced charge. I explained the Public Employment Relations Board's (PERB or Board) jurisdiction is limited.

Race

This section of the charge includes nine single-spaced pages which provide information dating back to 1993, and alleges the District discriminated against you because of your race.

EERA § 3541.5(a)(1) provides the Public Employment Relations Board 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." It is your burden, as the charging party to demonstrate the charge has been timely filed. (See Tehachapi Unified School District (1993) PERB Decision No. 1024.)

You filed this charge on August 22, 1996. Thus all allegations of conduct prior to February 22, 1996, are untimely filed and will not be addressed further in this letter.

Those allegations of conduct occurring after February 22, 1996, do not state a prima facie violation for the reasons that follow.

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.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor, 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; (2) the employer's departure from established procedures and standards when dealing with the employee; (3) the employer's inconsistent or contradictory justifications for its actions; (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; or (6) any other facts which might demonstrate the employer's unlawful motive. (Novato Unified School District, supra; North Sacramento School District (1982) PERB Decision No. 264.) As presently written, this charge fails to demonstrate any of these factors and therefore does not state a prima facie violation of EERA section 3543.5(a).

The allegations in this section do not factually support the conclusion that the District's actions were unlawfully motivated by your involvement in protected activities. Rather you allege the District's motivation was your race. Thus these allegations do not present a prima facie violation within the jurisdiction of PERB, and must be dismissed.[1]

Professional Workplace Violations

This section includes thirteen single-spaced pages which also include allegations of conduct dating back to 1993. As

[1]This letter addresses only your rights under the EERA, and does not address any other rights you may have under state or federal law.

previously discussed, allegations of conduct prior to February 22, 1996, are outside of PERB's six month statute of limitations and must be dismissed. Four allegations in this section remain.[2]

On March 6, 199 6, you filed a complaint against the District regarding bilingual teacher rights. You allege:

> . . . the Union and the BCSD have refused to provide the requested supportive and justifying documentation for the negative actions they have taken against me.

On March 11, 1996, the District refused to provide you with the "merit based criteria" for hiring principals and vice-principals. The District similarly refused to video tape the interviews for these positions.

On April 3, 199 6, the District's Mike Lingo, wrote you a letter which failed to address your concerns regarding the bilingual teacher rights. Lingo also informed you that your next opportunity to transfer would be on July 8, 1997. Lingo explained because your current position was due to a voluntary transfer you would not be eligible to transfer again until July 8, 1997. You assert your last transfer was involuntary.

On May 20, 1996, you requested the criteria the District planned to use to select principals and vice-principals. You also requested, "your due process rights to pursue the discrimination." The District did not respond to your requests.

The allegations in this section do not factually demonstrate a prima facie violation of the EERA. The charge did not indicate how the District's refusal to conduct the hiring of principals and vice-principals in accordance with your requests was a violation of the EERA. Nor did the charge indicate how the District denied your due process rights to pursue your discrimination claims.

With regard to Lingo's, April 3, 1996 letter limiting your next transfer opportunity to 1997, the charge fails to demonstrate the

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[2]This section also included four allegations which exclusively refer to the conduct of the exclusive representative, not the District. Those allegations do not present facts establishing the District violated the EERA and must be dismissed.

District was unlawfully motivated by your participation in protected activities. It is unclear when the prior transfer which you allege was involuntary occurred. The charge does not include a copy of the April 3, 1996 letter. Nor does the charge include any documentation regarding your allegation that the transfer was involuntary.

Even if factually supported, and timely filed, this allegation may not be within the jurisdiction of PERB. In Lake Elsinore School District (1987) PERB Decision No. 646, PERB held that section 3541.5(a) of the Educational Employment Relations Act, established a jurisdictional rule requiring that a charge be dismissed and deferred if: (1) the grievance machinery of the agreement covers the matter at issue and culminates in binding arbitration; and (2) the conduct complained of in the unfair practice charge is prohibited by the provisions of the agreement between the parties. PERB Regulation 32620(b)(5) (Cal. Code of Regs., tit. 8, section 32620(b)(5)) also requires the investigating Board agent to dismiss a charge where the allegations are properly deferred to binding arbitration.

The collective bargaining agreement between the District and the exclusive representative includes a grievance procedure which ends in binding arbitration. The agreement continues in effect from December 12, 1994, until June 30, 1997. Article 2 of the agreement allows a grievant to file a grievance alleging there has been a violation, misapplication or misinterpretation of the specific terms of the agreement.

Article 8.5.1 provides:

> No unit member shall be transferred without justifiable reason in fact and supported by a reasonable interpretation of the Policies and Procedures of the District and/or the Education Code and/or pertinent State and Federal laws. Transfers shall not be used to punish or discipline unit members.

In the instant charge the grievance machinery of the agreement covers the matter at issue and culminates in binding arbitration. The provisions of the agreement between the parties arguably prohibits the District's conduct. Thus even if this allegation were factually supported and timely filed, it must be dismissed and deferred to binding arbitration.

Harassment and Retaliation

This section of the charge includes 21 single-spaced pages. As

previously discussed, allegations of conduct prior to February 22, 1996, are outside of PERB's six month statute of limitations and must be dismissed.

Only two of the allegations are within the statute of limitations period. However the first of these allegations simply reiterates an allegation discussed in another section of your charge, and addressed in the preceding section of this letter.[3] The second of these allegations states the following:

> June, 1995 -- August 1996 Procedural Harassment
>
> Thereafter, the BCSD has harassed in a different form, as indicated in section two, Professional Workplace Violations -- Discriminatory Behavior. The relentless and continual obstruction, denial of due process, denial of access to problem resolution mechanisms, discrimination in promotional opportunities has gone beyond the bounds of professionalism and administrative discretion. When the most basic formulated policies and procedures are violated, the effect to me is harassic. [sic]
>
> The district is no longer fully supporting my teaching efforts positively but is undermining my efforts by, with full conscious knowledge, promoting negative conditions on me, and ignoring the most basic mechanisms of employee-employer conflict resolutions, the union and due process. The choice to avoid this type of negative conduct is inherent in the: 1. informal problem resolution professionalism inherent in human relations 2. formal problem resolution mechanisms within the district 3. formal problem resolution mechanisms within the union relationship.
>
> Yet the union and district have repeatedly avoided them with respect to administrative wrongful acts and problem complaints, to the point of even denying access to the Board.

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[3]The allegation refers to the District's failure to address the hiring concerns that you raised in your May 20, 1996 letter.

> Instead, the wrongful acts have been allowed to damage my reputation, defame my character, undermine my promotional opportunities and cause untold emotional distress to my family and the district in general.

As previously discussed, allegations of conduct prior to February 22, 1996, are outside of PERB's six month statute of limitations and must be dismissed. Since the allegation indicates the District engaged in conduct between June 1995 and August 1996, it is unclear from the allegation what specific actions the District engaged in during the relevant statute of limitations period.

Moreover, PERB regulation 32615(a)(5) states a charge shall contain a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." A charging party should allege the "who, what, when, where, and how" of an unfair practice. (United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision No. 944.) Mere legal conclusions are insufficient. (See State of California (Department of Food and Agriculture (1994) PERB Decision No. 1071-S.) To the extent the statement is meant to allege separate violations of the EERA, and not to simply summarize conduct discussed in more detail elsewhere in the charge it fails to identify the who, what, when and how of an unfair practice. Accordingly this allegation fails to state a prima facie violation within the jurisdiction of PERB.

The charge also alleges a violation of EERA section 3543.5(c). That section of the EERA states it shall be unlawful for a public school employer to, "refuse or fail to meet and negotiate in good faith with an exclusive representative." As an employee you are without standing to allege such a violation. (Oxnard School District (1988) PERB Decision No. 667.)

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 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 December 19. 1996. I shall dismiss your charge. If you have any questions, please call me at (213) 736-3008.

Sincerely,

Tammy L. Samsel
Regional Director