STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

DAVID NAGLE, JAMES RICKMAN AND TIMOTHY LEE, Charging Parties,	)	Case No. SF-CE-1929
v.	)	PERB Decision No. 1281
PERALTA COMMUNITY COLLEGE DISTRICT, Respondent.	)	August 27, 1998

Appearances: David Nagle on behalf of David Nagle, James Rickman and Timothy Lee; Crosby, Heafey, Roach & May by Boyd E. Burnison, Attorney, for Peralta Community College District.

Before Johnson, Amador and Jackson, Members.

DECISION

JOHNSON, Member: This case is before the Public Employment Relations Board (Board) on appeal by David Nagle (Nagle), James Rickman (Rickman) and Timothy Lee (Lee) (Charging Parties) to a Board agent's dismissal of their unfair practice charge. Nagle filed the unfair practice charge alleging that the Peralta Community College District (District) retaliated against the Charging Parties because of protected activity related to the District's decision to contract out its safety and police services. This conduct was alleged to violate section 3543.5(a) of the Educational Employment Relations Act (EERA).[1] After

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

> It shall be unlawful for a public school employer to do any of the following:

investigation, the Board agent dismissed the charge for Untimeliness.

The Board has reviewed the entire record in this case, including the unfair practice charge, the Board agent's warning and dismissal letters, Nagle's appeal, and the District's response. The Board reverses the Board agent's dismissal and remands the unfair practice charge to the Board agent for further proceedings consistent with this Decision.

BACKGROUND

As of January 1996, Charging Parties were employed in the District's Safety and Police Services Department (Department). They were exclusively represented by Service Employees International Union, Local 790 (SEIU). On or about January 31, 1996, the District announced its intention to eliminate the Department and to contract out its functions to the Alameda County Sheriff's Department. At a February 13, 1996, District Board of Trustees (Trustees) meeting, Charging Parties spoke to the Board, opposing the recommendation to contract out the work of the Department.

Ultimately, the District negotiated an agreement with the Sheriff's Department to perform the Department's work. District

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> (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.

employees could apply for those positions providing they met certain conditions. On or about May 29, 1996, the District provided SEIU with formal notice of its intent to contract out safety and police services to the Sheriff's Department. Over the next few months, SEIU and the District engaged in bargaining over the effects of this decision. Some Department employees would obtain positions with the Sheriff's Department, and others would be offered positions represented by another union, the Stationary Engineers, Local 39 (Local 39).

On or about August 7, 1996, Nagle and Lee addressed the Trustees and asked that the decision to contract out be reconsidered. On or about August 11, 1996, the Department was eliminated and employees who accepted positions with the Sheriff's Department ceased to be District employees on that day. On or about August 12, 1996, Vice Chancellor Hilliard (Hilliard) met with the safety officers who planned to remain with the District. He described the positions available and stated that if any employee did not accept a position offered, disciplinary action, up to and including termination, would follow.

On or about August 16, 1996, Nagle telephoned Hilliard's office and learned that he was to report on Monday, August 19, as a custodian.[2]

On or about August 27, 1996, Hilliard met with the Charging Parties and asked if they had received their assignment letters.

[2]That same day, Rickman was informed that he should report to food service, and Lee was informed that he should report as a custodian.

When they said no, Hilliard asked his secretary to provide copies of the letters, which were dated August 26. When the Charging Parties expressed dissatisfaction[3] with their assignments, Hilliard informed them that the assignments were not negotiable, and if Charging Parties chose not to report to their new assignments they would be terminated. Later that day, Rickman presented Hilliard with a copy of a Level I grievance covering these events.

On or about August 28, 1996, Rickman met with Laney Community College President Earnest Crutchfield (Crutchfield), requesting assistance in getting a better assignment. Crutchfield agreed to consider his request and promised to respond by September 5, but he ordered Rickman to report for work as assigned in the meantime.

On or about August 29, 1996, Rickman received a letter dated August 28 from Hilliard, accusing Rickman of not reporting to his new assignment. The letter threatened that Rickman would be subject to disciplinary action if he did not comply. The same day, Nagle received a letter from Hilliard, informing him that the custodian position he had been assigned on August 16 was "only temporary" and he could not be held in that position more than 90 days without his permission.

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[3]Lee, for example, told Hilliard that he had a bachelor's degree in business administration, and he was sure other positions existed within SEIU's unit which he could perform besides the custodian duties.

On or about September 6, 1996, the Charging Parties learned that other safety employees were assigned to (allegedly) preferable positions.

In a dismissal letter dated May 19, 1998, a PERB Board agent dismissed the charge for Untimeliness. He found that Charging Parties knew or should have known on August 16 that an alleged unfair practice had occurred.

Nagle filed an appeal, arguing that the dismissal was improper because it was based on "unsubstantiated remarks." He argues that the statute of limitations did not begin to run on August 16, and notes that Hilliard's August 28 letter stated that the Local 39 assignments were temporary. Although Nagle acknowledges that August 16 was the date on which Hilliard directed Charging Parties to report for the allegedly undesirable positions, he asserts that it was not until September 6 that Charging Parties learned that Hilliard had assigned other employees to better positions.

The District responds by supporting the dismissal.

DISCUSSION

The six-month statute of limitations commences to run when the charging parties knew or should have known of the conduct giving rise to the alleged unfair practice. (Regents of the University of California (1983) PERB Decision No. 359-H.) The charging party must file a charge when it has actual or constructive notice of a clear intent to implement the action which constitutes the basis for the unfair practice, provided

that nothing subsequent to that date evinces a wavering of that intent. The charging party may not wait until actual implementation occurs. (Regents of the University of California (1990) PERB Decision No. 826-H.)

The unfair practice charge was filed on February 21, 1997; thus, the charge is not timely if charging parties knew or should have known of the alleged unfair practice before August 21, 1996. The issue on appeal is the date on which, according to the charge, the alleged unfair practice (retaliation) occurred. The Board agent found that as of August 16 there was sufficient evidence of alleged retaliatory motive to put Charging Parties on notice and start the clock running.

We disagree because, according to the charge, on August 16 the Charging Parties knew only that they had been assigned to positions they considered undesirable.[4] Charging parties assert that it was not until September 6 that they learned that other employees allegedly received preferable assignments. It is this alleged disparate treatment[5] which forms the basis of the charge,

[4]We also note that Nagle received a letter from Hilliard stating on August 29 stating that his assignment was only "temporary." Hence, at that moment, Nagle could have reasonably believed that his assignment had not been finalized.

[5]The Board has long held that circumstantial evidence of unlawful intent may be found in evidence of: (1) timing of the adverse action (North Sacramento School District (1982) PERB Decision No. 264); (2) inadequate, inconsistent, shifting justification for the adverse action (Novato Unified School District (1982) PERB Decision No. 210); (3) disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (4) departure from standard procedures (Santa Clara Unified School District (1979) PERB Decision No. 104); (5) cursory investigation (State

and the relevant date is the date on which charging parties learned of that treatment, September 6. That date falls within the statutory period.

Accordingly, we find that the unfair practice charge is timely filed and we remand it to the Board agent for further proceedings to determine whether Charging Parties have stated a prima facie case of a violation.

ORDER

The Board hereby REMANDS Case No. SF-CE-1929 to the Board agent for further proceedings in accordance with the foregoing discussion.

Members Amador and Jackson joined in this Decision.

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of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S); and (6) pattern of antagonism toward the union (Cupertino Union Elementary School District (1986) PERB Decision No. 572).