

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



CHARLES E. ULMSCHNEIDER,

Charging Party,

v.

LOS BANOS UNIFIED SCHOOL DISTRICT,

Respondent.

Case No. SA-CE-2508-E

PERB Decision No. 2063

September 25, 2009

Appearance: Charles E. Ulmschneider, on his own behalf.

Before Dowdin Calvillo, Acting Chair; McKeag and Neuwald, Members.

DECISION

NEUWALD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Charles E. Ulmschneider (Ulmschneider) of a Board agent's dismissal of his unfair practice charge. The charge alleged that the Los Banos Unified School District (District) violated the Educational Employment Relations Act (EERA)¹ by retaliating against him. The Board agent dismissed the charge on the grounds that it was untimely filed and failed to state a prima facie case of retaliation.

The Board reviewed the entire record, including but not limited to, the unfair practice charge, the District's position, the warning and dismissal letters, and Ulmschneider's appeal. Based on this review, the Board affirms the dismissal subject to the following discussion.

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

BACKGROUND

Ulmschneider alleges that, from 2004 forward, the District engaged in “intensified forms of reprisals” against him after he filed numerous grievances, PERB complaints, and other governmental complaints, and participated in union activities. He further alleges that these reprisals culminated in his suspension without pay or benefits on January 1, 2008, which, following a hearing, became a final dismissal from employment with the District on September 11, 2008. He further alleges that, since his dismissal, he has been unable to obtain employment as a teacher because he is now “blackballed” throughout the State of California.

On December 5, 2007, the District issued a “Statement of Charges” charging that there existed causes, as permitted by Education Code sections 44932² and 44939,³ for the immediate suspension without pay and for the dismissal of Ulmschneider. The “Statement of Charges” further states:

It is accordingly requested and directed that procedures be implemented so that Mr. Ulmschneider be suspended immediately without pay and dismissed from employment at the expiration of thirty (30) days from the date of service of a notice of intention to dismiss, unless he demands a hearing.

²Education Code section 44932 sets forth causes for dismissal of a permanent certificated employee and authorizes a school district to suspend an employee without pay for a specified period of time on grounds of unprofessional conduct, pursuant to procedures specified in sections 44933, 44934, 44935, 44936, 44937, 44943, and 44944 of the Education Code.

³Education Code section 44939 authorizes the governing board of a school district to immediately suspend a permanent employee charged with specified misconduct and give the employee notice that, 30 days after service of the notice, he will be dismissed, unless he demands a hearing.

Ulmschneider exercised his option to demand a hearing, which was held on numerous dates between July 16 and 24, 2008, before the Commission on Professional Competence of the District (Commission).⁴

On September 11, 2008, the Commission issued a decision finding that Ulmschneider had engaged in unsatisfactory performance, unprofessional conduct, persistent violation of or refusal to obey the school laws of the state or reasonable regulations, and was unfit for service as a teacher, and ordered that he be dismissed as a permanent certificated employee of the District.

DISCUSSION

Timeliness

EERA section 3541.5, subdivision (a)(1), prohibits PERB from issuing a complaint with respect to “any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge.” The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.) A charging party bears the burden of demonstrating that the charge is timely filed. (*Tehachapi Unified School District* (1993) PERB Decision No. 1024; *State of California (Department of Insurance)* (1997) PERB Decision No. 1197-S.)

In cases involving allegations that an employee was terminated from employment in retaliation for having engaged in protected activities, the statute of limitations begins to run on the date of actual termination, rather than the date of notification of the intent to terminate. (*Regents of the University of California* (2004) PERB Decision No. 1585-H (*Regents*);

⁴The charge erroneously asserts that the hearing took place between August 16 and 24, 2008.

Los Angeles Unified School District (2005) PERB Decision No. 1754.) Where, however, the employee is not terminated and the employment relationship is not severed, the Board has declined to apply the *Regents* rule. (*Yuba Community College District* (2007) PERB Decision No. 1936 (charge was untimely filed as to notice of nonrenewal of contract, where employment was not terminated but employee was instead offered a probationary position, which he declined.)

The charge was filed on March 11, 2009. Therefore, all allegations of unlawful conduct occurring prior to September 11, 2008, are barred by the six-month statute of limitations set forth in EERA. Accordingly, the charge is untimely with respect to Ulmschneider's allegations that the District engaged in reprisals against him between 2004 and September 10, 2008.

The allegation that the District engaged in reprisal by suspending Ulmschneider without pay effective January 1, 2008, is likewise untimely. However, Ulmschneider was not actually terminated from employment with the District until September 11, 2008, when the Commission on Professional Competence issued its decision dismissing him from employment. Therefore, under *Regents*, the charge was timely filed only with respect to the allegation that Ulmschneider was dismissed in retaliation for having engaged in protected activity.

Retaliation

To demonstrate that an employer discriminated or retaliated against an employee in violation of EERA section 3543.5, subdivision (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; (3) the employer took adverse action against the employee; and (4) the employer

took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210; *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416; *San Leandro Police Officers Assn. v. City of San Leandro* (1976) 55 Cal.App.3d 553.) In determining whether evidence of adverse action is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*Palo Verde Unified School District* (1988) PERB Decision No. 689.) In a later decision, the Board further explained that:

The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment.

(*Newark Unified School District* (1991) PERB Dec. No. 864; emphasis added; fnt. omitted.)

We agree with the Board agent that the charge fails to allege a prima facie case of retaliation under EERA. As set forth in the Board agent's warning letter:

Charging Party provided no facts but rather legal conclusions that the District was retaliating against him due to his actions of filing grievances, PERB complaints, and other filings. Yet there is nothing that ties those activities to the suspension and ultimate termination of the Charging Party. Without those facts, this charge fails to state a prima facie case of discrimination.

Nothing in the information and documents provided by the charging party in response to the warning letter sets forth any facts establishing a causal connection between the grievances and complaints he filed and the District's decision to terminate him. Accordingly, the charge fails to state a prima facie case that the District dismissed Ulmschneider in retaliation for having engaged in protected activity.

The Board further notes that, in his appeal, Ulmschneider presents new supporting evidence for the first time on appeal. PERB Regulation 32635, subdivision (b) provides: “Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence.” It is clear from the appeal that Ulmschneider was aware of the newly provided information prior to the filing of his charge. Ulmschneider fails to demonstrate good cause. Accordingly, the Board did not consider the new evidence on appeal.

ORDER

The unfair practice charge in Case No. SA-CE-2508 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Acting Chair Dowdin Calvillo and Member McKeag joined in this Decision.