STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JOSEPH G. BULLER,	)	
	)	
Charging Party,	)	Case No. LA-CE-1937
	)	
v.	)	PERB Decision No. 448
	)	
LOS ANGELES UNIFIED SCHOOL DISTRICT,	)	December 3, 1984
	)	
Respondent.	)	
	)	

Appearance: Joseph G. Buller on his own behalf.

Before Hesse, Chairperson; Jaeger and Morgenstern, Members.*

DECISION

This case is before the Public Employment Relations Board on an appeal by Joseph G. Buller of the regional attorney's partial dismissal, attached hereto, of his charge alleging that the Los Angeles Unified School District violated sections 3543 and 3545 of the Educational Employment Relations Act (Government Code section 3540 et seq.).

We have reviewed the regional attorney's dismissal in light of the Charging Party's appeal and the entire record in this matter. Since the unfair practice complaint that has already issued in this case fully encompasses those portions of the charge which state a prima facie violation of the Act, we affirm the regional attorney's partial dismissal of the charge.

ORDER

The unfair practice charge in Case No. LA-CE-1937 is DISMISSED WITHOUT LEAVE TO AMEND.

By the BOARD

*Members Tovar and Burt did not participate in this Decision.

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD
LOS ANGELES REGIONAL OFFICE
3470 WILSHIRE BLVD., SUITE 1001
LOS ANGELES, CALIFORNIA 90010
(213) 736-3127

May 16, 1984

Joseph G. Buller
7012 McLennan Avenue
Van Nuys, CA 91406

Re: Joseph G. Buller v. Los Angeles Unified School District, LA-CE-1937, PARTIAL DISMISSAL of Unfair Practice Charge

Dear Mr. Buller:

The charge filed in the above-referenced case has been investigated. The charge alleges, in part, that the District violated the Educational Employment Relations Act (EERA or Act) by issuing a Notice of Unsatisfactory Conduct to you and transferring you because of your organizational activity. The General Counsel has determined that this aspect of the charge reflects a prima facie case of discrimination violative of Government Code section 3543.5(a), and a complaint containing such an allegation is being issued simultaneously with the issue of this letter.

The charge, however, also can arguably be read to allege that the District violated the EERA through conduct other than that alleged in the complaint. In particular, the charge arguably can be read to allege that the District independently violated the EERA by (1) "abus[ing]" other employees in the bargaining unit (paragraph 7 of the charge) and denying your constitutional rights (paragraph 3 of the charge); (2) violating the collective bargaining agreement in specified respects beyond issuing a Notice of Unsatisfactory Service and transferring you; and (3) failing, despite your request, to process promptly the grievance filed on your behalf by UTLA (paragraph 8 of the charge). Any such allegations, however, must be dismissed.

1. The charge alleges that the District has "abused" other bargaining unit members (paragraph 7 of the charge) and violated your constitutional rights. These allegations appear to assert, in essence, further discriminatory conduct by the District.

The EERA does not extend an omnibus remedy against all acts of perceived unfairness or discrimination against public school employees; rather, PERB's jurisdiction in this area is limited to resolving claims of unfair practices which violate the Act.

To state a prima facie case of discrimination violative of EERA section 3543.5(a), the charge must clearly and concisely state facts showing (1) the adverse action(s) taken against employees, (2) the employees' exercise of rights, and (3) an adequate "nexus," or connection, between the exercise of rights and the employer's action. Novato Unified School District (4/30/82) PERB Decision No. 210; Carlsbad Unified School District (4/30/79) PERB Decision No. 89; Board Rule 32615 (a)(5).

The charge does not allege facts establishing these elements in respect to alleged abuse of bargaining unit members apart from yourself, nor did the investigation reveal any evidentiary support for such an allegation. In addition, in our telephone conversation of May 8, 1984, you informed me that you did not wish or intend the instant proceeding to encompass allegations that the District's conduct toward other employees constitutes independent violations of the EERA. For these reasons, this aspect of the charge must be dismissed.[1]

2. The charge also can be read to allege that certain District conduct violated the collective bargaining agreement, and thereby independently violated the EERA. Within this category are allegations that the District violated contractual provisions requiring the District to act "reasonably" (charge, paragraph 1), to apply progressive discipline (charge, paragraph 4) and to give advance notice and counseling regarding transfers (charge, paragraph 5).

PERB does not have jurisdiction, however, to resolve alleged violations of collective bargaining agreements in all circumstances. Rather, PERB can only adjudicate conduct alleged to violate a collective bargaining agreement if such conduct also constitutes an unfair practice under the EERA, section 3543.5.

To state a prima facie of unlawful unilateral change, the charge must allege, and the investigation must reveal, that the employer unilaterally altered the status quo embodied in a negotiable past practice or policy without giving the exclusive representative notice and an opportunity to request bargaining

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[1]The apparent allegations of denial of your constitutional rights by the District also do not state independent violations of the Act. This is so because the Board does not have jurisdiction to resolve such constitutional claims.

over the proposed change. Pajaro Valley Unified School District (5/22/78) PERB Decision No. 51.

The provisions of the collective bargaining agreement may prescribe the "status quo" against which alleged "changes" are measured. (Grant Unified School District, PERB Decision No. 196; Pajaro, supra; Davis Unified School District, PERB Decision No. 116. But not every violation of a collective bargaining agreement constitutes a proscribed policy change.

> A change of policy has, by definition, a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members. On the other hand, when an employer unilaterally breaches an agreement without instituting a new policy of general application or continuing effect, its conduct, though remediable through the courts or arbitration, does not violate the Act. (Grant Unified School District, PERB Decision No. 196, at page 9.)

In the instant case, it has not been established that any of the purported contract violations amounted to a "change." First, as to the District's purported refusal to abide by contractual guarantees of "reasonableness," to apply progressive discipline, and to give advance notice and counseling regarding transfers, the charge does not allege what the employer's past practices were in these areas, nor does it state when the alleged "changes" occurred. Further, the investigation revealed that your complaints against District violations of "reasonableness" standard date back to no later than 1981. These factors contribute toward a conclusion that no proscribed change occurred within the six months preceding the filing of the charge and that the District's contract interpretation in your case was consistent with its prior practices.[2]

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[2]Government Code section 3541.5 precludes the Board from issuing a complaint as to charges that are filed outside of the six month period after which an alleged unlawful practice has occurred.

Second, as to all of the alleged "changes", the charge does not allege -- nor did the investigation reveal -- that the District's conduct towards you reflected a policy having a "generalized effect or continuing impact" on terms and conditions of employment. Grant, supra. Rather, as indicated above, the District's application of the contract toward you appears to have been particularized to the specific facts of your case. Indeed, the charge is predicated on the allegation that the District's contract applications toward you were inconsistent with the normal meaning which the District ascribes to the contract, and that these applications constituted individual acts of discrimination against you.

Last, in our telephone conversation of May 8, you informed me that because such unilateral change allegations are centrally related to bargaining concerns, it should be left to the exclusive representative to choose whether or not litigation of these questions is appropriate. For the foregoing reasons, a prima facie case of unilateral change is not present, and any allegation to that effect is dismissed.

3. Last, the charge alleges that the District engaged in "delays" in processing your grievance during step three of the grievance procedure (paragraph 8 of the charge). It is not clear whether you intend this allegation to assert that the District's alleged delay was an adverse action which independently violated EERA section 3543.5(a), or whether you have provided this information only as background evidence from which some inference of anti-union motivation can be drawn. To the extent, however, that you argue that the alleged "delay" was an independent violation of section 3543.5(a), such an allegation must be dismissed because (a) the allegation was unsupported by a clear and concise statement of facts (Board Rule 32615 (a)(5), and (b) no facts supporting the allegation were revealed during the investigation.

As noted above, to state a prima facie case of discrimination violative of EERA section 3543.5(a), the charge must clearly and concisely state facts showing (1) the adverse action(s) taken against employees, (2) the employees' exercise of rights, and (3) an adequate "nexus," or connection, between the exercise of rights and the employer's action. Novato Unified School District (4/30/82) PERB Decision No. 210; Carlsbad Unified School District (4/30/79) PERB Decision No. 89.

The charge does not clearly and concisely state a prima facie case under these principles. Rather, it merely alleges that you requested "all of the then present administrators that [your] grievance be processed as rapidly as possible" and that "the various deadlines . . . have been exceeded and the time has been 'tolled', . . . all without [your] permission." The charge fails to indicate the identity of any district representative who is responsible for such "tolling"; it can equally be read (as does the charge which you filed against UTLA[3]) that the exclusive representative was responsible for this tolling; and there is no further statement of underlying facts.

Further, the investigation revealed no evidentiary support for the proposition that this purported District conduct was an adverse action which independently violated section 3543.5(a). Rather, letters which were sent to you in connection with this transaction show that (1) the District and Union agreed to toll the time periods applicable to Step 3 (the step immediately preceding arbitration) (see letter of November 28 to UTLA from Ms. Falotico), and (2) on December 6, the Union sent you a letter informing you that your grievance representative had recommended that your case not be taken to arbitration, and that the Union was giving you an oppportunity to appeal that determination in January. Absent a tolling of the time limit at Step 3, the Union's deadline for filing for arbitration would have lapsed on or about November 28.

It is clear from this chain of events that tolling of the time limit in actuality (1) gave you an opportunity to submit your appeal to the Union's grievance committee, and (2) preserved the ability of the Union to proceed to arbitration. Indeed, had the time limit not been extended, a later request for arbitration apparently would have been time barred.

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[3]A related charge in Buller v. UTLA, Case No. LA-CO-287 alleged, inter alia, that such a delay caused by ULTA contributed toward a violation of the duty of fair representation. On May 11, 1984, that charge was dismissed for failure to state a prima facie case.

Thus, while you allegedly neither asked for nor consented to tolling at Step 3, you have failed to demonstrate how such tolling was a District action which was adverse to you. To the extent that you allege that the District's alleged involvement in the tolling of Step 3 independently violated section 3543.5(a), such an allegation must be dismissed.

Right to Appeal

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 (section 32635(a)). To be timely filed, the original and five (5) copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) on June 5, 1984, or sent by telegraph or certified United States mail postmarked not later than June 5, 1984 (section 32135). 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 (5) copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal (section 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 the document filed with the Board itself (see 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 (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 (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.

Very truly yours,

DENNIS M. SULLIVAN
General Counsel

By Jeffrey Sloan by m.m
Jeffrey Sloan
Assistant General Counsel

cc: Richard Fisher, O'Melveny & Myers
Shirley Woo, Los Angeles USD

JS/MM:djm