STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

DR. WELBORN G. FREEMAN, JR., Charging Party,	Case No. SF-CO-454
v.	PERB Decision No. 1057
OAKLAND EDUCATION ASSOCIATION, Respondent.	September 14, 1994

Appearance: Dr. Welborn G. Freeman, on his own behalf.

Before Caffrey, Garcia, and Johnson, Members.

DECISION

GARCIA, Member: This case is before the Public Employment Relations Board (Board) on appeal by Dr. Welborn G. Freeman, Jr. (Freeman) of a Board agent's dismissal (attached hereto) of his unfair practice charge. In the charge, Freeman alleged that the Oakland Education Association (OEA) violated section 3543.6 of the Educational Employment Relations Act (EERA or Act)[1] by

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.6 provides, in pertinent part:

> It shall be unlawful for an employee organization to:
>
> (b) 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.
>
> (c) Refuse or fail to meet and negotiate in good faith with a public school employer of any of the employees of which it is the exclusive representative.

discriminating and taking reprisal actions against Freeman because of his exercise of rights protected by the Act.[2] The Board agent dismissed his charge and refused to issue a complaint on the grounds that some of Freeman's allegations were untimely filed; for the remaining timely filed allegations, the Board agent found that Freeman had failed to state a prima facie case of a violation of EERA section 3543.6.

The Board has reviewed applicable statutes and case law, the warning and dismissal letters, the original and amended charges, Freeman's appeal[3] and the entire record in this case. The Board finds the Board agent's dismissal to be free of prejudicial error and adopts it as the decision of the Board itself.

DISCUSSION

On appeal, Freeman challenges the Board agent's dismissal of his allegations as untimely. He argues that the statute of limitations did not begin to run on any of his allegations until October 1993,[4] based on a "continuing chain of events" theory and citing the proposed decision in Jefferson School District

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[2]We take jurisdiction because: (1) Freeman is an employee and OEA is an employee organization as defined in EERA; (2) some of Freeman's allegations were timely filed as unfair practice charges; and (3) we found no grievance agreement between Freeman and OEA to delay PERB jurisdiction under EERA section 3541.5(a)(2). Member Johnson concurs in the result that PERB has jurisdiction to hear this matter and excepts to Member Garcia's analysis of how and in what manner PERB obtained jurisdiction.

[3]No response to the appeal was filed by OEA.

[4]The original unfair practice charge was filed November 19, 1993; an amended unfair practice charge was filed February 15, 1994.

(1980) PERB Decision No. 133 (Jefferson).[5] The Jefferson case did not involve the statute of limitations and is inapplicable. Even if all allegations were timely, the entire charge was still properly dismissed for failure to state a prima facie case on the merits.

Freeman's appeal does not overcome the Board agent's conclusion that he had not stated a prima facie case for any charges. Rather, on appeal, he raises for the first time numerous new allegations[6] of reprisal without addressing the weaknesses identified in the warning letter. Freeman argues that a prima facie case exists based on the new allegations and new evidence, without specifying when the events occurred.

PERB Regulation 32635 states,[7] in pertinent part:

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[5]We note that the version of the case from which Freeman cites was appealed to the Board itself. On appeal, the Board affirmed the hearing officer's finding "that the Association did not insist to impasse on negotiating matters outside the scope of representation." (Id. at p. 64.)

[6]Those new allegations included claims that, among other things, OEA violated its own procedure for running Faculty Advisory Committee elections; that OEA violated the District's Affirmative Action policy; that OEA "recruited" employees to make false allegations of sexual harrassment against Freeman; that OEA intentionally lost grievances it handled for Freeman, in reprisal for his exercise of "legal rights," such as membership in a rival union; that OEA and the District "conspired to commit fraud" by consolidating his position; and that OEA failed to enforce unspecified violations of the contract between OEA and the District.

[7]PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

(b) Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence. (Emphasis added.)

Interpreting this regulation, PERB has been reluctant to find that good cause existed to allow a party to raise new allegations or new evidence for the first time on appeal.[8] The reason for this reluctance is stated in South San Francisco:

> The purpose of PERB Regulation 32635(b) is to require the charging party to present its allegations and supporting evidence to the Board agent in the first instance, so that the Board agent can fully investigate the charge prior to deciding whether to issue a complaint or dismiss the case.

As the Board noted in another case, when a party has the opportunity to cure defects in his prima facie case at earlier stages and does not do so, the Board is reluctant to allow him to raise such facts or evidence later.[9] The warning letter to Freeman stated that if there were any factual inaccuracies in the warning letter or any additional facts which would correct the deficiencies explained therein, he should amend the charge accordingly. While the lack of responsiveness by OEA to Freeman's inquiries could imply an improper motive, it is

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[8]See, e.g., South San Francisco Unified School District (1990) PERB Decision No. 830 (South San Francisco); Association of California State Attorneys (Winston) (1992) PERB Decision No. 931-S; California School Employees Association (Watts) (1993) PERB Decision No. 1008; California State Employees Association (Hackett) (1993) PERB Decision No. 1012-S; California School Employees Association (LaFountain) (1992) PERB Decision No. 925. In all the above cases, the Board found no good cause existed because no explanation was offered.

[9]See LaFountain, supra.

Freeman's burden to make the case. Freeman did not cure those deficiencies in his amended charge, and he has not offered any reason why the Board should consider the new allegations on appeal now.

In conclusion, we find that Freeman has not demonstrated good cause for the Board to consider the new allegations contained in his appeal. The remainder of Freeman's appeal is an attempt to overcome deficiencies in timeliness and establish a prima facie case. The effort is insufficient. Therefore, we affirm the Board agent's dismissal of Freeman's unfair practice charge.

ORDER

The unfair practice charge in Case No. SF-CO-454 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Member Johnson joined in this Decision.

Member Caffrey's concurrence begins on page 6.

CAFFREY, Member, concurring: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Dr. Welborn G. Freeman, Jr. (Freeman) of a Board agent's dismissal of his unfair practice charge. In his charge, Freeman alleged that the Oakland Education Association (OEA) violated section 3543.6(b) of the Educational Employment Relations Act (EERA) by failing to fairly represent him, and by retaliating and discriminating against him because of his exercise of rights protected by EERA.

I have reviewed the entire record in this case and I find the Board agent's dismissal to be free of prejudicial error. Therefore, I concur in adopting it as the decision of the Board itself.

I write separately to expressly reject Member Garcia's statement regarding Board jurisdiction in this case, which appears in footnote 2.

EERA section 3541.5(a)(2) provides, in pertinent part, that PERB shall not:

> Issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration.

The Board has interpreted this section as denying it jurisdiction in cases in which the complained of conduct is arguably prohibited by provisions of a collective bargaining agreement (CBA) in effect between <u>an employer and an employee</u>

organization, when the CBA provides for a grievance procedure covering the conduct and culminating in binding arbitration. (Lake Elsinore School District (1987) PERB Decision No. 646.)

The Board has not interpreted the EERA section 3541(a)(2) reference to "the agreement between the parties" to include an agreement between an employee organization and an employee. Yet, in footnote 2, Member Garcia states that there is "no grievance agreement between Freeman and OEA to delay PERB jurisdiction under EERA section 3541.5(a)(2)" in this case.

Member Garcia offers no explanation and cites no authority for this novel interpretation, which is inconsistent with PERB precedent. I reject this unsubstantiated view.

STATE OF CALIFORNIA PETE WILSON, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415) 557-1350

February 23, 1994

Dr. Welborn G. Freeman, Jr.

Re: **DISMISSAL OF UNFAIR PRACTICE CHARGE/REFUSAL TO ISSUE COMPLAINT**
Dr. Welborn G. Freeman. Jr. v. Oakland Education Association
Unfair Practice Charge No. SF-CO-454

Dear Mr. Freeman:

The above-referenced unfair practice charge, filed on November 19, 1993, alleges that the Oakland Education Association (Association) failed to fairly represent him with regard to a transfer and the elimination of an annuity. This conduct is alleged to violate Government Code section 3543.6 of the Educational Employment Relations Act (EERA).

I indicated to you, in my attached letter dated January 28, 1994, 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 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 case or withdrew it prior to February 9, 1994, the charge would be dismissed. You were granted an extension of time to file an amended charge.

On February 15, 1994, an amended charge was filed. The amended charge contains new allegations in substance as follows. The amended charge alleges that Mr. Freeman is an African-American. It further alleges that Freeman elected not to join the Association and that he was known by the Association to have participated in a rival employee organization. The amended charge asserts that his grievance has remained on the third level since 1989 because of his decision not to join the Association and his membership in a rival organization.

Although the amended charge asserts the theory that the Association failed to pursue a grievance because of Freeman's protected activity of electing not to join the Association and participating in a rival organization, this new claim appears to be untimely. Freeman knew or should have known that the Association was failing to process his grievance when it failed to return his telephone calls or reply to his correspondence.

Correspondence attached to the charge indicates that these events occurred in August 1991 and September 1992. Only violations discovered within six months of the filing of the charge, or after May 19, 1993, may be considered.

Therefore, I am dismissing the charge based on the facts and reasons contained in my January 28, 1994 letter as well as those stated above.

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

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 ______________________
DONN GINOZA
Regional Attorney

Attachment

cc: Ramon E. Romero

STATE OF CALIFORNIA PETE WILSON, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415) 557-1350

January 28, 1994

Dr. Welborn G. Freeman, Jr.

Re: **WARNING LETTER**
Dr. Welborn G. Freeman. Jr. v. Oakland Education Association
Unfair Practice Charge No. SF-CO-454

Dear Mr. Freeman:

The above-referenced unfair practice charge, filed on November 19, 1993, alleges that the Oakland Education Association (Association) failed to fairly represent him with regard to a transfer and the elimination of an annuity. This conduct is alleged to violate Government Code section 3543.6 of the Educational Employment Relations Act (EERA).

Investigation of the charge revealed the following. The Association is the exclusive representative of a bargaining unit composed of certificated employees of the Oakland Unified School District (District). Dr. Welborn G. Freeman, Jr. is employed as a teacher in the District. He posseses a California Standard Teaching Credential to teach the major subjects of social science and history and the minor subject of business education. Prior to 1989, he taught at Montera Junior High School, a school located in a "hills" area of Oakland. Purportedly because of projected declining enrollment at Montera, there was a need to consolidate one teaching position for the 1989-90 school year. The Montera principal reported to Freeman that the school did not have a history assignment for the coming year and therefore his position was consolidated. After a review of Freeman's teaching credential, the programmatic needs of Montera, and staff credentials, the District consolidated Freeman's position. He was subsequently transferred to Calvin Simmons Junior High School, a school with predominantly low-seniority teachers and low achieving students, located in the "flat-lands" area, which has a high crime rate. Sometime in 1989, he filed a grievance with the Association as his representative to challenge the consolidation. The charge does not state on what language in the collective bargaining agreement he based his claims.

In August 1991, Freeman wrote a letter to the Association's representative, Ward Roundtree, thanking him for handling his grievance and asking for the findings when they become available.

Under a provision of the collective bargaining agreement cited by Freeman in a letter to Roundtree, dated September 10, 1992, teachers transferred by consolidation have the option of returning to the school from which they were transferred if an equivalent position for which the teacher is qualified and credentialed becomes available. Freeman stated in the letter that a White female teacher without tenure and with less seniority was teaching the same classes as Freeman. He demanded that Roundtree review his pending grievance and asked how long it would remain pending.

The charge contains a photocopy of a certified mail receipt for a letter addressed to Roundtree in March 1993, but there is no indication of the contents of this letter.

Freeman, who is black, asserts that since September 1993, the Association has systematically practiced race and age discrimination. Teachers with high seniority and white teachers with the same seniority as Freeman are allowed to teach in the "hills" schools. This is alleged to violate the Association's "affirmative action contract."

The charge alleges that the Association negotiated with the District to eliminate an annuity for teachers, which continues for the administrative staff. The teachers on staff had the 7.5% annuity contribution transferred to a salary increase, which is subject to income taxation. New teachers simply received a 7.5% increase and therefore" did not suffer the same adverse tax impact.

All of the above-described conduct is alleged to violate the Equal Protection clause of the 14th Amendment, the 1964 Civil Rights Act, and the Unruh Civil Rights Act.

The charge alleges that Association representative Marilyn Jamerson engaged in a reprisal against Freeman by publicly humiliating him as a result of tampering with voting results during a Faculty Advisory Committee. In October 1993, Freeman was the only teacher not given a calculator needed for student testing. At an unidentified time, Freeman alleges that the Association failed to respond to a request by him to file a grievance.

Based on the facts stated above, the charge as presently written fails to state a prima facie violation of the EERA for the reasons that follow.

In order to state a prima facie violation regarding lack of grievance representation, the Charging Party must show that the

Association refused to process a meritorious grievance for arbitrary, discriminatory, or bad faith reasons. In United Teachers of Los Angeles (Collins) (1983) PERB Dec. No. 258), the Public Employment Relations Board (PERB) stated:

> Absent bad faith, discrimination, or arbitrary conduct, mere negligence or poor judgment in handling a grievance does not constitute a breach of the union's duty. [Citations.]
>
> A union may exercise its discretion to determine how far to pursue a grievance in the employee's behalf as long as it does not arbitrarily ignore a meritorious grievance or process a grievance in a perfunctory fashion. A union is also not required to process an employee's grievance if the chances for success are minimal.

It has also been stated that in order to state a prima facie case of arbitrary conduct violating the duty of fair representation, a charging party:

> ". . . must at a minimum include an assertion of sufficient facts from which it becomes apparent how or in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment. (Emphasis added.)" (Reed District Teachers Association. CTA/NEA (Reyes) (1983) PERB Dec. No. 332, p. 9, citing Rocklin Teachers Professional Association (Romero) (1980) PERB Dec. No. 124.)

The charge fails to allege sufficient facts from which it can be concluded that a prima facie violation occurred under the standards articulated above. There is insufficient evidence to demonstrate that the Association failed to pursue a meritorious grievance, or if it did, that it did so for arbitrary, discriminatory, or bad faith reasons. The charge should contain the language of the contract alleged to have been violated in order to establish that the grievance potentially had merit. Although there are allegations of discrimination based on age and race, the charge fails to articulate how such motivations actually played a role in the Association's handling of his grievance. The mere fact that the District assigns younger, white teachers to "hills" school does not establish that the Association has been a participant in these actions, and without

more, does not demonstrate that the Association supports the policy by failing to enforce the contract with regard to civil rights obligations. The allegation that the Association's conduct violates the 14th Amendment and civil rights statutes is not within PERB's jurisdiction and the Association has no duty to enforce such provisions, unless they or parallel provisions are contained in the collective bargaining agreement. (Oxnard School District (1988) PERB Dec. No. 664; California Faculty Association (Pomerantsev) (1989) PERB Dec. No. 698-H.)

The allegations regarding the consolidation and/or transfer grievance also appear to be untimely. In order to be timely filed, a charge must be filed within six months of the conduct alleged to constitute the unfair practice. The statute of limitations period commences to run when the charging party knew or should have known of the conduct giving rise to the alleged unfair practice charge. (Regents of the University of California (1983) PERB Dec. No. 359-H.) The last correspondence noted in the charge with respect to this grievance(s) took place in March 1993. But only conduct after May 19, 1993 may be considered.

The issue of the Association negotiating to convert the annuity to a salary increase involves somewhat different considerations. PERB has held that an exclusive representative is accorded considerable discretion in the negotiations process. In Redlands Teachers Association (Faeth and McCarty) (1978) PERB Dec. No. 72, PERB quoted the following language of the U.S. Supreme Court:

> Any, authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented. A major responsibility of negotiators is to weigh the relative advantages and disadvantages of differing proposal . . . Inevitably, differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject

> always to complete good faith and honesty of purpose in the exercise of its discretion.
>
> (Ford Motor Co. v. Huffman (1953) 345 U.S. 330 [31 LRRM 2548, 2551].)

In Service Employees International Association (Kimmett) (1979) PERB Dec. No. 106, PERB stated:

> The duty of fair representation implies some consideration of the views of various groups of employees and some access for communication of those views, but there is no requirement that formal procedures be established. (Citations omitted.)
>
> (Id., at p. 11; see also American Federation of State, County and Municipal Employees, Council 10 (Alvarez) (1993) PERB Dec. No. 984-H.)

In order to state a prima facie violation involving a breach of the duty of fair representation, facts must be alleged in the charge indicating how and in what manner the union acted without a rational basis or in a way that was devoid of honest judgment. (Reed District Teachers Association, CTA/NEA (Reyes) (19803) PERB Dec. No. 332.) The allegations fail to establish that the decision to negotiate for a salary increase rather than an annuity exceeded the Association's discretion or was devoid of honest judgment. The charge does not establish when the agreement was negotiated and therefore does not establish that the alleged violation is timely.

Finally, the allegations under the heading of reprisals fail to contain sufficient details to enable the undersigned to determine if a prima facie violation has been stated under the standards explained above and/or whether the allegations are timely. A charging party's obligation is to provide a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." (PERB Regulation 32615(a)(5) [Cal. Code of Regs., tit. 8, sec. 32615(a) (5)].)

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 **February 9, 1994**, I shall dismiss your charge. If you have any questions, please call me at (415) 557-1350.

Sincerely,

DONN GINOZA
Regional Attorney