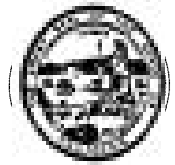


**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**



ANNA M. THOMAS,

Charging Party,

v.

UNITED TEACHERS OF LOS ANGELES,

Respondent.

Case No. LA-CO-1415-E

PERB Decision No. 2150

December 13, 2010

Appearance: Linda A. Albers, Attorney, for Anna M. Thomas.

Before Dowdin Calvillo, Chair; McKeag and Wesley, Members.

DECISION

WESLEY, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Anna M. Thomas (Thomas) of a Board agent's dismissal (attached) of her unfair practice charge. The charge alleged that United Teachers of Los Angeles (UTLA) breached its duty of fair representation, set forth in section 3544.9 of the Educational Employment Relations Act (EERA or Act),¹ and thereby violated EERA section 3543.6(b), when it failed or refused to file a grievance on her behalf. The Board agent dismissed the charge as untimely filed.

The Board has reviewed the dismissal and the record in light of Thomas' appeal and the relevant law. Based on this review, the Board finds the Board agent's warning and dismissal letters to be well-reasoned and a correct statement of the law, and therefore adopts them as the decision of the Board itself, as supplemented by a discussion of the appeal.

¹ EERA is codified at Government Code section 3540 et seq. Unless otherwise noted, all statutory references are to the Government Code.

BACKGROUND

Thomas was employed as a nurse by the Los Angeles Unified School District (District). Between March 2005 and August 2008, Thomas was involved in a series of disputes with the District, primarily regarding her desire to transfer to new school sites. When UTLA declined to assist Thomas, she retained private counsel to assist with her complaints against the District.

On October 22, 2008, Thomas again requested UTLA's assistance regarding a transfer dispute. UTLA Representative Carl Joseph (Joseph) told Thomas he needed to talk with her attorney and obtain a written statement. The charge alleges Joseph did not obtain a written statement from Thomas' attorney and UTLA took no further action.

On January 19, 2010, Thomas filed the instant unfair practice charge against UTLA.

The Board agent found that Thomas knew or should have known in or about October 2008, well outside the six-month statute of limitations, that UTLA would not provide her with assistance. The Board agent, therefore, dismissed the charge as untimely filed.² Even if timely filed, the Board agent determined the charge did not state a prima facie violation of the duty of fair representation.

THOMAS' APPEAL

On appeal, Thomas asserts the Board should extend the statute of limitations in this case due to PERB's prejudicial error. The appeal states that in January 2009, Thomas called and spoke to a Board agent regarding her work complaints. Although Thomas asked the Board agent for assistance, he provided only "technical advice," and did not advise Thomas to seek

² EERA section 3541.5(a)(1) states that PERB 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.

legal counsel or inform Thomas she could file charges against both the District and UTLA. On February 29, 2009, Thomas filed a charge against the District.

Thomas contends PERB erred when it failed to advise her to file a charge against both the District and UTLA. In the alternative, Thomas asserts PERB should have, on its own motion, joined UTLA as a necessary party to her charge against the District pursuant to PERB Regulation 32164.³

DISCUSSION

Thomas is mistaken in her claim that PERB erred by failing to provide legal assistance and advise her to file a charge against UTLA. A charging party bears the burden to identify the respondent and allege facts to state a prima facie violation of the Act. (PERB Reg. 32615.) A Board agent can assist a charging party by answering “procedural questions of each party regarding the processing of the case.” (PERB Reg. 32620(b)(2).) While Board agents are authorized to provide technical assistance regarding PERB procedures, they do not provide legal representation. (*Los Angeles Community College District* (1981) PERB Decision No. 186.) PERB bears no burden to inquire of charging parties whether they might have a claim against any other entities covered by EERA, and advise them whether they should pursue any possible claims. Furthermore, PERB has no authority to “extend” a statute that sets time limits on filing requirements.⁴

³ PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

⁴ Statutory and equitable tolling of the statute of limitations may apply in cases where a charging party has filed a grievance against the employer. (*Long Beach Community College District* (2009) PERB Decision No. 2002.)

Finally, whether PERB should have ordered joinder of UTLA as a necessary party in Thomas' charge against the District is not an issue that can be raised in this case; the proper place to raise it was in the case against the District.

Thomas' appeal is denied and the charge is dismissed as untimely filed.

ORDER

The unfair practice charge in Case No. LA-CO-1415-E is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Chair Dowdin Calvillo and Member McKeag joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
Telephone: (818) 551-2805
Fax: (818) 551-2820



April 8, 2010

Anna M. Thomas

Re: *Anna M. Thomas v. United Teachers of Los Angeles*
Unfair Practice Charge No. LA-CO-1415-E
DISMISSAL LETTER

Dear Ms. Thomas:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on January 19, 2010 and amended on February 9 and April 7, 2010. Anna M. Thomas (Thomas or Charging Party) alleges that the United Teachers of Los Angeles (Union or Respondent) violated the Educational Employment Relations Act (EERA or Act)¹ by failing to represent her.

Charging Party was informed in the attached Warning Letter dated March 29, 2010, 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 that 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 April 7, 2010, the charge would be dismissed. On April 7, 2010, you timely filed a second amended charge.

This letter provides a brief summary of the additional information included in the second amended charge.

Facts as Alleged

Thomas has worked for 25 years as a nurse for the Los Angeles Unified School District (District). In 2004, Assistant Principal Myrna Brutti (Brutti) began working at Stephen White Middle School (White M.S.), Thomas' work location. In March 2005, Thomas filed a grievance (with Union assistance) against Brutti involving an incident where Brutti publicly reprimanded Thomas while she was conducting student hearing and vision tests. As a result of the grievance process, Thomas was transferred to a different school site, 95th Preparatory School (95th School), in July 2005.

¹ EERA is codified at Government Code section 3540 et seq. The text of the EERA and PERB Regulations may be found at www.perb.ca.gov.

In June 2007, 95th School Principal Nora Armenta (Armenta) announced that she was transferring to Gulf Avenue School (Gulf School), and asked Thomas if she would like to transfer to Gulf School as well. Thomas stated that she desired this transfer, because Gulf School is year-round and located near Thomas' home. Thomas alleges that the transfer request was then blocked by Brutti and/or White M.S. Principal Shannon Lee (Lee). Armenta specifically requested to Yolanda Lasmarias (Lasmarias)² that Thomas be transferred to Gulf School. Lasmarias informed Thomas that if she was "not satisfied with [the] arrangements [Thomas] could grieve it." At that point Thomas contacted Union Representative Carl Joseph (Joseph), who told Thomas that the Union could not assist her in this situation. Thomas then obtained a private attorney.

In June 2008, Lasmarias contacted Thomas to offer her a transfer to Danna Middle School (Danna M.S.). Thomas told Lasmarias that she wanted to transfer to this school, because it is located within walking distance of her home. Later that month, Lasmarias called Thomas at home and directed her to move her belongings to Danna M.S., and Thomas did so. Thomas alleges that "once again my transfer was blocked by Myrna Brutti and/or Shannon Lee."

At some point in time, Thomas' private attorney filed a civil lawsuit against the District. During the attorney's investigation of Thomas' case against the District, the attorney reportedly was told by District Legal Counsel Richard L. Ettensohn that "the reason Anna did not get the position at Danna was because she grieved Myrna Brutti in 2005."

In August 2008, Lasmarias sent a letter to Thomas assigning her back to 95th School. On September 2, 2008, Thomas was placed on stress-related medical leave by her physician.

On October 22, 2008, Thomas again contacted Joseph and told him what the District's lawyer had said to her attorney. Joseph told Thomas that he needed to talk to the attorney and obtain a statement from him. Thomas states that Joseph never did this, however, and that the Union "did nothing in the matter."

As discussed more fully below, the charge, as amended, has not corrected the timeliness deficiency outlined in the March 29, 2010 Warning Letter, and therefore does not demonstrate a prima facie violation of EERA.

Discussion

As stated in the Warning Letter, EERA section 3541.5(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 (*Gavilan*)). A charging

² Lasmarias' position in the District is not specifically defined in the amended charge, but it appears that she may be a Nursing Department supervisor.

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.)

The second amended charge does not provide any facts to demonstrate that the charge was timely filed. As discussed in the Warning Letter, Thomas knew as of October 2008 that the Union was not assisting her with filing a grievance over the District's decision to deny her transfer. This is the conduct underlying the unfair practice charge, and thus, the time that the limitations period commenced. (*Gavilan, supra*, PERB Decision No. 1177.) This charge was not filed until January 2010, well beyond the six-month period in which the charge could be timely filed. Accordingly, the charge is untimely and must be dismissed.

Right to Appeal

Pursuant to PERB Regulations,³ Charging Party 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 Regs, tit. 8, § 32635, subd. (a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs, tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs, tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

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 Regs, tit. 8, § 32635, subd. (b).)

³ PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

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 Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs, tit. 8, § 32135, subd. (c).)

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 Regs, tit. 8, § 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,

TAMI R. BOGERT
General Counsel

By _____
Valerie Pike Racho
Regional Attorney

Attachment

cc: Dana S. Martinez, Attorney

PUBLIC EMPLOYMENT RELATIONS BOARD

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700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
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Fax: (818) 551-2820



March 29, 2010

Anna M. Thomas

Re: *Anna M. Thomas v. United Teachers of Los Angeles*
Unfair Practice Charge No. LA-CO-1415-E
WARNING LETTER

Dear Ms. Thomas:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on January 19, 2010 and amended on February 9, 2010. Anna M. Thomas (Charging Party) alleges that the United Teachers of Los Angeles (Union or Respondent) violated the Educational Employment Relations Act (EERA or Act)¹ by failing to represent her.

Facts as Alleged

The charge filed on January 19, 2010 provides the following brief statement:

I notified UTLA (Denise Rockwell and Carl Joseph) on October 22, 2008 [that] I wanted to file a grievance against Myrna Brutti for retaliation. I also filed Unfair Practice Charge Number LA-CE-5299-E regarding this matter [against] Los Angeles Unified School District [on] 2-26-09. The Union would not support me.

The amended charge filed on February 9, 2010 adds the following statement:

I was discriminated against[,] retaliated against, and harassed.
UTLA would not represent me in this matter.

For the reasons to follow, the above-stated facts do not demonstrate a prima facie violation of EERA.

Discussion

1. Filing Deficiencies

¹ EERA is codified at Government Code section 3540 et seq. The text of the EERA and PERB Regulations may be found at www.perb.ca.gov.

On February 8, 2010, I sent a letter informing you that the charge was not properly filed. Specifically, PERB did not receive an original signed charge and Proof of Service as required by PERB Regulation 32140.² In addition, the Proof of Service did not include the Respondent's address or facsimile number. I also discussed these problems with you in a telephone call on or about February 18, 2010. During this call I explained that filing a charge electronically (the February 9 amended charge)³ or via facsimile (the original charge filed January 19) only provides PERB with a "copy" of the charge, and that to complete the filing PERB must receive "original," (i.e., signed in ink) documents. I also stated that you should either mail or deliver the charge documents to be received by PERB no later than February 23, 2010.

On February 22, 2010, PERB received the signed original charge filed January 19 with a corrected proof of service, and so that filing deficiency has been corrected. However, as of the date of this letter, PERB still has not received by mail or delivery signed original charge documents for the amended charge filed February 9. Accordingly, the amended charge has not been properly filed and is not considered a part of the official record of the unfair practice charge. (Cal. Code Regs, tit. 8, § 32135, subd. (c).)

2. Statute of Limitations

Even if Charging Party corrects the filing deficiency discussed above, the charge is untimely. EERA section 3541.5(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 (*Gavilan*).) 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.)

The charge states that on October 22, 2008, Charging Party notified Union representatives that she wanted to file a grievance against the employer, and that the Union would not support or represent her. This shows that as of October 2008, Charging Party knew of the conduct underlying the charge, and thus commenced the limitations period. (*Gavilan, supra*, PERB Decision No. 1177.) This charge was filed approximately 15 months later in January 2010. As this is well beyond the six-month limitations period, the charge is untimely and must be dismissed.

² PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

³ On February 11, 2010, PERB received by U.S. mail the February 9 amended charge. The declaration section of the charge form does not contain Charging Party's signature. Therefore, this does not constitute a signed original charge document.

3. Duty of Fair Representation

Assuming Charging Party could demonstrate that the charge is not time-barred, the facts provided do not show that the Union breached its duty of fair representation. The duty of fair representation imposed on the exclusive representative extends to grievance handling. (*United Teachers of Los Angeles (Collins)* (1982) PERB Decision No. 258; *Fremont Teachers Association (King)* (1980) PERB Decision No. 125.) In order to state a prima facie violation of this section of EERA, Charging Party must show that the Respondent's conduct was arbitrary, discriminatory or in bad faith. In *United Teachers of Los Angeles (Collins)*, the Public Employment Relations Board 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 omitted.]

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.

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.

(*Reed District Teachers Association, CTA/NEA (Reyes)* (1983) PERB Decision No. 332, p. 9, quoting *Rocklin Teachers Professional Association (Romero)* (1980) PERB Decision No. 124; emphasis in original.)

Charging Party has not provided any facts from which it can be concluded that the Union acted here without a rational basis. PERB Regulation 32615(a)(5) requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." A charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S, citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.) Because Charging Party has not provided any details regarding the specific conduct by the Union alleged to be unlawful, there are no grounds, based on the current record, for PERB to issue a complaint.

For these reasons the charge, as presently written, does not state a prima facie case.⁴ If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may 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 an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before April 7, 2010,⁵ PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Valerie Pike Racho
Regional Attorney

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⁴ In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make "a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Ibid.*)

⁵ A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)