STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CHARTER OAK EDUCATORS ASSOCIATION, CTA/NEA, and ELIZABETH NIXON-DILLON,	)	
Charging Parties,	)	Case No. LA-CE-1617
v.	)	PERB Decision No. 404
CHARTER OAK UNIFIED SCHOOL DISTRICT,	)	September 6, 1984
Respondent.	)	

Appearances; Sandra H. Paisley, Attorney for Charter Oak Educators Association, CTA/NEA and Elizabeth Nixon-Dillon.

Before Hesse, Chairperson; Tovar and Burt, Members.

DECISION

TOVAR, Member: Charter Oak Educators Association, CTA/NEA and Elizabeth Nixon-Dillon, Charging Parties, appeal the decision of a regional attorney of the Public Employment Relations Board (PERB or Board) to dismiss their charge that the Charter Oak Unified School District (District) violated subsections 3543.5(a), (b) and (c) of the Educational Employment Relations Act.[1] The charge alleges, inter alia,

[1]The Educational Employment Relations Act is codified at Government Code section 3540 et seq. Section 3543.5 provides in relevant part as follows:

> It shall be unlawful for a public school employer to:

that the District terminated Nixon-Dillon's employment because she filed and pursued a grievance against the District.[2] As set forth in the attached letter of dismissal, however, the regional attorney found that the charge failed to state a prima facie case because no facts had been alleged showing a causal connection between Nixon-Dillon's pursuit of her grievance and the District's decision to terminate her employment. We affirm the regional attorney's determination to dismiss the charge.

DISCUSSION

In the charge, as amended, Nixon-Dillon alleges the facts which follow. On January 20, 1982, she informed the District of her intention to file a grievance based on asserted violations of the collective bargaining agreement. The District acknowledged receipt of her notice on January 26. On February 3, and again on February 10, Nixon-Dillon requested a

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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.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

[2]On appeal to the Board, Charging Parties contest only the dismissal of this allegation, acceding to the dismissal of the remaining allegations set forth in their charge.

level I grievance conference with her supervisor. This conference was held on February 16. At the close of the conference, the supervisor instructed Nixon-Dillon to report to the District's director of personnel. Upon so reporting, she was served with notice of the superintendent's intent to recommend to the board of trustees that she not be reemployed for the next school year.

Attached to the charge are some 23 documents which bear on Nixon-Dillon's relationship with her employer. Among them are numerous memoranda which indicate that, prior to January 20, 1982, the District had expressed repeated and substantial dissatisfaction with Nixon-Dillon's job performance, first in the form of warning letters and, ultimately, by the docking of salary.

In reviewing Nixon-Dillon's charge that her dismissal was a reprisal for her action in filing a grievance, the regional attorney correctly cited Novato Unified School District (4/30/82) PERB Decision No. 210. That case holds that, in order to establish a prima facie case of reprisal, the charging party must allege facts showing that the employee's protected activity was "a motivating factor" in the employer's decision to take the adverse action complained of. In the instant case, the regional attorney found that the allegations of fact set forth in the charge are insufficient to show that Nixon-Dillon's grievance was a motivating factor in the District's decision to dismiss her. The mere fact that the

superintendent's notice of intent to recommend dismissal issued after, rather than before, Nixon-Dillon filed her grievance, he found, was insufficient. Moreover, he noted, Charging Parties have candidly included in their charge documentation which makes clear that the District's serious dissatisfaction with Nixon-Dillon's job performance substantially pre-dates her grievance.

On appeal, Charging Parties simply reassert the claim that unlawful reprisal has been demonstrated by the timing of the events, i.e., that Nixon-Dillon's grievance preceded the notice of dismissal. We agree with the regional attorney that such a showing, with nothing more, is insufficient to establish a prima facie case of discrimination under Novato, supra.

In Moreland Elementary School District (7/27/82) PERB Decision No. 227, we considered a claim that an employee had been discharged based on his employer's knowledge of his union activity. The charging party could offer no proof of the employer's knowledge of union activity except to point out that the discharge followed immediately after a period of time in which the employee had engaged in union organizing. Without more, we found, the single fact of the timing was insufficient, citing Amyx Industries, Inc. v. NLRB (8th Cir. 1972) 457 F.2d 904 [79 LRRM 2930], in which the court stated that:

> . . . mere coincidence in time between the employee's union activities and his discharge does not raise an inference of

> knowledge on the part of the employer without some direct or persuasive circumstantial evidence in the record of knowledge.

For the same reasons, "coincidence in time," by itself, is insufficient to prove unlawful motivation. We note that were this not so, any employee who perceived that he or she might be in danger of dismissal could, by the mere act of filing a grievance, be assured of a hearing before an administrative law judge of this agency and, further, place the legal burden of producing evidence on the employer to prove, pursuant to the test set forth in Novato, supra, that the discharge resulted from a legitimate operational justification. Such a state of affairs would be unwise and unnecessary.

ORDER

Upon the foregoing Decision and the entire record in this matter, Case No. LA-CE-1617 is DISMISSED without leave to amend.

Chairperson Hesse and Member Burt joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD
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July 25, 1983

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RE; DISMISSAL OF UNFAIR PRACTICE CHARGE
Charter Oak Educators Association/CTA/NEA and Elizabeth Nixon-Dillon v. Charter Oak Unified School District; Charge No. LA-CE-1617

Dear Parties:

Pursuant to Public Employment Relations Board (PERB) Regulation section 32630, the above-captioned charge is hereby dismissed because it fails to allege facts sufficient to state a prima facie violation of the Educational Employment Relations Act (hereafter EERA).[1] The reasoning which underlies this decision follows.

On August 5, 1982, Charging Party, Charter Oak Educators Association (Association) and Elizabeth Nixon-Dillon, former probationary certificated employee of Respondent Charter Oak Unified School District (District) filed the above-referenced charge with the Public Employment Relations Board (PERB) alleging that the District violated sections 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA). The charge was subsequently amended on October 19, 1982, January 20, 1983, and on April 29, 1983. In its most recent form, the charge alleges that the District violated the above-stated EERA sections by taking the following actions:

[1]References to the EERA are to Government Code sections 3540 et seq. PERB Regulations are codified in California Administrative Code, Title 8.

1. Basing an accusation of cause for non-reemployment against Ms. Nixon-Dillon on duties not performed while she was on illness and/or pregnancy leaves of absence taken pursuant to Article X sections 1, 2, 3, 13 and 14 of the existing collective bargaining agreement.[2]

2. Serving Ms. Nixon-Dillon on February 16, 1982, with a notice of intent to recommend her for non re-employment for 1982-83, immediately following, and in reprisal for pursuing, a Level I grievance conference between Ms. Nixon-Dillon and her immediate supervisor.

3. Requiring Ms. Nixon-Dillon to conform to a rigidly defined work day, in violation of past practice which had permitted Special Services Personnel to adjust their individual starting and stopping times according to job demands within the contractually prescribed seven hour work day, and reprimanding her for her failure to conform to this schedule. Charging Party alleges that Ms. Nixon-Dillon was treated differently than other psychologists in this respect.

4. Unilaterally declaring that Ms. Nixon-Dillon would be allowed only ten days in which to respond to derogatory items placed in her personnel file.

5. Refusing to stay its proceedings regarding Ms. Nixon-Dillon's non-reemployment, pursuant to Education Code Section 44949, pending the outcome of arbitration proceedings under the parties' collective bargaining agreement. Moreoever, refusing to accede to the Association's June 15, 1982, request that the District take no action adverse to Ms. Nixon-Dillon's continued employment pending resolution of the arbitration proceedings.

6. Denying Ms. Nixon-Dillon during the 1981-82 school year a timely preliminary conference with her evaluator to assess needs and mutually develop employment objectives. Further, denying her a conference with her evaluator to identify and receive recommendations regarding areas of needed

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[2]A collective bargaining agreement was in effect between the Association and the District from September 1, 1979, through June 30, 1982.

> improvement, and to receive assistance in improving her performance. Moreover, denying her a formal written evaluation on the approved form showing a recommendation regarding re-employment, as required by Article IX of the collective bargaining agreement.

Contractual Violations - EERA Section 3543.5(c)

The gravamen of allegations one, three, four and six is that the District failed to accord Ms. Nixon-Dillon rights to which she was entitled under the collective bargaining agreement* Section 3541.5(b) of EERA states:

> [t]he board shall not have authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of such an agreement that would not also constitute an unfair practice under this chapter.

In order for a breach of contract to constitute a violation of EERA section 3543.5(c), such a breach must amount to a change of policy, having a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members. Colusa Unified School District (3/21/83) PERB Decision No. 296; Grant Joint Union School District (2/26/82) PERB Decision No. 196. The charge alleges no facts which would indicate that the District implemented changes in policy having a generalized effect or continuing impact on unit members' terms and conditions of employment, since it alleges no facts which would indicate that the collective bargaining agreement rights at issue were denied to employees other than Ms. Nixon-Dillon.

Reprisal - EERA Section 3543.5(a)

Allegation one also asserts that in proceeding with the accusation, the District has taken reprisal against Ms. Nixon-Dillon because of her exercise of the contractually provided sick leave. Allegation two asserts that Ms. Nixon-Dillon was subject to reprisal because she pursued a grievance against the District.

The PERB has ruled that in order for an unfair practice charge alleging a violation of EERA section 3543.5(a) to be correctly stated, it must contain facts that establish a "nexus," or

connection between an exercise of protected rights and the employer's action. (Carlsbad Unified School District (1/30/79) PERB Decision No. 89; Novato Unified School District (4/30/82) PERB Decision No. 210.)

a) Reprisal for Filing a Grievance

The grievance that Ms. Nixon-Dillon filed pertained to several memoranda of criticism issued by the District which reflected strong dissatisfaction with her job performance. These memoranda predated any exercise of EERA-guaranteed rights on her part. They establish that long before Ms. Nixon-Dillon resorted to the grievance procedure, the District, had determined to take adverse action against her. While Ms. Nixon-Dillon was notified of the District's decision to not reemployee her almost immediately after attending a grievance conference,[3] this in and of itself is not sufficient to establish a nexus between Ms. Nixon-Dillon's exercise of her grievance rights and the District's decision. The District's timing may indicate a lack of circumspection, but absent additional facts establishing a connection between Ms. Nixon-Dillon's grievance and the District's decision to not reemploy her, the charge does not state a prima facie violation of EERA section 3543.5(a).

b) Reprisal for Exercising Sick Leave Rights

Ms. Nixon-Dillon's utilization of contractually guaranteed sick leave rights does not appear to be cognizable as protected activity under the EERA. Under EERA section 3543 school employees have the "protected" right to form, join and

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[3]The District's accusation of cause of non-reemployment against Ms. Nixon-Dillon contains allegations of a number of different problems regarding her work performance during the 1980-81 and 1981-82 school years. The items in the accusation pertaining to duties not performed while on sick leave refer to Ms. Nixon-Dillon's alleged failure to complete an IEP testing program for handicapped children within the statutory time requirement. Other items in the District's accusation refer to various incidents of alleged tardiness, insubordination, and failure to complete assigned work.

participate in union activities, as well as present grievances to a school district. Sick leave rights are provided for by contract, and termination for so asserting those rights may well violate "just cause" dismissal requirements in the Education Code section 44949. Nevertheless, such a breach does not amount to a violation of Ms. Nixon-Dillon's EERA-protected rights, for exercising a contractually guaranteed sick leave right does not amount to "participation" in the activities of an employee organization. As discussed above, PERB does not have the authority to enforce contractual provisions and shall not issue a complaint on any charge based on alleged violations of a collective bargaining agreement unless the alleged violations also constitute unfair labor practices. EERA section 3541.5(b).

Staying of Education Code Proceedings - EERA Section 3543

Finally, the District was under no obligation to stay its proceedings regarding Ms. Nixon-Dillon's non-reemployment, pursuant to Education Code section 44949, pending outcome of the arbitration proceedings under the parties' collective bargaining agreement.[4] EERA section 3540 provides as follows:

> Nothing contained herein shall be deemed to supersede other provisions of the Education Code and the rules and regulations of public school employers which establish and regulate tenure or a merit or civil service system or which provide for other methods of administering employer-employee relations, so long as the rules and regulations or other methods of the public school employer do not conflict with lawful collective agreements.

Education Code Section 44949 provides a procedure whereby a probationary employee is given notice that his/her services will not be required for the following year, with a statement of the reasons for non-reemployment. The section provides for a hearing in accordance with Government Code section 11500 et seq.

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[4]See summary of allegations in charge, No. 5, infra.

to determine if there is cause for not reemploying her. These proceedings are entirely separate from the arbitration proceedings provided for under Article VI of the parties collective bargaining agreement, and there is nothing in EERA which requires that they be stayed every time the non-retention of an employee raises an issue of contract interpretation. Further, there is nothing in EERA which requires an employer to refrain from recognizing an Administrative Law Judge's decision, pursuant to Education Code section 44949, pending final determination of arbitration proceedings.

Pursuant to Public Employment Relations Board regulation 32635 (California Administrative Code, title 8, part III), you may appeal the refusal to issue a complaint (dismissal) to the Board itself.

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 Notice (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 August 15, 1983, or sent by telegraph or certified United States mail postmarked not later than August 15, 1983 (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, any other party may file with the executive assistant to 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 except for amendments to the charge must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany the document filed with the Regional Office or the Board itself (see section 32140 for the required contents and a sample form). The

documents 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 executive assistant to the Board at the previously noted address. A request for an extension in which to file a document with the Regional Office should be addressed to the Regional Attorney. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the subject document. The request must indicate good cause for 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 Sullivan
GENERAL COUNSEL

Howard Schwartz
Attorney