STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

VICTOR WIGHTMAN, Charging Party, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondent.	)	Case Nos. LA-CE-1736, LA-CE-1765 LA-CE-1767, LA-CE-1769 LA-CE-1771, LA-CE-1773 LA-CE-1774, LA-CE-1781 PERB Decision No. 473 December 31, 1984

Appearances: Victor Wightman and Jules Kimmett for Victor Wightman; O'Melveny & Meyers by Joel M. Grossman for Los Angeles Unified School District.

Before Hesse, Chairperson; Tovar and Morgenstern, Members.

DECISION

TOVAR, Member: Victor Wightman appeals the determination of a regional attorney of the Public Employment Relations Board (PERB or Board) that no complaint should issue on the above-captioned charges. While the regional attorney considered and decided each of the several enumerated charges individually, the Board itself finds that, for purposes both of fairness and of administrative economy, these charges are appropriately consolidated on appeal for disposition by a single decision. Having considered these consolidated charges, together with the entire record in each case, we conclude that the matter should be remanded to the general counsel for

issuance of a complaint consistent with the discussion which follows.

THE CHARGES

Each of Wightman's charges presents a fragment of information which, when taken together, sets forth his central complaint, to wit: that he was wrongfully discharged by the Los Angeles Unified School District (District) from his position as a bus driver. By synthesizing these charges and extracting the pertinent factual allegations, we can identify the conduct of which Wightman complains, as set forth below.

Wightman alleges that in the fall of 1982, he, with the assistance of union representative Jules Kimmett, filed a grievance against the District which included claims for, inter alia, backpay, violation of seniority rights and improper work assignment. On December 3, Wightman and Kimmett met with District Director of Transportation Max Barney. As his means of transportation to this meeting, Wightman, without the authorization of the District, drove himself in a District school bus to the site of the meeting at Barney's office. At Barney's direction, another employee was dispatched to return the bus to its proper place. At the meeting, Barney threatened Wightman with dismissal for raising the issues which were the subjects of his grievance.[1]

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[1]In one of the consolidated charges Wightman generally states that Barney threatened him with dismissal. In another

On January 12, 1983, District administrator James Srott informed Wightman that a meeting would be held for pre-disciplinary purposes at which charges would be read against Wightman and Wightman would have the opportunity to respond. Srott at that time refused to furnish Wightman with a written statement of the charges against him. For reasons not stated, the parties were unable to schedule a date for the pre-disciplinary meeting. Following this discussion, Wightman filed with PERB unfair practice charges LA-CE-1715 through 1718 alleging that Srott had denied Wightman his right to receive a copy of the charges against him and that other District officials were wrongfully attempting to have him fired. On January 31, Administrator Srott, by telephone, again attempted to set a date for the pre-disciplinary meeting. Upon being informed that union representative Kimmett was unavailable to attend the meeting proposed by Srott, Srott stated that he would send to Wightman by mail a copy of the letter recommending his dismissal.

On February 1, Wightman was personally served with a copy of the letter recommending his dismissal. On February 12, he received another copy of that letter by mail. Wightman alleges that the District's conduct in these matters was motivated by his union activities.

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charge, Wightman alleges that Barney made "thinly veiled threats towards [his] status as an employee of the L.A.U.S.D."

On March 25, Wightman and Kimmett met with Deputy Director of Transportation Ralph Jacobs. Wightman and Kimmett informed Jacobs that no pre-disciplinary meeting had yet been held to review and discuss the dismissal charges pending against Wightman. They requested permission of Jacobs to bring witnesses to such a meeting, whenever it should be held. On April 7, Wightman again met with Jacobs. They agreed to have the pre-disciplinary meeting on April 22. Jacobs told Wightman that the presentation of witnesses would not be permitted.

On April 4, the District's personnel commission issued a recommendation to the school board that Wightman should be dismissed from employment effective at the close of the workday on April 19. On April 18, Wightman, together with Kimmett and a third individual, appeared before the school board to protest that no pre-disciplinary meeting had yet occurred. The personnel commission director was also in attendance. This information was presented for the apparent purpose of stirring the board or the personnel commission director to delay the date of Wightman's dismissal. Despite the presentation of this information, neither the board nor the director took action and Wightman's dismissal became effective on the close of his workday on April 19.

On April 22, the "pre-disciplinary" meeting was held, at which Wightman and Kimmett presented their rebuttal to the charges against Wightman. On April 29, Wightman received a

letter from Jacobs stating in reference to the April 22 meeting that "neither you nor your representative, Jules Kimmett, presented evidence that the Notice of Unsatisfactory Service was in error or that you were unfairly treated." Finally, Wightman alleges that his dismissal was motivated by his protected activity of filing previous unfair practice charges against the District with this agency.

DISCUSSION

In deciding whether a charge states a prima facie case requiring a hearing on the merits, we deem that "the essential facts alleged in a charge are true." San Juan Unified School District (3/10/77) PERB Decision No. 12. Here, Wightman alleges that District's conduct towards him violated sections 3543.5(a), (b), (c), and (d) of the Educational Employment Relations Act (EERA).[2]

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[2]The EERA is codified as Government Code section 3540 et seq. Sections 3543.5(a), (b), (c), and (d) provide as follows:

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

Initially, we find on review of the charges that, as noted by the regional attorney, the factual allegations entirely fail to support the charges that the District violated EERA sections 3543.5(b), (c), or (d). Those portions of the charges which so allege, therefore, are dismissed.

Clearly, Wightman's central concern is with his dismissal from employment with the District on April 19, 1983. A California public school employer which dismisses an employee because of his or her participation in activity protected by the EERA violates section 3543.5(a) of that Act; and indeed, Wightman alleges that his former employer is guilty of exactly this conduct.

In Novato Unified School District (4/30/82) PERB Decision No. 210, the Board articulated the test it will apply to determine whether an employer has engaged in the kind of discriminatory conduct proscribed by section 3543.5(a). Under that test, a charging party must show 1) that he or she has engaged in conduct protected by the EERA; 2) that the employer has subsequently taken adverse personnel action against

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good faith with an exclusive representative.

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

charging party; and, 3) facts raising the inference that there is a causative "nexus" between the foregoing two elements. Of course, conclusory allegations that an employee has engaged in protected activity, or that an employer was motivated by protected activity, are insufficient to support a valid charge. Rather, PERB Regulation 32615(a)[3] requires that a charge must include "[a] clear and concise statement of the facts and conduct alleged to constitute an unfair practice."

While Wightman makes the conclusory assertion that he has engaged in protected activity, the facts and conduct alleged in support of this claim are limited. Thus, he alleges that in the fall of 1982, he, with the assistance of his employee organization, filed a grievance against the District. Certainly this is protected conduct. North Sacramento School District (12/20/82) PERB Decision No. 264; Rio Hondo Community College District (12/28/82) PERB Decision No. 272. He also alleges that some time shortly after January 12, 1983, he filed unfair practice charges with this agency. This conduct, also, is protected by the EERA. Regents of the University of California (9/6/84) PERB Decision No. 403-H. Wightman also alleges that both he and Jules Kimmett, the individual who extensively assisted Wightman in his efforts to resist his

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

dismissal, are shop stewards of "Local 99," the exclusive representative of Wightman's bargaining unit. However, in the course of the investigation of these charges, the regional attorney was informed by the District that to its knowledge neither of these two individuals were in fact stewards of that organization or any other, and that indeed Kimmett was not an employee of the District at all. PERB Regulation 32620 empowers the Board agent to investigate unfair practice charges and to dismiss such charges if the charge or the evidence is insufficient to establish a prima facie case. In the face of these conflicting assertions, the regional attorney wrote a letter to Wightman requiring him to present some evidence which would support the claim of union stewardship. Wightman responded by expressly declining to do so, stating that he would produce evidence "if and when a hearing takes place."

We find that the procedure employed by the regional attorney was an appropriate exercise of his authority to investigate the charges. As the Charging Party, Wightman ultimately has the burden of proving the truth of his charges and thus necessarily cannot prevail at a hearing without producing evidence which will support his charges. The regional attorney's requirement that Wightman demonstrate that some evidence exists to support his allegations is therefore not unreasonable. In reviewing the sufficiency of Wightman's

charges, therefore, we do not rely on his allegation of status as union stewards for Jules Kimmett and himself.

To establish a prima facie case of EERA-violative discrimination regarding his dismissal, Wightman must have alleged facts raising the inference that the above-noted protected acts of pursuing a grievance and filing charges with PERB acted as a motivating factor in the District's decision to dismiss him. Upon our review of those factual allegations, we find that no such inference is raised.

In reaching this finding, we note initially that the protected act of filing unfair practice charges is alleged to have occurred sometime shortly after January 12, 1983. The charges themselves, however, by Wightman's own description, complain of the District's failure to turn over the list of misconduct charges against him and of the District's efforts to have him fired. Logically, Wightman's subsequent act of filing unfair practice charges against the District cannot have been a causative factor in the District's issuance of misconduct charges and efforts to discharge him which are complained of in the unfair practice charges themselves. While the possibility logically remains that the District's governing board would not have pursued its dismissal efforts to the end but for that protected conduct, neither factual allegation nor argument is presented by Charging Party to raise this claim.

What remains, then, is a charge that Wightman's exercise of his right to file the grievance in the fall of 1982 led to his dismissal. Factual allegations in the charges indicate that the grievance raised claims of substantial importance. It sought approximately $3,000 in backpay, it raised objections to Wightman's position on the seniority list and to the seniority calculations of the District as a whole, and it contested his involuntary transfer to a new work assignment. Furthermore, administrator Max Barney allegedly displayed sufficient antagonism toward the subjects included in the grievance to threaten Wightman with dismissal for raising those matters at their meeting of December 3, 1982. While the facts alleged indicate, then, that at least one District administrator was antagonized by Wightman's protected pursuit of his grievance, we find that the record of factual allegations as a whole fails to support an inference that Wightman's pursuit of his grievance was a motivating factor in the District's decision to dismiss him.

In connection with his allegation that Barney threatened him, Wightman frankly includes the allegation that Barney angrily directed his subordinates to return to its proper place the bus Wightman had driven to Barney's office. The regional attorney's investigation revealed that, without authorization, Wightman appropriated a District bus for the purpose of transporting himself to a meeting with Barney being held at his

own request. In response to the regional attorney's inquiry, Wightman did not deny these facts, claiming instead on appeal that he has a right to attend grievance meetings via District transportation.

PERB has not and does not now recognize the transportation right here asserted. We infer to the contrary, from the allegations surrounding this incident, that Barney would understandably be antagonized by the conduct to which Wightman admits and would therefore show hostility toward him at the meeting. While the threats themselves may be violative of the EERA in connection with Wightman's right to pursue his grievance (see discussion, infra), we are unable to conclude that Barney's utterance of "thinly veiled threats" at the December 3 meeting is a sufficient basis, without more, to support the inference of unlawful motive regarding his dismissal.

Wightman asserts, however, that the record does reflect other conduct by the District which supports his charge. Thus, he urges that the District's failure to hold his pre-disciplinary hearing[4] before the effective date of his

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[4]Wightman at times refers to this hearing as a "Skelly proceeding." This apparently is in reference to the legal requirement first articulated by the California Supreme Court in Skelly v. State Personnel Board (1975) 15 Cal.3d 194. The Court there held that due process considerations require that some form of procedural safeguard be used before a public employee may be deprived of his or her employment as a disciplinary action.

termination, contrary to required procedure, is a factor showing that the District harbored unlawful animus against him and that his discharge was motivated by this animus. We find no such significance in the late date of the Skelly hearing. Wightman's charges acknowledge that on January 12, District administrator Srott informed Wightman of the District's desire to schedule a hearing. Again on January 31, Srott attempted to schedule a meeting. It was Wightman who turned down the offer, stating that his representative, Jules Kimmett, was unavailable. Not until April 7 did Wightman accept a District offer to set a time for the hearing. The fact that, at this late date, the agreed-upon date of April 22 turned out to be three days after the date of discharge independently set by the personnel commission fails to carry with it the critical significance that Wightman ascribes to it.

While we find that the charges fail to allege facts showing that Wightman was discharged in violation of the EERA, we note that a different EERA violation does appear from allegations. Wightman alleges that he filed a grievance in the fall of 1982 and that Director of Transportation Barney threatened Wightman with discharge for attempting to raise and pursue that grievance at a meeting on December 3. As noted, supra, the pursuit of a grievance generally constitutes conduct protected by the EERA. Section 3543.5(a), supra at footnote 2, plainly states that it is an unlawful practice to "threaten to impose

reprisals on employees . . . because of their exercise of rights guaranteed by [the EERA]." The regional attorney received affidavits from the four District administrators who were present at the meeting, each of whom denied Wightman's version of the events in controversy, maintaining that no threats of any kind were uttered. He resolved this factual dispute in favor of the District, finding the District's evidence more persuasive than Wightman's allegation. In taking it upon himself to decide these contested facts, the regional attorney exceeded his authority. San Francisco Classroom Teachers Association (Bromell) (11/13/84) PERB Decision No. 430. On this basis we find that Wightman has the right to a hearing at which he will have the opportunity to prove that the District interfered with the exercise of his right to pursue his grievance as alleged.

ORDER

Upon the foregoing Decision and the entire record in this case, these consolidated charges are REMANDED to the general counsel for disposition consistent with this Decision.

Chairperson Hesse's concurrence and dissent begin on page 14.

Member Morgenstern's concurrence and dissent is on page 15.

Hesse, Chairperson, concurring and dissenting: While I agree with that part of the majority opinion that dismisses the bulk of Mr. Wightman's charges, I feel strongly that all of the allegations should be dismissed.

The majority believes that the only conduct that could state a prima facie violation of EERA is the allegation that Wightman filed a grievance in the fall of 1982 and was thereafter threatened with discharge for attempting to raise and pursue that grievance at a December 3, 1983 meeting with the District. I reject the notion that this conduct merits the issuance of a charge for two reasons.

First, there is no credible evidence that the allegations have any merit. Wightman was permitted to file the grievance and, indeed, it was pursued at least to the level at which he was accorded a face-to-face meeting with his supervisor.

Second, and more significantly, Wightman filed charges against the District after the December meetings in which he alleged the same essential facts on which the majority would issue a charge (Charge Nos. LA-CE-1715, 1716, 1717, 1718, filed January 14, 1983). Those charges were dismissed by the regional attorney on March 16, 1983,[1] and were not appealed to the Board itself. Thus, the majority, in their eagerness to

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[1]Charging party was warned by letter dated March 4, 1983, that unless the defects in the charges were cured, they would be dismissed. Charging party made no contact with the regional attorney concerning the warning letter, nor did he cure the defects.

"synthesize" the events in question covering the dismissals on appeal, have (1) written a new charge for Wightman covering events he had already filed on, and (2) resurrected the already dismissed charges and granted an appeal sua sponte.

To the extent that the majority opinion has that effect, I dissent from the issuance of a complaint. In all other aspects, I concur with the majority.

Morgenstern, Member, concurring and dissenting: I concur in the majority's decision that a prima facie violation of section 3543.5(a) is stated by Wightman's allegations that on December 3, 1982, District Director of Transportation Max Barney threatened him with dismissal for attempting to pursue a grievance.

However, contrary to the majority, I find that this threat of dismissal for protected activity constitutes direct evidence of animus and is sufficient to raise an inference that the dismissal proceedings initiated only one month later were similarly motivated. Simply stated, it is reasonable to infer that the alleged unlawful threat was carried out.

For this reason, I would direct the general counsel to issue a complaint and proceed to hearing on the alleged discriminatory discharge as well as the unlawful threat.