

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



WOODLAND EDUCATION ASSOCIATION,)
CTA/NEA,)
)
Charging Party,) Case No. S-CE-1211
)
v.) Request for Reconsideration
) PERB Decision No. 808
WOODLAND JOINT UNIFIED SCHOOL)
DISTRICT,) PERB Decision No. 808a
)
Respondent.) August 17, 1990
_____)

Appearances: Kronick, Moskovitz, Tiedemann & Girard by Jan K. Damesyn, Attorney, for Woodland Joint Unified School District.

Before Hesse, Chairperson; Shank and Camilli, Members.

DECISION

CAMILLI, Member: The Woodland Joint Unified School District (District) requests reconsideration of Woodland Joint Unified School District (1990) PERB Decision No. 808. In that decision, the Public Employment Relations Board (PERB or Board) affirmed the Administrative Law Judge's (ALJ) conclusion that the District violated section 3543.5(a)¹ of the Educational Employment

¹EERA is codified at California Government Code section 3540, et seq. Section 3543.5(a) states:

It shall be unlawful for a public school employer to do any of the following:

- (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. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

Relations Act (EERA) when it discriminated and retaliated against Carol Peart (Peart), a District teacher, for the exercise of protected activities. Specifically, the ALJ found the District violated EERA by requiring Peart to obtain a doctor's excuse for four consecutive days of absence, when such verification had not been required of other bargaining unit employees, and was imposed to harass and intimidate her for having filed and appealed a grievance.

DISCUSSION

PERB Regulation 32410(a)² provides, in relevant part:

Any party to a decision of the Board itself may, because of extraordinary circumstances, file a request to reconsider the decision The grounds for requesting reconsideration are limited to claims that the decision of the board itself contains prejudicial errors of fact, or newly discovered evidence or law which was not previously available and could not have been discovered with the exercise of reasonable diligence.

In its request for reconsideration, the District asserted that the Board's decision contained approximately 13 prejudicial errors of fact. Each alleged error is addressed below.

1. ~~No Evidence Indicating That the District's Letter Formalizing Its Request That Peart Provide Verification of Her Absence Was Placed in Her Personnel File.~~

The District claims that the Board erroneously concluded Peart suffered harm when two letters were placed in her personnel file, one formalizing the District's request that she provide

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

verification of her absences.³ The District notes that the ALJ made no finding of animus toward Peart resulting from the letters and contends there was no evidence indicating the letter dated October 9, 1987, was actually placed in her file. Finally, the District contends that even if the October 9, 1987 letter was placed in Peart's personnel file, under Education Code section 44031 she could have asked for its removal and/or submitted a rebuttal statement. Since she did neither, the District argues Peart did not find the letter harmful or offensive.

The fact the ALJ made no finding of animus as a result of the letters is of no import. The Board is free to draw its own conclusions from the record apart from those made by the ALJ, and did so in this case. (PERB Regulation 32320(a)(1);⁴ cf Santa

³There are, in fact, three letters involved in this case. One dated January 22, 1988 is from Peart to Assistant Superintendent Dr. Ray Crawford (Crawford) requesting release time to attend an arbitration hearing pertaining to a grievance she had filed against the District. The second letter is dated November 23, 1987 and is a memo from Crawford to Peart documenting that she failed to comply with requests by her principal Mike Parker (Parker) to submit her objectives by October 5, 1987 or meet with him by October 15, 1987. The memo then directs her to meet with Parker on November 25, 1987. The third letter dated October 9, 1987 is from Crawford to Peart requesting that she provide a verification from her doctor that she was unable to work from October 6 through the date of her return. There is no dispute the letters dated January 22, 1988 and November 23, 1987 were in Peart's personnel file. The District, however, disputes the Board majority's finding that the October 9, 1987 letter was placed in her personnel file.

⁴PERB Regulation 32320 states in pertinent part:

(a) The Board itself may:

(1) Issue a decision based upon the record of hearing, or

Clara Unified School District (1979) PERB Decision No. 104.)

Further, although there was no direct testimony by any of the witnesses that the October 9, 1987 letter was placed in Peart's file, the majority of the Board inferred from the weight of the evidence that it did occur. Specifically, Crawford, testified as an adverse witness on direct examination that "sick leave verifications" are the types of documents that are automatically placed in a personnel file. Crawford also testified that certain letters from supervisors are "routinely [placed] in a holding file" to see if a response from the employee is submitted, prior to its final entry into the personnel file. Crawford further testified that routine correspondence with the teachers, such as letters "setting up a meeting," or "asking the teachers to serve on a committee," are placed in the file "[i]f it was something that had some information . . . relative to something that they [the employee] needed to do in terms of their pay schedule or something like that." (Emphasis added.) Later Crawford testified concerning the contents of the personnel files that:

"I couldn't say exactly if all of the individual forms [regarding sick leave, leave without pay and release time] are put in there, but there is some information, I believe, in there that deal with that kind of thing, especially if its something unusual that has to do with --like in this case with a pay dock or something of that nature. If

(2) Affirm, modify or reverse the proposed decision, order the record reopened for the taking of further evidence, or take such other action as it considers proper.
(Emphasis added.)

where they would go to look to see if there was something that was relative to that."
(Emphasis added.)

Finally, Crawford testified that his staff will place items in a teacher's personnel file without consulting with him which they understand are appropriate for placement in the file. Thus, the majority of the Board found no evidence to indicate the October 9, 1987 letter was treated differently from any other correspondence between an employee and supervisor about matters involving sick leave verification or a subject possibly resulting in a dock in pay.

Concerning its argument that Peart did not find the October 9, 1987 letter offensive or harmful, the District misses the point with respect to placement of the letters in her personnel file. The majority of the Board concluded that, in this case, placement of two [of the three] letters in Peart's file conveyed a message: appealing grievances can result in placement of letters in personnel files. Whether this conduct constitutes an "adverse action" by the District is determined by an objective standard. (Palo Verde Unified School District (1988) PERB Decision No. 689.) Accordingly, Peart's perceptions about whether she was harmed is irrelevant. The District's allegation of prejudicial error is, therefore, rejected.

2. The Evidence Does Not Support a Finding That Several Teachers in the Past Requested Substitutes for More Than Three Days at a Time at Peart's School and That No Verification Had Been Requested.

By discrediting various examples in the record, the District attempts to show the evidence does not support a finding that several teachers at Peart's school, in the past, requested substitutes for more than three days and that no verification had been requested. The District contends it was prejudiced by this finding because it was, in part, relied upon by the Board majority, in finding discriminatory enforcement of the medical verification requirement.

Examples of teachers out with multiple-day absences are reflected in the testimony of Parker, Oleta Richardson (Richardson), Parker's secretary, and Crawford. Parker testified in response to questions about teachers with multiple-day absences, "We have one teacher that was out for a week, one that has requested yesterday to be out for the remainder of the week."⁵ (Emphasis added.) Additionally, both Crawford and Parker testified about another teacher, Mr. Zuber, whose wife called in and notified Parker "he would be out for some period of time." Finally, Richardson testified that a teacher called in sick for three days with the flu, then called in again and reported he would be out two additional days.

⁵The teacher "out for the remainder of the week" is identified as the teacher whose son died. This example was not relied upon in the Board's decision.

There was no evidence that the teacher "out for the week" was required to provide a medical verification. With regard to Zuber, the District contends that none of the witnesses were asked if he was required to provide a medical verification and speculates that possibly such a verification was required. This argument, however, is rejected. Parker, responding to that very question posed by Peart's counsel, testified that he could not recall if a verification was requested of Zuber. Parker was also asked twice (once by Peart's counsel and once by the ALJ) whether he could recall any occasion in which he had requested a medical verification of employee absences. In both instances Parker replied that he could not recall any such occasion. In addition, the ALJ noted in her proposed decision that the parties stipulated to the fact that, with one exception, no such verification had previously been requested of any certificated employee. Accordingly, the Board properly concluded that no such verification had been requested of Zuber.

The District also attempts to discredit Richardson's example by emphasizing that the teacher "out with the flu" did not request more than three days at a time per telephone call. The District's emphasis on the number of days requested per telephone call and the role it played in the Board's decision, however, is misplaced. Neither Crawford nor Parker testified that a specific number of days of absence requested would necessarily prompt their inquiry. In fact, both Crawford and Parker testified there was no specific policy as to when a medical verification would be

required. Crawford further testified that he would request the verification whenever "we feel there's any question about it" or there is some "discrepancy." The Board's finding of discriminatory enforcement, therefore, was based on the fact the teacher was out for five consecutive days and no medical verification was requested. Accordingly, the finding that several teachers in the past had been absent for more than three days and no verification was requested is correct.

3. ~~The Evidence Does Not Support a Finding That on Three Occasions Dating Back to 1981, Peart Was ill for More Than Three Days and No Verification Was Requested.~~

The District argues the Board erroneously found that Peart was absent for more than three days on three separate occasions dating back to 1981. Relying on an exhibit prepared by Peart on which she designated certain multiple-day absences with an asterisk, and admitted into evidence at the formal hearing, the District asserts Peart was absent on only one occasion for more than three days. The District contends it was prejudiced by the Board majority's finding, because it was relied upon in concluding discriminatory enforcement of the medical verification requirement.

Specific dates listed on the exhibit, however, indicated that Peart was absent for three or more days on October 19-28, 1981 (ten days); September 27 to October 5, 1984 (seven days); December 16-18, 1985 (three days)⁶ and January 12-16 (five days),

⁶Peart testified that dates indicated by an asterisk on the exhibit indicated illnesses for three days or more. Such an indication appears next to the dates December 16-18, 1985. The

20-22 (three days) and 27-30 (four days) in 1987. There is no evidence that Peart was required to provide a medical verification on any of these occasions.

Further, the District's attempt to limit the Board's consideration only to those days indicated with an asterisk by Peart on the exhibit is unwarranted. The fact that Peart may have segregated her medical absences according to minor infirmities (such as colds, flu, chest pains, etc.) versus hospitalization and surgery does not preclude the Board from considering other dates on the exhibit. Accordingly, the evidence supports a finding that Peart was absent on three occasions dating back to 1981 for more than three days.

record reflects that the parties were given the opportunity to examine the accuracy of her prepared document through voir dire examination, but that the District apparently did not exercise its opportunity. The record also indicates the District submitted Respondent's Exhibit I (R-I) as its official record covering this same period of time. There is, however, no testimony explaining the handwritten data appearing on the District's document. Further, there is an apparent discrepancy on R-I with regard to the dates of the absence (i.e., [December] 16-18, possibly covering three days) and the time (days) taken (i.e., "2"). The attachments to R-I only partially clarify the ambiguity. One attachment refers to December 16, 1985 and indicates "one day" absent; the other refers to December 18, 1985 and also indicates "one day." There is no attachment covering December 17 and no testimony, other than Peart's, covering that date. Thus, in light of her testimony that her absence on December 16-18 was for three days, the ambiguity that appears on the face of the District's R-I, the lack of any testimony to clarify the data entered on R-I or explaining the absence of an attachment covering December 17, the majority found Peart's document more persuasive on the issue of the number of days she was absent during this period.

4. The Evidence Does Not Support the Board's Finding That in the One Other Instance When Parker Complained to Crawford of Possible Sick Leave Abuse or Pursued a Medical Verification, It Was Discovered the Teacher Also Had Filed Grievances.

This allegation by the District arguably has merit but does not change the result of the decision. Parker, in providing an example of one occasion in which he contacted Crawford about the absence of a teacher, testified the contact was made concerning the multiple-day absence of Zuber. Specifically, Parker was asked whether he had requested sick leave verifications in any instance where it was brought to his attention by his secretary that a teacher would be out for more than one day. At first he replied, "I can't think of any." Parker then testified that Zuber's absence was the one occasion he reported to Crawford and, when the question and answer was reviewed in the context of the previous questions, he implied the contact was for the purpose of determining whether a medical verification should be sought. However, after it was brought to his attention that Zuber filed several grievances against the District, Parker attempted to explain he contacted Crawford only to determine how long Zuber would be out and/or whether it would be considered disability leave. Thus, Parker initially represented that he was seeking some verification concerning Zuber's absence, and it was only after he was questioned about the grievances that he sought to undo his prior testimony.

Nevertheless, even assuming the validity of the District's allegation on the above point, the Board's ultimate finding of discriminatory enforcement of a work rule for the purpose of

harassment and intimidation against Peart is supported by the other facts identified in footnote 3 of the Board majority's opinion.

5. ~~The Evidence Does Not Support a Finding that, 10 to 15 Minutes After Receiving a Response, Peart Went to Parker's Secretary.~~

The District argues there is insufficient evidence to support a finding that Peart requested a substitute 10 to 15 minutes after her grievance was denied. The District claims the correct time is 5 to 10 minutes and, because the specific time frame involved is critical to its suspicion Peart may have been abusing sick leave, it was prejudiced by the Board's reference of 10 to 15 minutes.

This argument is rejected because the Board majority's opinion did not turn on whether Peart requested the substitute within 5 minutes or 15 minutes of receiving the denial of her grievance. While the importance of the time frame justifying the District's suspicion was examined by the Board, the theory was, nevertheless, rejected in light of the weight of the evidence. A majority of the Board concluded the District's alleged suspicion was merely a sham for the real reason for the request (i.e., harassment). We do not find, therefore, that the District was prejudiced by the differing characterizations of the time frame identified above.

6. The Evidence Does Not Support a Finding That Peart Stated to Parker's Secretary That She Was Having Severe Back Pains and Needed to See a Doctor.

The District objects to two references which appear at footnote 5 of the Board's opinion. Specifically, the District claims that Peart did not tell Richardson she was having "severe" back pains or that she needed to see a doctor. The District contends it was prejudiced by this finding because it erroneously credits Peart with conveying information to Richardson concerning her request for a substitute.

The District's allegation of prejudice misses the point because that footnote merely paraphrases events underlying the grievance and leading up to Peart's request for a substitute.⁷ The use of the adjective "severe" to describe in different terms the amount of pain or discomfort Peart claimed she was experiencing is not prejudicial to the District. Peart testified that she told Richardson, "My back is killing me. I've had it. Get me a sub for the rest of the week." (Emphasis added.)

⁷Footnote 5 states, in pertinent part:

Peart applied for, but was denied, a transfer from her teaching assignment to another teaching assignment. She then initiated a step 1 grievance with her principal, Mike Parker (Parker), which was denied as untimely filed. Ten to fifteen minutes after receiving the response, Peart went to Parker's secretary and requested a substitute for the next four days, stating she was having severe back pains and needed to see a doctor. Parker, hearing only that she was requesting a substitute, contacted Ray Crawford (Crawford). . . . (Emphasis added.)
(Woodland Joint Unified School District, supra, fn. 5, pp. 4-5.)

Richardson also testified she was told by Peart her back was "killing" her. Thus, paraphrasing Peart's condition as "severe" back pain is not incorrect or prejudicial to the District.

The District's exception to the phrase that Peart advised Richardson "she needed to see a doctor" has merit. Nevertheless, the majority of the Board concluded that the medical verification was imposed to harass Peart and was not based on whether Richardson was told by Peart she needed to see a doctor. The conclusion was based, among other things, on the finding that the reasons given by the District for requesting the verification were not credible in light of the fact that: (1) Peart was considered by Crawford and Parker to be a capable and conscientious teacher; (2) Peart's use of sick leave was not extensive or beyond the ordinary use of any teacher in the District; and (3) the District had no suspicion prior to October 5 that Peart might be abusing sick leave or malingering. Accordingly, the Board's reference to the doctor did not prejudice the District and, therefore, does not justify reconsideration of the decision.

7. The Evidence Does Not Support a Finding That Parker Made No Investigation as to the Reasons for the Request and Suggested to Crawford That Some Action Be Taken Against Peart.

The District argues the evidence does not support a finding that Parker "suggested" to Crawford that some action be taken against Peart. The District contends it was prejudiced by this finding because it was relied upon by the Board majority to support a conclusion of animus toward Peart. The District's

argument, however, is based on a selective reading of Parker's testimony and ignores testimony supporting an alternative conclusion. Specifically, Parker responded on cross-examination to the question, "Were you suggesting that Mr. Crawford follow up on this or were just reporting the day's events?" He stated, "I was requesting that something should happen. . . . Where do we go from here. . . . What's the next step." (Emphasis added.) Thus, while other testimony was elicited from Parker and Crawford to rebut the damage done by Parker's statement that something should happen, the evidence supports the finding that Parker suggested some action should be taken against Peart. In arriving at this conclusion, the Board majority was not finding that Parker suggested that Crawford take a specific course of action, only that some action should be taken. Accordingly, the District's request for reconsideration of this issue is denied.

8. The Evidence Does Not Support the Board's Finding That Crawford Asked Peart If She Was Returning to School on October 9.

The District argues it was prejudiced by this finding because the Board relied on it when concluding that Crawford had already judged Peart guilty of sick leave abuse. The District's allegation, however, is without merit.

Peart testified that Crawford asked her, "Are you returning to school?" It is clear from Peart's testimony that she understood this question to mean Crawford was asking her if she was returning to school that day and the ALJ concluded as such in her proposed decision. Although Crawford offered testimony to

rebut Peart's account of the conversation, the ALJ found her more credible than Crawford on the issue. Moreover, the Board majority found no evidence to justify overturning the ALJ's determination on this fact. (Santa Clara Unified School District, supra, PERB Decision No. 104.) Accordingly, the District's request for reconsideration of this issue is denied.

The District also contends in its request for reconsideration that Peart misunderstood the request and that Crawford did not intend to imply that she should return to school on October 9. This latest argument by the District characterizing Peart's and Crawford's state of mind, however, is unpersuasive and also does not justify reconsideration.

9. The Evidence Does Not Support the ALJ's Finding, Adopted by the Board, That the Omissions in the Transcript Alleged by the District in a Separate Motion Constituted Harmless Error.

This allegation is without merit because the ALJ did not deny the District's motion to augment the record on the grounds that the omitted testimony constituted harmless error. Rather, the motion was denied because the request was untimely under PERB regulations. Moreover, the ALJ's reference in her proposed decision to the alleged omission of important testimony as harmless error was not relied upon by the Board majority.

10. The Evidence Does Not Support a Finding That Peart Was Harmed When the Request Was Purportedly Made in Front of Other Clerical Employees.

To demonstrate that reconsideration is warranted under PERB Regulation 32410, the petition must show the existence of extraordinary circumstances. (Rio Hondo Community College

District (1983) PERB Decision No. 279a.) Since the District in this argument merely reasserts an argument previously considered and rejected by the Board in the underlying decision, no extraordinary circumstances justifying reconsideration exist. Accordingly, the District's request for reconsideration of this issue is denied. In addition, for these same reasons, the remaining allegations of error alleged by the District in its request for reconsideration are rejected.

ORDER

Having found no merit in the District's allegations, the request for reconsideration is DENIED.

Chairperson Hesse joined in this Decision.

Member Shank's dissent begins on page 17.

Shank, Member, dissenting: For the reasons stated in my dissent in Woodland Joint Unified School District (1990) PERB Decision No. 808, I would grant the request for reconsideration.