STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JEANETTE G. GILLIGAN, Charging Party,	)	Case No. SF-CE-1415
v.	)	PERB Decision No. 913
MONTEREY COUNTY OFFICE OF EDUCATION, Respondent.	)	December 13, 1991

Appearances: Jeanette G. Gilligan, on her own behalf; Breon, O'Donnell, Miller, Brown & Dannis by Martha Buell Scott, Attorney, for Monterey County Office of Education.

Before Hesse, Chairperson; Shank and Carlyle, Members.

DECISION AND ORDER

CARLYLE, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Jeanette G. Gilligan (Gilligan) of the attached proposed decision by an administrative law judge (ALJ). The ALJ dismissed the complaint which alleged that the Monterey County Office of Education (MCOE) violated the Educational Employment Relations Act (EERA) section 3543.5(a).[1] The Board has reviewed the entire record, including the proposed

[1]EERA is codified at Government Code section 3540 et seq. Section 3543.5 states, in pertinent part:

> 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.

decision, Gilligan's exceptions and MCOE's response thereto, and finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and therefore adopts the proposed decision as the decision of the Board itself.[2] We write separately, however, to briefly address MCOE's response to Gilligan's exceptions.

MCOE asserts, in its response to Gilligan's exceptions, that the Board agent erroneously issued the complaint because the facts alleged in the complaint were taken from a telephone conversation between the Board agent and Gilligan. MCOE argues that PERB regulations require the Board agent to review only written charges in the investigation of an unfair practice charge. PERB Regulation 32615[3] lists the information that should be included in an unfair practice charge. Specifically, Regulation 32615(a)(5) states the charge shall contain "[a] clear and concise statement of the facts and conduct alleged to constitute an unfair practice." PERB Regulation 32620[4] provides

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[2]Gilligan requested oral argument pursuant to Regulation 32315. We find no need to grant the request as the matter was thoroughly litigated by the parties and there are sufficient facts in the record to allow the Board to reach its decision.

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

[4]Regulation 32620 states:

> (a) When a charge is filed, it shall be assigned to a Board agent for processing.
>
> (b) The powers and duties of such Board agent shall be to:

the procedure for processing an unfair practice charge. Under Regulation 32620, a Board agent is specifically empowered to "make inquiries" and "facilitate communication and the exchange of information between the parties." Further, Regulation 32620(c) requires that the respondent be apprised of the allegations and be allowed to state its position during the investigation.[5]

> (1) Assist the charging party to state in proper form the information required by section 32615;
>
> (2) Answer procedural questions of each party regarding the processing of the case;
>
> (3) Facilitate communication and the exchange of information between the parties;
>
> (4) Make inquiries and review the charge and any accompanying materials to determine whether an unfair practice has been, or is being, committed, and determine whether the charge is subject to deferral to arbitration, or to dismissal for lack of timeliness.
>
> (5) Dismiss the charge or any part thereof as provided in section 32630 if it is determined that the charge or the evidence is insufficient to establish a prima facie case; or if it is determined that a complaint may not be issued in light of Government Code sections 3514.5, 3541.5 or 3563.2 or because a dispute arising under HEERA is subject to final and binding arbitration.
>
> (6) Issue a complaint pursuant to section 32640.
>
> (c) The respondent shall be apprised of the allegations, and may state its position on the charge during the course of the inquires.

[5]Here, MCOE does not assert that the Board agent failed to inform MCOE of Gilligan's allegations, or failed to allow MCOE to respond, but instead alleges the Board agent improperly considered Gilligan's oral allegations. The Board finds that, as

In Eastside Union School District (1984) PERB Decision No. 466, the Board found that a Board agent may not accept, as conclusive, respondent's ex parte statements regarding the allegations in an unfair practice charge. Further, the Board held that Board agents may not rule on the ultimate merits of the unfair practice charge. Except for this limitation, the Board agent has the authority to conduct an investigation to determine whether the unfair practice charge allegations state a prima facie case.

Additionally, the Board has found that a charging party's allegations were sufficient to state a prima facie case where the unfair practice charge lacked in specifics and could have been stated with greater clarity. (Regents of the University of California (AFT. Local 1474) (1987) PERB Decision No. 654-H.) Although the amended unfair practice charge may not be clear and concise in the present case, the charge contains sufficient factual allegations supporting the conclusion that a violation may have occurred. Therefore, we find that the General Counsel properly issued a complaint based on Gilligan's amended unfair practice charge.

The unfair practice charge and complaint in Case No. SF-CE-1415 is HEREBY DISMISSED.

Chairperson Hesse and Member Shank joined in this Decision.

MCOE was provided with the opportunity to respond to Gilligan's allegations, MCOE was not prejudiced due to the Board agent's consideration of Gilligan's oral allegations.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

JEANETTE G. GILLIGAN, Charging Party, V. MONTEREY COUNTY OFFICE OF EDUCATION, Respondent.	)	Unfair Practice Case No. SF-CE-1415 PROPOSED DECISION **(8/16/91)**

Appearances: Jeanette G. Gilligan, on her own behalf; Breon, O'Donnell, Miller, Brown & Dannis, by Martha Buell Scott, Attorney, for Monterey County Office of Education.

Before JAMES W. TAMM, Administrative Law Judge.

PROCEDURAL HISTORY

This unfair practice charge was filed by Jeanette G. Gilligan (Charging Party or Gilligan) against the Monterey County Office of Education (Employer or MCOE) alleging the Employer retaliated against Charging Party because of her exercise of protected rights, in violation of section 3543.5(a) of the Educational Employment Relations Act (EERA).[1] A complaint was

[1] The EERA is codified at Government Code section 3540 et. seq. The pertinent portion of section 3543.5 reads:

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

issued by the Office of the General Counsel for the Public Employment Relations Board (PERB) alleging that the Employer took adverse action against Gilligan by issuing her a Notice of Intent to Dismiss.

At the start of the formal hearing, the Charging Party amended her complaint on the record to allege that the adverse action taken against her also included her actual dismissal.

At the conclusion of two days of testimony, the hearing was recessed and the Charging Party was ordered to make an offer of proof as to the remainder of her case. This decision is in response to the evidence offered by Charging Party at the formal hearing as well as her offer of proof.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Under the test set forth by the PERB in Novato Unified School District (1982) PERB Decision No. 210, a prima facie case of discrimination or reprisal for protected activities is established if the charging party can prove that the employee participated in protected activities, that the protected activity was known to the employer, and that adverse action taken by the employer was motivated, at least in part, by the employee's protected activities.

At the time Charging Party was notified she was being dismissed, she was employed as a switchboard operator. Since at least as early as April 1989, Gilligan had been represented in numerous meetings with her employer by the California School

Employees Association (CSEA), the exclusive representative of classified employees at MCOE.

Between April 1989 and July 1990, Charging Party filed numerous grievances; many of those grievances were filed with the assistance of CSEA. The grievances covered a range of issues, such as denial of sick leave benefits, her supervisor's alleged refusal to meet with her, complaints by other employees against her, disputes over job duties and placement of letters of reprimand and other negative material into her personnel file.

This rather consistent pattern of the Charging Party engaging in protected activity was admitted by the Employer, either in the Answer to the Complaint or through the testimony of Charging Party's immediate supervisor, Gary Bousum. Therefore, the Charging Party has met two requirements of the Novato test; that she engaged in protected activity and that the employer had knowledge of that protected activity.

The Charging Party has also demonstrated that the Employer took adverse action against her in the form of the Notice of Intent to Dismiss, placing Charging Party on administrative leave pending her dismissal, then finally, her actual termination from employment.

What Charging Party has failed to demonstrate, however, through either evidence offered at the formal hearing or the offer of proof, is any connection or nexus between her protected activity and the adverse action taken against her by the Employer.

What was established instead, by Charging Party's own witnesses and documentary evidence, was that she was terminated for reasons having no connection to her protected activity. There was ample convincing evidence[2] that Charging Party was terminated for reasons such as her persistent refusal to follow her supervisor's directions, rudeness towards other employees and taking unauthorized actions. For example, Charging Party continued to screen telephone calls rather than putting them directly through to individuals who had been called. She had been the subject of numerous complaints by other employees that she had been extremely rude to them, sometimes in front of members of the general public. Her unauthorized actions included, for example, ordering a mail cart on an expedited basis from a local stationery store and ordering work directly from Pacific Bell without going through proper procedures. The Employer's dismissal action included over 25 such allegations.

There was ample evidence that the Employer's action was motivated solely by the allegations included in the dismissal notice. There was no convincing evidence that the Employer was motivated, in any way, by Charging Party's protected activity. For instance, the timing of Gilligan's dismissal is not suspicious because it came only after lengthy corrective efforts. The Employer carefully investigated allegations prior to taking any action and did not appear to overreact or to jump to

[2] The testimony of Gary Bousum was very credible.

conclusions. There were no shifting justifications offered by MCOE for its action. The Employer has consistently based its action upon a well documented history of poor work performance, inability or unwillingness to follow directions and rudeness to other employees. There was never any failure to offer justification to Gilligan at the time any disciplinary action was taken. It was usually well documented along with efforts for corrective action. MCOE followed standard policies in disciplining Gilligan. She was never denied an opportunity to be represented by her union or personal counsel. In fact, her supervisor made efforts to accommodate her in that regard. Meeting times were changed just so her Union representative could be available. Any disparate treatment actually favored Gilligan. For example, Gilligan was having difficulty performing certain duties. They were then removed from her, given to another employee and Gilligan was assured she would not be evaluated on those duties.

The Charging Party has therefore not met the burden established by Novato, i.e., that the adverse action taken against her was motivated by her exercise of protected activity. For that reason, this complaint must be dismissed.

SUMMARY AND ORDER

Jeanette G. Gilligan has demonstrated that she engaged in protected activity, that the Monterey County Office of Education (Employer) knew of that protected activity and that the Employer took adverse action against her by terminating her. Gilligan has

not proven any nexus between her protected activity and the adverse action taken against her. This case is therefore DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (See Cal. Code of Reg., tit. 8, sec. 32300.) A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing ". . .or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . . ." (See Cal. Code of Regs., title 8, sec. 32135; (Code Civ. Proc, sec. 1013 shall apply.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code of Regs., tit. 8, secs. 32300, 32305 and 32140.)

Dated: August 16, 1991

James W. Tamm
Administrative Law Judge