

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



FRESNO COUNTY SCHOOLS OFFICE)
EDUCATORS ASSOCIATION, CTA/NEA,)
)
Charging Party,) Case No. S-CE-1509
)
v.) PERB Decision No. 978
)
FRESNO COUNTY OFFICE OF EDUCATION,) March 9, 1993
)
Respondent.)
_____)

Appearances: California Teachers Association by Diane Ross, Attorney, for Fresno County Schools Office Educators Association, CTA/NEA; Stroup & deGoede by Daniel G. Stevenson, Attorney, for Fresno County Office of Education.

Before Blair, Chair; Hesse and Carlyle, Members.

DECISION AND ORDER

CARLYLE, Member: This case is before the Public Employment Relations Board (Board) on appeal by the Fresno County Schools Office Educators Association, CTA/NEA of the Board agent's partial dismissal, attached hereto, of its charge alleging that the Fresno County Office of Education violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA).¹

¹EERA 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.

The Board has reviewed the Board agent's warning and dismissal letters, and finding them to be free of prejudicial error, adopts them as the decision of the Board itself.

The Board hereby AFFIRMS the Board agent's partial dismissal in Case No. S-CE-1509.

Chair Blair joined in this Decision.

Member Hesse's concurrence/dissent begins on page 3.

(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.

Hesse, Member, concurring and dissenting: With the exception of one allegation, I concur with the Public Employment Relations Board's (PERB or Board) affirmance of the partial dismissal of the unfair practice charge in Case No. S-CE-1509. Following a de novo review of the original and amended unfair practice charge, I find that a prima facie case has been stated with regard to the charge that the employer allegedly discriminated against Carlos Jiminez (Jiminez) when it evaluated him on May 7, 1992.

Assuming that the allegations in the charge are true (see San Juan Unified School District (1977) EERB Decision No. 12¹), a prima facie charge alleging discrimination has been plead. In Novato Unified School District (1982) PERB Decision No. 210, the Board set forth the standard by which charges alleging discriminatory conduct under the Educational Employment Relations Act (Act) section 3543.5(a) are to be decided: (1) the unfair practice charge must allege that the employee engaged in activity protected by the Act; (2) the employer was aware of the activity; (3) the employer took adverse action against the employee; and (4) the employer's action was motivated by the protected activity.

Here, all of the elements of the Novato standard have been met in the charge that the employer allegedly discriminated against Jiminez because of his protected activity when it

¹Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board.

evaluated him for the second consecutive year. Therefore, I would reverse that portion of the dismissal and order that the matter be remanded to the PERB General Counsel for the issuance of a complaint.

PUBLIC EMPLOYMENT RELATIONS BOARD



Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916)322-3198



December 24, 1992

Diane Ross
Staff Attorney
California Teachers Association
1705 Murchison Drive
Burlingame, CA 94010

Re: Fresno County Schools Office Educators Association v. Fresno
County Office of Education
Unfair Practice Charge No. S-CE-1509
PARTIAL DISMISSAL LETTER

Dear Ms. Ross:

On September 30, 1992, you filed a charge in which you allege that the Fresno County Office of Education (FCOE) violated Government Code sections 3543.5(a), (b) and (c) (Educational Employment Relations Act (EERA or Act)). Specifically, you allege that the FCOE retaliated against Carlos Jiminez by refusing to acknowledge his status as an Association site representative and retaliated against Jiminez by evaluating him in the 1991-92 school year, after having evaluated him in the 1990-91 school year.

I indicated to you, in my attached letter dated December 16, 1992, that certain allegations contained in the charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended these allegations to state a prima facie case or withdrew them prior to December 23, 1992, the allegations would be dismissed. On December 21, 1992, you filed an amended charge.

Your amended charge alleges that the FCOE's "refusal to acknowledge Carlos Jiminez as a site representative and insistence upon determining the number and identity of site

representatives constitutes unlawful interference with the Association. This refusal to acknowledge Carlos Jiminez as a site representative has continued to date and constitutes a continuing violation."

In San Dieguito Union High School District (1982) PERB Decision No. 194, PERB determined that a "continuing violation would only be found where active conduct or grievances occurred within the limitations period that independently constituted an unfair practice. However, a continuing violation would not be found where the employer's conduct during the limitations period constituted an unfair practice only by its relation to the original offense." El Dorado Union High School District (1984) PERB Decision No. 382, at p. 4 (citations omitted).

As I stated in my December 16, 1992 letter, on or about January 22, 1992, the FCOE by letter informed the Association that it would only recognize Mr. Thomason as the site representative. On March 7th and 23rd Carlos Jiminez was informed that he would not be recognized as the site representative. This correspondence and Mr. Jiminez being specifically informed that he would not be recognized as the site representative indicates that the Association and Jiminez had knowledge that the FCOE may have engaged in an unfair labor practice as early as January 22, 1992. Although your amended charge alleges this is a continuing violation, you have failed to demonstrate that the FCOE has changed its original position of refusing to recognize Jiminez as a site representative. In addition, the FCOE has maintained its position of recognizing one site representative. (See UCLA Labor Relations Division (1989) PERB Decision No. 735-H, where the university's failure to change its position did not constitute a continuing violation.)

Your charge was filed with the Public Employment Relations Board on September 30, 1992, which means that any alleged unfair practice by the FCOE should have occurred during the six-month statutory period which began on March 30, 1992. Therefore, this allegation is untimely and is dismissed.

Your amended charge also states that the FCOE's "evaluation of Carlos Jiminez in the 1991-92 school year after having evaluating him in the 1990-91 constitutes an independent instance of discrimination and retaliation against Carlos Jiminez for his union activity." Although your amended charge contains numerous conclusionary statements regarding FCOE's "discriminatory attitude" and "disparate treatment" it fails to demonstrate that the FCOE evaluated Jiminez because of his union activity. Therefore, based on the facts and reasons contained in this letter and my letter of December 16, 1992 your allegations that the FCOE retaliated against Carlos Jiminez by refusing to

acknowledge his status as an Association site representative and by evaluating him in the 1991-92 school year, after having evaluated him in the 1990-91 school year shall be dismissed.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, you may obtain a review of this dismissal of certain allegations contained in the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code of Regs., tit. 8, sec. 32635(a).) To be timely filed, the original and five copies of such appeal must be actually received by the Board itself before the close of business (5 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing. (Cal. Code of Regs., tit. 8, sec. 32135.) Code of Civil Procedure section 1013 shall apply. The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

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 of Regs., tit. 8, sec. 32635(b).)

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 of Regs., tit. 8, sec. 32140 for the required contents and a sample form.) The document 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 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 of Regs., tit. 8, sec. 32132.)

PUBLIC EMPLOYMENT RELATIONS BOARD



Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916)322-3198



December 16, 1992

Diane Ross
1705 Murchison Drive
Burlingame, CA 94010

Re: Fresno County Schools Office Educators Association. CTA/NEA
v. Fresno County Office of Education
Unfair Practice Charge No. S-CE-1509
WARNING LETTER

Dear Ms. Ross:

On September 30, 1992, you filed a charge in which you allege that the Fresno County Office of Education (FCOE) violated Government Code sections 3543.5(a), (b) and (c) (Educational Employment Relations Act (EERA or Act)). Specifically, you allege that the FCOE retaliated against Carlos Jiminez by refusing to acknowledge his status as an Association site representative and retaliated against Jiminez by evaluating him in the 1991-92 school year, after having evaluated him in the 1990-91 school year. My investigation revealed the following facts.

On or about January 22, 1992 Timothy J. Nolt, Chapter President of the Fresno County Schools Office Educators Association (Association) received a letter from Andrew Rodarte, Administrator informing him that "Mr. Cecil Thomason is the site CTA representative for the Migrant Education Department," and to his knowledge "there is only one site CTA representative per department."

On or about March 6, 1992, Carlos Jiminez was informed by Cecil Thomason that the FCOE refused to recognize Jiminez as a site representative. On or about March 23, 1992, Carlos Jiminez was informed by Andy Rodarte that he would not be recognized as a site representative.

On or about May 7, 1992, Jiminez received an evaluation for the 1991-92 school year, after having been evaluated in the 1990-91 school year. Jiminez is the only Association employee to have been evaluated consecutively in 1990-91. The collective bargaining agreement between the parties states: "Those employees of more than two years shall be evaluated every other year unless either party shall make a request for more frequent evaluation."

In order to state a prima facie case a Charging Party must allege and ultimately establish that the conduct complained of either occurred or was discovered within the six-month period immediately preceding the filing of the charge. San Dieguito Union High School District (1982) PERB Decision No. 194. Government Code section 3541.5(a) states in relevant part:

Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following: (1) 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, . . .

Your charge was filed with the Public Employment Relations Board on September 30, 1992, which means that any alleged unfair practice by the FCOE should have occurred during the six-month statutory period which began on March 30, 1992.

The six month limitation period runs from the date the charging party knew or reasonably should have known of the alleged unfair practice, if the knowledge was obtained after the conduct occurred. Fairfield Suisun Unified School District (1985) PERB Decision No. 547.

On or about January 22, 1992, the FCOE by letter informed the Association that it would only recognize Mr. Thomason as the site representative. On March 7th and 23rd Carlos Jiminez was informed that he would not be recognized as the site representative. This correspondence and Mr. Jiminez being specifically informed that he would not be recognized as the site representative indicates that the Association and Jiminez had knowledge that the FCOE may have engaged in an unfair labor practice as early as January 22, 1992. Since the conduct you complained of and your receipt of knowledge of that conduct occurred outside the six-month limitation period, your charge is untimely and must be dismissed.

Your charge also alleges that the FCOE retaliated against Jiminez in violation of EERA section 3543.5(a) by evaluating him in the 1991-92 school year, after having evaluated him in the 1990-91 school year. To demonstrate a violation of EERA section

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3543.5(a), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210; Carlsbad Unified School District (1979) PERB Decision No. 89; Department of Developmental Services (1982) PERB Decision No. 228-S; California State University (Sacramento) (1982) PERB Decision No. 211-H.) Your charge fails to demonstrate that the FCOE evaluated Jiminez during the 1991-92 school year because of his exercise of protected activity and therefore does not state a prima facie violation of EERA section 3543.5(a).. Accordingly, that allegation is dismissed.

For these reasons the allegations that the FCOE retaliated against Carlos Jiminez by refusing to acknowledge his status as an Association site representative and by evaluating him in the 1991-92 school year, after having evaluated him in the 1990-91 school year, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts which would correct the deficiencies explained above, please 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 the charging party. The amended charge must be served on the respondent and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before December 23, 1992, I shall dismiss the above-described allegation from your charge. If you have any questions, please call me at (916) 322-3198.

Sincerely,

Michael E. Gash **fa**

Michael E. Gash
Regional Attorney