

Passno (Passno) a disciplinary letter, placed Passno on paid administrative leave, and ordered him to undergo a psychological examination in retaliation for his protected activity.

On December 11, 1997 a complaint was issued by PERB's Office of the General Counsel. The ALJ held a formal hearing on March 25 and 26, 1998 and rendered a proposed decision holding that the District violated EERA section 3543.5(a) and (b) when it issued a disciplinary letter to Passno in retaliation for his attendance at a grievance meeting. The ALJ dismissed the remaining allegations.

FINDINGS OF FACT

The District is a public school employer within the meaning of EERA section 3540.1(k). The Federation is an employee organization within the meaning of EERA section 3540.1(d). Passno is an employee within the meaning of EERA section 3540.1(j). The District and the Federation are parties to a collective bargaining agreement (CBA) with a negotiated term of July 1, 1994 through June 30, 1997.

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.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

The District has employed Passno at Ventura College for 28 years. He has coached baseball, tennis, and football and has served as head of the physical education department.

On May 22, 1997,² Steve Tobias (Tobias), Passno's immediate supervisor, requested a meeting with Ventura College President Larry Calderon (Calderon). During the meeting, Tobias informed Calderon that he had recently become aware that Passno had been convicted of spousal abuse. Tobias expressed concern about his relationship with Passno and indicated that he had begun to feel physically threatened by Passno. Calderon was troubled by Tobias' concerns. He considered Tobias a formidable athlete and felt that it would take something serious to make him react in this manner. Calderon and Tobias discussed the need to pursue some form of preventive action by the District.

Pursuant to his discussion with Calderon, Tobias contacted District Chancellor Philip Westin (Westin). Tobias met with Westin on May 22, as well. During that meeting, Tobias informed Westin that he had a security concern involving Passno. Tobias briefed Westin on the history of conflict between himself and Passno and described instances of angry behavior on Passno's part. Tobias also told Westin about a recent conversation he had with a police officer. The officer had informed Tobias that Passno had pled no contest to the charge of inflicting corporal

²All dates refer to 1997 unless otherwise indicated.

injury on his wife and advised Tobias to consider seeking an injunction against Passno.

On May 23, Westin asked Deputy Chancellor Michael Gregoryk (Gregoryk) to investigate the situation. Gregoryk proceeded to speak to a number of people, including Tobias and Calderon. Passno was not informed of this investigation.

On June 3, Passno filed seven grievances under the CBA. The CBA defines a grievance as "a written complaint alleging that there has been a refusal to apply [the CBA] or misapplication of the terms of [the CBA]." Nonetheless, two of Passno's grievances failed to reference any specific section of the CBA. The remaining five grievances cited CBA sections with little apparent relevance to the allegations. In addition, six of Passno's grievances failed to comply with the time limits set forth in the CBA. Despite these defects, Passno testified that he believed that the grievances were an appropriate way to address these issues.

Tobias reviewed the grievances at the first step of the grievance process and denied all seven. Passno then raised the grievances to the second (college president) step of the grievance process and requested a meeting with President Calderon. Although the CBA does not require Calderon to meet with a grievant at the second level, Calderon had made it a practice to meet with grievants and discuss their grievances. Accordingly, Calderon scheduled a meeting with Passno for July 9.

At the July 9 meeting, Calderon reviewed a few of Passno's grievances and explained why he considered them to be inappropriate. After a time, Calderon turned to Passno and told him that he would continue to go through the grievances but that it appeared to be a waste of time. Calderon testified that Passno acquiesced and, prior to the end of the meeting, agreed to withdraw the grievances.³

At that time, Calderon moved from behind his desk, sat down next to Passno and said, "Phil, I don't understand what you're doing. You seem awfully angry." Passno responded that he wanted to get past all of the problems and focus on teaching but that there were some "injustices" that needed to be resolved. Passno indicated that he was in therapy to deal with his anger.

On July 10, Calderon sent Passno two memoranda. The first was addressed to Passno and copied to the Federation grievance representative. That memorandum simply memorialized Passno's withdrawal of the seven grievances. The second memorandum was addressed to Passno and copied to Westin and Gregoryk. In this memorandum, Calderon indicated that, "after careful consideration I have become concerned about the degree of obsession with which you interpret circumstances related to your working relationships. In the interest of your safety as well as that of

³ There appears to be some dispute regarding whether Passno actually withdrew his grievances during the July 9 meeting. As that issue is not material to our resolution of this case, however, we make no specific finding regarding the disposition of Passno's seven grievances.

those with whom you work, I am therefore recommending to Chancellor Westin that you undergo some form of appropriate psychological evaluation to [sic] prior to Fall 1997 semester and be deemed fit to return to work."

Calderon testified that he sent two memoranda because he wanted to address two issues. First, he wished to bring official closure to the grievances and to put Passno's withdrawal of the seven grievances on record. Second, his observation of Passno, coupled with his meeting with Tobias had raised substantial safety concerns for Calderon. Calderon testified that he sent the second memorandum because he wished to inform Passno of his "observation and contemplation" of Passno's behavior. Calderon testified that safety was "the only basis" for his recommendation that Passno undergo a psychological evaluation.

On July 14, Gregoryk reported back to Westin regarding his investigation of Passno. Gregoryk informed Westin that his investigation had confirmed Tobias' concerns and that some employees feared that Passno's anger might be escalating. Gregoryk recommended that Passno be sent to a psychiatrist for evaluation. After consultation with the District's general counsel, Westin decided to procure an outside evaluation of the situation.

Westin retained the services of Michael Corcoran (Corcoran), a former Secret Service agent who had performed similar investigations for the District in the past. Gregoryk gave

Corcoran the names of four of Passno's long-term acquaintances. Gregoryk also gave Corcoran a number of documents, including the seven grievances, Calderon's July 10 memo, and a record of Passno's no-contest plea.

In mid-August, Corcoran submitted his report to Gregoryk. Based on his interviews and review of documents, Corcoran concluded that Passno represented a moderate threat of violence with Tobias as a possible target. Corcoran recommended that the District send Passno to a psychological evaluation to ensure that he was fit to continue working for the District.

Westin and Gregoryk discussed Corcoran's recommendations. Based on Corcoran's assessment, Passno's no contest plea, Tobias' reports of other incidents involving Passno and another employee's expressed concern that she might get caught up in an altercation between Tobias and Passno, Westin and Gregoryk decided to require Passno to undergo a fitness for duty evaluation. Westin testified that the decision was not based on Passno's grievances.

On August 15, Passno and a Federation representative met with Gregoryk. Gregoryk told Passno that the District was placing him on administrative leave with pay and that he should report to a doctor in Santa Monica for a psychological evaluation. He ordered Passno not to return to the campus until the evaluation was complete.

Passno met with the doctor for three days. After the

examination, the doctor recommended that the District return Passno to work. During the Fall of 1997, Passno worked on two special projects for Gregoryk. Passno began teaching again in the Spring of 1998.

DISCUSSION

As noted above, the complaint in this case alleged that the District retaliated against Passno both when Calderon issued the July 10 memorandum and when Gregoryk placed Passno on administrative leave pending a psychological evaluation.

In order to state a prima facie case for retaliation, a charging party must establish by a preponderance of the evidence that: (1) the employee engaged in activity protected by the EERA; (2) the employer knew of said activity; and (3) the employer took adverse action against the employee because of the activity. (Fall River Joint Unified School District (1998) PERB Decision No. 1259 (Fall River); Novato Unified School District (1982) PERB Decision No. 210 at p. 6 (Novato).) Although an employee's participation in protected activity and the employer's knowledge thereof can often be demonstrated by empirical evidence, direct proof of unlawful motivation is rarely possible. (Carlsbad Unified School District (1979) PERB Decision No. 89 at p. 11.) Accordingly, the Board recognizes the following circumstantial indications of unlawful motivation: (1) the proximity of time between the protected activity and the adverse action; (2) disparate treatment of the affected employee(s); (3)

departure from established procedures; (4) inconsistent or contradictory justifications for the employer's actions; and (5) inadequate investigation. (Fall River at p. 19; Baldwin Park Unified School District (1982) PERB Decision No. 221 at p. 16; Novato at p. 7.) If the charging party is able to demonstrate more than one of these circumstantial indicia of unlawful motivation, the Board will find that it is more likely than not that the employer took the adverse action in retaliation for the employee's protected activity. Once the charging party has established an implication of unlawful motivation, the burden of proof shifts to the employer to establish that it would have taken the adverse action in spite of the employee's protected activities. (Fall River at pp. 20-21; Novato at p. 14.)

July 10 Memorandum

The parties dispute every element of the prima facie case, including whether or not Passno's filing and pursuit of facially defective grievances was an activity protected by the EERA. However, the absence of any element of the prima facie case requires the Board to dismiss the allegation. (See, e.g., Los Angeles Unified School District (1998) PERB Decision No. 1300, warning letter at p. 3 (motivation); Sulphur Springs Union Elementary School District (1997) PERB Decision No. 1229, warning letter at pp. 4-5 (participation in protected activity); Little Lake School District (1997) PERB Decision No. 1228, warning letter at p. 3 (employer knowledge).) Assuming, for the moment,

that Passno engaged in protected activity and that Calderon's letter constituted an adverse action, we conclude that Calderon did not issue the July 10 memorandum because of Passno's protected activity.

The filing and pursuit of grievances is an activity protected by the EERA. (San Bernardino City Unified School District (1998) PERB Decision No. 1270, proposed dec. at p. 72; Healdsburg Union High School District (1997) PERB Decision No. 1185, proposed dec. at p. 47 (Healdsburg).) However, participation in protected activities does not insulate an employee from legitimate employer actions. (Fall River at pp. 22-24; Healdsburg, proposed dec. at p. 69.)

Here, Calderon testified that Passno appeared angry and frustrated during the grievance meeting. In addition, Tobias' expressed fear of Passno and Passno's no-contest plea on spousal abuse charges had made a substantial impression on Calderon. Calderon was aware that Tobias had expressed his concerns to the District administration and that the administration had begun an investigation into Passno's potential for violence. Under these circumstances, Calderon had an obligation to inform the administration of his concerns about Passno's attitude and conduct during the grievance meeting.

It was Passno's behavior, rather than his protected activity, which motivated Calderon to write the June 10 memorandum. Accordingly, Calderon's June 10 memorandum did not

violate the EERA.

Administrative Leave and Psychological Evaluation

We reach the same conclusion with regard to the allegations concerning the District's decision to place Passno on administrative leave and require him to undergo a psychological evaluation. As noted above, the process that resulted in the District's decision to place Passno on administrative leave pending a psychological evaluation originated prior to Passno's protected activity, when Westin talked to Tobias and then asked Gregoryk to investigate. After Passno filed his grievances, Westin and Gregoryk brought in Corcoran for an outside assessment of the situation, a move which would tend to limit any bias in the process. There is no evidence that Corcoran was hostile towards, or held any interest in, Passno's protected activity. Although he saw Calderon's July 10 memo, Corcoran did not interview Calderon but only interviewed long-term acquaintances of Passno. When Corcoran finally gave his assessment, it was reasonable for Gregoryk and Westin to rely on it.

Gregoryk testified credibly that the ultimate decision was based on Corcoran's assessment, Passno's no contest plea, Tobias' reports of Passno's behavior, and another employee's expressed concerns about a possible altercation. Westin credibly testified about the grievances, about which he knew little, and which were not a factor. Both the ultimate decision and the process that produced it were consistent with written District policy and with

the past treatment of another faculty member, who had not filed grievances. From the record as a whole, it appears the decision would have been the same whether or not Passno had engaged in protected activity.

ORDER

The charge and complaint in Case No. LA-CE-3829 are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Caffrey and Member Amador joined in this Decision.