STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, LOCAL UNION NO. 101, Charging Party, v. SAN JOSE UNIFIED SCHOOL DISTRICT, Respondent.	Case No. SF-CE-2323-E PERB Decision No. 1555 November 10, 2003

Appearances: Beeson, Tayer & Bodine by Andrew H. Baker, Attorney, for American Federation of State, County & Municipal Employees, Local Union No. 101; Miller, Brown & Dannis by Namita S. Brown, Attorney, for the San Jose Unified School District.

Before Baker, Whitehead and Neima, Members.

DECISION

BAKER, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the American Federation of State, County & Municipal Employees, Local Union No. 101 (AFSCME) from a Board agent's dismissal of its unfair practice charge. The charge alleged that the San Jose Unified School District (District) violated the Educational Employment Relations Act (EERA) [1] by laying off Robert Vasquez (Vasquez), the president of the AFSCME local, in retaliation for his protected activities. The Board agent dismissed the charge after finding the charge failed to establish the required nexus between Vasquez' protected activities and his layoff.

[1] EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

After reviewing the entire record in this matter, including AFSCME's appeal and the District's response, the Board reverses the Board agent's dismissal for the reasons set forth below.

BACKGROUND

Vasquez is employed as a programmer analyst III (programmer III) for the District. Vasquez is also the chapter president of the District's AFSCME unit. For many years Vasquez has been active in numerous activities on behalf of AFSCME, including the filing and processing of grievances. The charge describes Vasquez as an "aggressive advocate" for AFSCME members.

On or about March 12, 2003, the District announced the layoff of two of its three computer programmers, including both its programmer III positions. As one of two programmer IIIs, Vasquez was notified of his impending layoff. The one computer programmer position not slated for layoff was the lead systems analyst/programmer (lead). According to the District, the lead position supervises both the two programmer IIIs and system analysts.

AFSCME alleges, and the District does not appear to dispute, that Vasquez was the most senior of the three computer programmer positions. AFSCME argues that pursuant to the seniority system, Vasquez should have been the one retained. There was no particular need to retain the lead position, argues AFSCME, since once the other two programmer IIIs were laid off the lead position would have no supervisory duties. Other than supervising programmer IIIs, there is no difference between a programmer III and a lead, according to AFSCME. Thus, AFSCME argues that all three computer programmers should have been considered as part of the layoff pool and that Vasquez should have been retained based on his seniority.

BOARD AGENT'S DISMISSAL

AFSCME alleges that the District retaliated against Vasquez for his protected activities in violation of EERA section 3543.5(a).[2] The Board agent analyzed AFSCME's charge using the familiar framework set forth in Novato Unified School District (1982) PERB Decision No. 210 (Novato). The only prong of Novato in dispute was whether AFSCME's charge established the required nexus between Vasquez' protected activities and his layoff.

Analyzing the original and amended charge, the Board agent determined that AFSCME failed to establish the required nexus. According to the Board agent, AFSCME provided no facts demonstrating disparate treatment since both programmer IIIs were laid off. The District appeared to follow the contractual procedures and has been consistent throughout the process. Accordingly, the Board agent dismissed the charge.

AFSCME'S APPEAL

AFSCME argues on appeal that the Board agent erred in dismissing the charge. Specifically, AFSCME argues that the Board agent erred by not assuming its allegations to be true. According to AFSCME, the Board agent's dismissal letter relies on inaccurate facts provided by the District. The District's false justifications for the layoff of Vasquez and its departure from the seniority system provide ample evidence of unlawful animus, according to AFSCME.

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[2] EERA section 3543.5 provides, 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.

AFSCME also provides additional facts in support of its charge. Aware of PERB Regulation 32635(b)[3], AFSCME asserts that good cause exists for the Board to take notice of the new allegations because, "the warning letter did not contain a degree of specificity sufficient to clarify the evidence it considered lacking to show a prima facie case."

DISTRICT'S RESPONSE

The District responds that the Board agent correctly dismissed the charge. In support of its position, the District also provides many factual allegations. Specifically, the District asserts that Vasquez was not targeted but was merely a victim of a "massive reduction in force" necessitated by budget cuts. The programmer III positions were just two of many layoffs. While the District concedes that Vasquez participated in protected activities, the District denies that it targeted Vasquez for layoff in retaliation for those activities. The District reiterates its position that it was necessary to retain the lead position and that Vasquez was unqualified to fill it. Accordingly, the District asserts that the charge was properly dismissed.

DISCUSSION

To demonstrate a violation of EERA section 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 employee because of the exercise of those rights. (Novato; Carlsbad Unified School District (1979) PERB Decision No. 89.) The sole issue in this case is whether AFSCME has established the third prong of Novato, nexus.

[3] PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq. Regulation 32635(b) provides:

One factor establishing nexus is a showing that the employer's adverse action was taken in close temporal proximity to the employee's protected conduct. (North Sacramento School District (1982) PERB Decision No. 264 (North Sacramento).) Timing, without more, however, is not enough to demonstrate the necessary nexus between the adverse action and the protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District (1979) PERB Decision No. 104.); (3) the employer's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S; (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; (6) employer animosity towards union activists (Cupertino Union Elementary School District) (1986) PERB Decision No. 572.); or (7) any other facts which might demonstrate the employer's unlawful motive. (Novato; North Sacramento.)

AFSCME argues that it has sufficiently alleged that the District provided inconsistent or contradictory justifications for its actions and departed from established procedures in implementing the layoff. The Board agrees. First, AFSCME has alleged that the District's purported reason for not subjecting the lead position to potential layoff is false or contradictory. Specifically, AFSCME asserts that the only difference between the lead and a

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(b) Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence.

programmer III is that the lead oversees the programmer III. Since two of the three computer programmers are being laid off, the remaining individual will have no oversight duties, according to AFSCME. Thus, asserts AFSCME, the District's purported justification makes no sense. The District vigorously denies AFSCME's assertion that there is no difference between the lead position and a programmer III. However, at this stage, AFSCME's essential allegations must be deemed true. (Golden Plains Unified School District (2002) PERB Decision No. 1489 (Golden Plains); San Juan Unified School District (1977) EERB[4] Decision No. 12 (San Juan).) Accepting AFSCME's allegations as true, the Board finds that AFSCME has sufficiently alleged false or contradictory justifications by the District.[5]

Second, AFSCME alleges that the District departed from the established seniority system by not considering the lead position for layoff. According to AFSCME, the lead and programmer positions perform identical functions. Pursuant to past practice all three positions should have been considered for layoff. If the District had followed past practice, Vasquez would have been spared as the most senior of the three computer programmers. Again, the District disputes AFSCME's allegation that the lead and programmer III positions are equivalent. However, as noted above, the Board must deem AFSCME's allegations to be true. (Golden Plains; San Juan.) Accepting AFSCME's allegations as true, the Board finds that AFSCME has sufficiently alleged a departure from established practice by the District.

[4] Prior to January 1978, PERB was known as the Educational Employment Relations Board or EERB.

[5] In accepting AFSCME's allegations as true, the Board does not accept those allegations set forth in AFSCME's appeal. The Board agent's warning letter, requesting AFSCME to furnish any further evidence, was sufficiently clear. Accordingly, AFSCME has not shown good cause for bringing new allegations and evidence at this juncture.

Based on these findings, the Board concludes that AFSCME has established the required nexus under Novato. Accordingly, the Board reverses the Board agent's dismissal and remands this case to Office of the General Counsel for issuance of a complaint.

ORDER

The unfair practice charge in Case No. SF-CE-2323-E is hereby REMANDED to the Office of the General Counsel with instructions to issue a complaint in this matter.

Members Whitehead and Neima joined in this Decision.