

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



BRYAN ERIC ASTRACHAN,

Charging Party,

v.

LOS ANGELES COMMUNITY COLLEGE
DISTRICT,

Respondent.

Case No. LA-CE-4497-E

PERB Decision No. 1668

July 28, 2004

Appearance: Bryan Eric Astrachan, on his own behalf.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case is before the Public Employment Relations Board (Board) on exceptions filed by Bryan Eric Astrachan (Astrachan) to a proposed decision (attached) of the administrative law judge (ALJ). The underlying unfair practice charge alleged that the Los Angeles Community College District violated the Educational Employment Relations Act (EERA)¹ by retaliating against Astrachan for seeking the assistance of his union. After Astrachan rested his case, the ALJ dismissed the charge and complaint on motion for failure to state a prima facie case.

The Board has reviewed the entire record in this matter, including the ALJ's proposed decision and Astrachan's exceptions. The Board finds the proposed decision to be free of prejudicial error and adopts it as the decision of the Board itself.

¹EERA is codified at Government Code section 3540, et seq.

ORDER

The unfair practice charge and complaint in Case No. LA-CE-4497-E is hereby
DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Whitehead joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



BRYAN ERIC ASTRACHAN,

Charging Party,

v.

LOS ANGELES COMMUNITY COLLEGE
DISTRICT,

Respondent.

UNFAIR PRACTICE
CASE NO. LA-CE-4497-E

PROPOSED DECISION
(3/29/04)

Appearances: Bryan Eric Astrachan, on his own behalf; Jones & Matson by Urrea C. Jones, Jr., Attorney, for Los Angeles Community College District.

Before Thomas J. Allen, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, an employee alleges that his employer retaliated against him for contacting his union. The employer denies any retaliation.

Bryan Eric Astrachan (Astrachan) filed an unfair practice charge against the Los Angeles Community College District (District) on March 18, 2003. The Office of the General Counsel of the Public Employment Relations Board (PERB) issued a complaint on May 2, 2003, to which the District filed an answer on May 30, 2003. PERB held informal settlement conferences on July 1 and 10, 2003, but the case was not settled.

PERB held a formal hearing on November 24, 2003. Astrachan represented himself and was his only witness. He was allowed to testify in a narrative fashion, and all ten of his exhibits were received in evidence.

At the close of Astrachan's case in chief, the District made a motion to dismiss. The hearing was recessed for preparation of a transcript and briefing of the motion. Astrachan

received a copy of the transcript but chose not to file a brief. With the filing of the District's brief on February 2, 2004, the matter was submitted for decision.

FINDINGS OF FACT

The District is a public school employer under the Educational Employment Relations Act (EERA).¹ Astrachan is an employee under EERA.

The PERB complaint alleges in part:

3. In June of 2002, Mr. Astrachan exercised rights guaranteed by the Educational Employment Relations Act by contacting his Union, the American Federation of Teachers, for assistance with his employment relationship with the Los Angeles Community College District.

4. During Winter (January 6th through February 13th) and Spring (February 18th through June 16th) 2003, Respondent [the District], acting through its agent, Dean of Academic Affairs Abraham Farkus [sic], took adverse action against Mr. Astrachan by denying him teaching assignments.

The PERB complaint further alleges that the District took the actions described in paragraph 4 because of Astrachan's activities described in paragraph 3 and thus violated EERA section 3543.5(a).

With regard to Astrachan's alleged union contact in June 2002, Astrachan's clearest testimony was as follows:

. . . I contacted Darrell Eckersley at the American Federation of Teachers on the telephone and expressed the concern that I had that I was not being treated appropriately at West Los Angeles College.

We examined the contract, we discussed the issues that I was being treated unfairly, and he said he would contact again [Dean] Mr. Abe Farkas. . . .

Neither Mr. Eckersley nor Dean Farkas testified, and there was no other evidence that the District actually learned about Astrachan's union contact.

¹ EERA is codified at Government Code section 3540 and following.

With regard to Astrachan's alleged denial of teaching assignments in winter 2003, he testified as follows:

Winter, which was January 6 through February 13, I was not given an assignment. I was promised an assignment by [Division Chair] Professor Stapleton. When I was asked why I was not given an assignment, he told me that Abe Farkas, the acting dean would not approve it.

Division Chair Charles "Buck" Stapleton did not testify.

With regard to Astrachan's alleged denial of teaching assignments in spring 2003, Astrachan testified:

. . . Last semester, which was spring of 2003, I had an assignment at Pierce College and an assignment at West Los Angeles College. The one at West was obtained after a second level grievance hearing.

Astrachan explained:

The hourly seniority at West Los Angeles, I filed a grievance and was successful in demonstrating that I in fact should have been placed on the seniority list. I did not get placement on the seniority list until 2003 in approximately May of 2003. Having gotten hourly seniority, I was then given a class, a three unit class to teach, at West Los Angeles College. . . .

It is not apparent what teaching assignments (if any) Astrachan was denied in spring 2003 or what reasons (if any) he was given for any denial.

In his opening statement, Astrachan stated:

On June 3 of this year, 2003, at approximately 5:00 p.m. on the campus of West Los Angeles College, I was informed by [Division Chair] Buck Stapleton . . . that if I had not filed my complaints, I would in fact have a position, an assignment.

Although Astrachan was told that his opening statement would not be evidence on which a finding could be made, he did not repeat this statement when he testified under oath.

Astrachan did testify that at the time of the hearing in November 2003 he had no present assignment with the District and that he believed this to be "a direct result of filing my

PERB complaint and seeking [a] remedy.” The PERB complaint did not, however, cover this issue, and Astrachan made no motion to amend the complaint.

ISSUE

Was Astrachan denied teaching assignments in winter and spring 2003 because he contacted his union in June 2002?

CONCLUSIONS OF LAW

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 Unified School District (1982) PERB Decision No. 210 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (North Sacramento School District (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "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 School District, supra, PERB Decision No. 264.)

In the present case, Astrachan's testimony did establish that he exercised rights under EERA by contacting his union in June 2002. Astrachan's testimony did not, however, establish that his employer had knowledge of that contact. According to Astrachan, his union representative said he would contact Dean Farkas, but neither the representative nor the dean testified, and there was no other evidence that the District actually learned about Astrachan's union contact. This failure of evidence is in itself fatal to Astrachan's case.

Astrachan's testimony did appear to establish what may be characterized as an adverse action against him in winter 2003. He testified that Division Chair Stapleton promised him an (unspecified) assignment but did not give him one, explaining that Dean Farkas would not approve it. There is no evidence, however, that the denial involved disparate treatment, a departure from established procedures, inconsistent or contradictory justifications, or other evidence of unlawful motive. I therefore could not find a nexus between this adverse action and Astrachan's union contact in June 2002, even if I could find that the District had knowledge of that contact.

With regard to spring 2003, I could not even find an adverse action against Astrachan. The evidence shows he received two teaching assignments that spring, one of them after a successful grievance concerning seniority. The evidence does not show that he was denied any

teaching assignments that spring, or what they might have been, or why they might have been denied.

I conclude that Astrachan has not carried his burden of establishing a prima facie case of retaliation as alleged in the PERB complaint, and that no purpose would be served by continuing the hearing. (San Francisco Unified School District (1986) PERB Decision No. 573.)

PROPOSED ORDER

Based on the foregoing findings of fact and conclusions of law, and the entire record in this case, it is ordered that the complaint and the underlying unfair practice charge in Case No. LA-CE-4497-E, Bryan Eric Astrachan v. Los Angeles Community College District, is hereby 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 Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

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. (Cal. Code Regs., tit. 8, sec. 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Cal. Code Regs., tit. 8, secs. 32135(a) and 32130.) A document is also considered "filed" when received by facsimile transmission before the close

of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

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 Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

THOMAS J. ALLEN
Administrative Law Judge