

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



EVELYN YBARRA-GROSFIELD,

Charging Party,

v.

OXNARD ELEMENTARY SCHOOL DISTRICT,

Respondent.

Case No. LA-CE-4729-E

PERB Decision No. 1679

August 20, 2004

Appearances: Evelyn Ybarra-Grosfield, on her own behalf; Burke, Williams & Sorensen by Ellen J. Shadur, Attorney, for Oxnard Elementary School District.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Evelyn Ybarra-Grosfield (Ybarra-Grosfield) of a Board agent's dismissal (attached) of her unfair practice charge. The charge alleged that the Oxnard Elementary School District (District) violated the Educational Employment Relations Act (EERA)¹ by forcing her to use family medical leave, canceling her disability insurance, and denying her legal representation.

The Board has reviewed the entire record in this matter, including the unfair practice charge, the warning and dismissal letters, Ybarra-Grosfield's appeal and the District's response. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself, subject to the discussion below.

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

DISCUSSION

In her appeal, Ybarra-Grosfield offers new supporting evidence and alleges that since she filed her charge, the District has taken additional discriminatory actions against her. The Board may not consider, however, any new evidence or allegations on appeal absent a showing of good cause. (PERB Reg. 32635.)² Here, Ybarra-Grosfield has not made such a showing.³

Even if Ybarra-Grosfield's new evidence was considered, the disposition of this matter would not change. The charge simply fails to establish the elements necessary for a prima facie case. (See Novato Unified School District (1982) PERB Decision No. 210; Carlsbad Unified School District (1979) PERB Decision No. 89.) To the contrary, most of Ybarra-Grosfield's allegations appear to be the province of forums other than PERB. Accordingly, the charge is dismissed.

ORDER

The unfair practice charge in Case No. LA-CE-4729-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Whitehead joined in this Decision.

²PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq.

³To the extent Ybarra-Grosfield alleges additional discriminatory actions by the District, the Board agent properly informed her that she could file another unfair practice charge.

PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1023
Fax: (510) 622-1027



May 21, 2004

Evelyn Ybarra-Grosfield

Re: Evelyn Ybarra-Grosfield v. Oxnard Elementary School District
Unfair Practice Charge No. LA-CE-4729-E
DISMISSAL LETTER

Dear Ms. Ybarra-Grosfield:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 25, 2004. Evelyn Ybarra-Grosfield alleges that the Oxnard Elementary School District violated Educational Employment Relations Act (EERA)¹ sections 3543.2 and 3543.5 by forcing her to use Family Medical Leave, canceling her disability insurance, and denying her legal representation.

I indicated to you in my attached letter dated May 7, 2004, that the above-referenced 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 the charge to state a prima facie case or withdrew it prior to May 17, 2004, the charge would be dismissed.

I had not received either an amended charge or a request for withdrawal and on May 18, 2004, I left a message for you to that effect. On May 19, 2004, I spoke with you confirmed that if I dismissed the charge you would have the right to appeal. You indicated that you would like to pursue that option. You also indicated the District had taken new actions against you and I confirmed that you could file a new unfair practice charge. As I have not received an amended charge or request for withdrawal, I am dismissing the charge based on the facts and reasons contained in my May 7, 2004 letter.

Right to Appeal

Pursuant to PERB Regulations,² you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Regulation 32635(a).) Any document filed with the Board must contain the case

¹ EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

² PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Regulations 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 Regulation 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. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

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

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. (Regulation 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 Regulation 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. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

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. (Regulation 32132.)

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Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

ROBERT THOMPSON

General Counsel

By

Tammy Samel

Regional Attorney

Attachment

cc: Ellen J. Shadur

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May 7, 2004

Evelyn Ybarra Grosfield

Re: Evelyn Ybarra Grosfield v. Oxnard Elementary School District
Unfair Practice Charge No. LA-CE-4729-E
WARNING LETTER

Dear Ms. Ybarra Grosfield:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 25, 2004. Evelyn Ybarra-Grosfield alleges that the Oxnard Elementary School District violated Educational Employment Relations Act (EERA)¹ sections 3543.2 and 3543.5 by forcing her to use Family Medical Leave, canceling her disability insurance, and denying her legal representation.² My investigation revealed the following information.

The Oxnard Elementary School District employs Evelyn Ybarra-Grosfield. The Oxnard Educators Association exclusively represents her.

Family Care Medical Leave

On December 12, 2003, Ybarra-Grosfield provided a letter to the District from her doctor indicating that she was "disabled from teaching" and that could not return to work until she could have a more dust and allergen-free environment. On December 17, 2003, Ybarra-Grosfield provided a letter to the District indicating she could return to work on December 18, 2003. On December 18, 2003, Ybarra-Grosfield provided a letter stating she could not return to work in Room 304 and that she would be off work until further evaluation. By January 23, 2004, Ybarra Grosfield had not returned to work. On that day, the District wrote to Ybarra Grosfield indicating that she would be considered on Family Care and Medical Leave.

¹ EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

² The charge also includes facts regarding the District's failure to properly pay Ybarra Grosfield. To the extent that these facts are duplicative of those in charge LA-CE-4722-E they are not addressed herein.

The District's letter indicates that its decision is based on Article VI of the collective bargaining agreement. The letter further indicates Ybarra Grosfield should meet with the District to pursue a reasonable accommodation if she wishes to return to work.

On January 30, 2004, Ybarra Grosfield's doctor issued another letter indicating she was free to return to work. The District told Ybarra Grosfield that she should not return to work. On January 31, 2004, Ybarra Grosfield indicated in an email that she had not been released to return to work.

On February 2, 2004, Ybarra Grosfield met with Assistant Superintendent Marc Jackson to discuss reasonable accommodations. Jackson indicated she could not return to work because the District was working on providing Family Care Medical Leave. Ybarra Grosfield objected and indicated she wanted to return to work. On February 9, 2004, Ybarra Grosfield again notified the District that she was ready to return to work. On February 10, 2004, the District notified Ybarra Grosfield that she must submit to an evaluation by a District physician to determine whether she could return to work.

On February 17, 2004, Ybarra Grosfield met with Jackson and OEA Representative Eleanor Crilly. Jackson refused to allow Grosfield to return to work pending an evaluation by a District doctor. Jackson also indicated that an air quality report indicated the room requested by Ybarra Grosfield was worse than other rooms. The District denied Ybarra Grosfield's request for a copy of that report.

On February 23, 2004, the District wrote to Ybarra Grosfield stating, in pertinent part:

In view of the inconsistent statement made your own physician and by you, the District is concerned that you may not be fit to return to work, or alternatively, that you were in fact able to work during your periods of absence in December and January. The District would like to have you examined by an independent physician to determine if you are able to work. Moreover, we have offered you several different dates for an appointment, each of which you have rejected, claiming that you are too busy.

The District placed Ybarra Grosfield on paid administrative leave pending a resolution of whether she could return to work.

Denial of Legal Representation

On September 8, 2003, Ybarra Grosfield, her attorney, her attorney's assistant, OEA Representative Roberto Gallegos, and the District's attorney Yuri Calderon met with a mediator. The mediator indicated that OEA was Ybarra Grosfield's exclusive representative. Ybarra Grosfield contends by allowing the District to have an attorney present during the mediation and telling her that OEA was her exclusive representative, the mediator denied her right to legal representation. Ybarra Grosfield wanted her attorney to make a presentation on

three grievances. Ybarra Grosfield contends the District prevented this presentation when Calderon presented a new set of documents regarding her pay.

On January 26, 2004, Ybarra Grosfield told the OEA she was unable to attend a second mediation session and would like it postponed. Ybarra Grosfield also indicated she wanted legal representation to be present. Despite Ybarra Grosfield's request, the District and OEA representatives held a mediation session on January 30, 2004 without her. Following the mediation, OEA informed Ybarra Grosfield that the mediator determined that she owed the District money.

On February 2, 2004, the mediator contacted Ybarra Grosfield with a settlement offer. He advised that she not get too greedy and explained how another teacher who fought the District with an outside attorney had lost. Ybarra Grosfield rejected the offer.

On February 8, 2004, Ybarra Grosfield contacted OEA President Ann McCarthy regarding the second mediation session and the OEA Executive Session regarding her issues. McCarthy indicated that OEA had determined that her grievance would not prevail at arbitration.

Canceling of Disability Insurance

The American Fidelity Assurance company provides Ybarra Grosfield with group disability insurance. The District told the company that Ybarra Grosfield was on unpaid leave and therefore no longer eligible for insurance. Ybarra Grosfield explained to the company that she was appealing the denial of her workers compensation claim and had requested the District to deduct premiums for insurance. The company representative contacted Ybarra Grosfield and indicated her insurance was reinstated and that she would contact the District's representative Karen Phipps to take care of this issue.

The above-stated information fails to state a prima facie violation for the reasons that follow.

The charge specifically cites EERA section 3543.2 and 3543.5. EERA section 3543.2 defines the scope of representation and requires the employer and exclusive representative to negotiate. Ybarra Grosfield, as an individual employee does not have standing to pursue a failure to negotiate charge. (West Contra Costa Unified School District (Hughes-Tutass) (2001) PERB Decision No. 1427.) Thus, this allegation is dismissed.

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 employees 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.)

Evidence of adverse action is also required to support a claim of discrimination or reprisal under the Novato standard. (Palo Verde Unified School District (1988) PERB Decision No. 689.) In determining whether such evidence is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (Ibid.) In a later decision, the Board further explained that:

The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment. [Newark Unified School District (1991) PERB Decision No. 864; emphasis added; footnote omitted.]

Although the charge cites EERA section 3543.5, the charge does not include a statement indicating why Ybarra-Grosfield believes the District is taking action against her. Nor does the charge provide information regarding any specific relationship between the District's actions and any protected activities. A charging party should allege the "who, what, when, where, and how" of an unfair practice. (United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision 944.) Mere legal conclusions are insufficient. (See State of California (Department of Food and Agriculture) (1994) PERB Decision No. 1071-S.) Thus, the charge should be dismissed.

The facts of LA-CE-4722-E indicate that Ybarra-Grosfield filed a grievance on April 28, 2003. This charge could be read to allege that the District is discriminating against Ybarra-Grosfield for that protected activity. However, the charge fails to demonstrate a prima facie violation based on that theory. The charge does not demonstrate the District took adverse action against Ybarra-Grosfield. Although the charge alleges the District is forcing Ybarra-Grosfield to take

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Family Care and Medical Leave, it is unclear how that action is adverse to Ybarra-Grosfield. Without such leave, it appears Ybarra-Grosfield's failure to return to work after her doctor's December 17, 2003 note indicating she could return to work is unexcused. Additionally, the District did not place Ybarra Grosfield on Family Care and Medical Leave, but instead placed her on paid administrative leave. The charge similarly fails to demonstrate the District violated the Act by canceling her disability insurance. Ybarra Grosfield's insurance was reinstated. Thus, the charge fails to demonstrate a retaliation violation.

The charge also claims the District denied Ybarra Grosfield legal representation. The District is not responsible for conduct by the exclusive representative. Nor does the charge demonstrate the mediator was an agent of the District. It is unclear how the District's actions during the mediation violated the Act. (United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision 944.) Thus, this allegation must also be dismissed.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts that 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 have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before May 17, 2004, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Tammy Samsel
Regional Attorney

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