

We have reviewed the entire record in this matter, including the initial unfair practice charge, the amended charge, the warning and dismissal letters, Mandell's appeal (along with the first second and third addenda) and the District's response.³ Based on this review, we find the Board agent's dismissal free from prejudicial error and, therefore, adopt the warning and dismissal letters as a decision of the Board itself.

ORDER

The unfair practice charge in Case No. SF-CE-2589-E is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Chair Neuwald and Member Shek joined in this Decision.

³Mandell also filed a fourth addendum which the PERB Appeals Assistant determined was not timely filed, and consequently, did not accept. On appeal, the Board found Mandell did not show good cause to excuse his late filing and denied his request to accept the fourth addendum. (San Leandro Unified School District (2007) PERB Order No. Ad-366.) Accordingly, the fourth addendum was not considered by the Board in making this decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

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



March 19, 2007

GREGORY K. MANDELL

Re: Gregory K. Mandell v. San Leandro Unified School District
Unfair Practice Charge No. SF-CE-2589-E
DISMISSAL LETTER

Dear Mr. Mandell:

The above-referenced unfair practice charge was filed on December 27, 2006. Gregory K. Mandell alleges that the San Leandro Unified School District (District or SLUSD) violated the Educational Employment Relations Act (EERA) at section 3543.5 by discriminating against him for his protected activity. Charging Party amended the charge on March 6, 2007. In both the original and amended charges, Mr. Mandell alleges that the employer's conduct has also violated Government Code sections 3512, 3515, 3515.5, 3519, 3543 and 3543.1.

My investigation of both the original and amended charges revealed the following. On August 28, 2006, Mr. Mandell was given a verbal offer of employment, and provided a membership enrollment form for CTA. On August 30, 2006, Mr. Mandell was given a Statement of Temporary Employment by the District, stating that he was hired as a temporary intern teacher through the District's intern program. Mr. Mandell was hired to teach math.

During a meeting on September 12, 2006, Mr. Harp, the Bancroft Middle School Vice Principal, criticized Mr. Mandell's classroom rules, which were posted in his classroom and were also distributed to students in a handout. Mr. Harp believed that the rules were too subjective and contained exceptions. One of the rules disputed by Mr. Harp was Mr. Mandell's rule that "disrespectful conduct towards others will not be tolerated."

On September 13, 2006, Mr. Harp conducted a classroom observation of Mr. Mandell. During the observation, Mr. Mandell was instructing his students how to place a proper heading on their assignments. On September 14, 2006, Mr. Harp met with Mr. Mandell to discuss the observation. During this after school meeting in Mr. Harp's office, Mr. Harp raised several concerns with Mr. Mandell. Mr. Harp instructed Mr. Mandell that he should be spending instructional time teaching math, and that it was not appropriate for him to spend instructional time teaching students how to place a proper heading on their homework. Mr. Harp also informed Mr. Mandell that he should not be assigning his students independent work unless he was actively walking around the room providing assistance to them. Mr. Harp also criticized Mr. Mandell's practice of taking a point off of a student's homework for failing to write a

proper heading. Finally, Mr. Harp instructed Mr. Mandell that he needed to vary his teaching techniques, so that students were working both in teams and independently.

On September 17, 2006, Mr. Mandell sent an email to Mr. Harp. The email begins with the statement, "In accordance with Article V Section C(1) of the contract between SLUSD and SLTA, [San Leandro Teachers Association] I am providing you this formal written grievance. My assertion is that you have repeatedly violated the non-discrimination clause of Article II of the SLUSD/SLTA contract. Below is a list of your actions toward me which prove my assertion." What follows are four "discriminatory acts" by Mr. Harp and one "miscellaneous" complaint. The first three "discriminatory acts" are based on Mr. Harp's criticism of Mr. Mandell's classroom teaching methods and performance, based on the above discussion of Mr. Harp's observations and comments on September 12, 13 and 14. The "miscellaneous" complaint refers to an incident during an after-school meeting between Mr. Mandell and Mr. Harp in which the two men disagreed over basic teaching methods.

On September 25, 2006, Mr. Mandell filed a complaint about Bancroft Middle School Administrators. This complaint apparently addressed Mr. Mandell's belief that he was being denied his right to suspend disruptive students from his classroom. A meeting was scheduled for September 27, 2006 with Mr. Mandell, Mr. Harp, and two union representatives to discuss Mr. Mandell's September 17 email. The meeting was cancelled on the morning of September 27, however, due to a lack of substitute teachers to cover the classrooms of all those teachers who would be in attendance at the meeting. The meeting was rescheduled for September 29, 2006. On the morning of September 29, Mr. Mandell, Principal Mary Ann Valles, Union Representative Tom Morse, and Assistant Superintendent Mike Martinez were in attendance. The concerns raised in the email were not discussed at the meeting. Instead, Ms. Valles informed Mr. Mandell that he was being fired, for "performance concerns," and that he was "not a good fit," for the job. Ms. Valles refused to provide any details. Mr. Mandell states that he was not informed of any performance related issues, prior to this meeting.¹

In its response, the District makes several arguments. First, the District argues that Mr. Mandell never filed a grievance – rather, he sent several emails to administrators, complaining that the District was failing to comply with the Education Code with regard to student suspensions. Second, the District argues that Mr. Mandell resigned, and that the District never took any adverse action against him. Third, the District argues that even assuming Mr. Mandell had established that he engaged in protected activity and the District took adverse actions against him, Mr. Mandell has failed to establish any nexus between his protected activity and the adverse acts. Finally, the District argues that Mr. Mandell had misinformed the District about his eligibility to teach, and when the District learned that Mr. Mandell was not in a teacher credential program in September 2006, it would have fired him regardless of his protected activity.

¹ This statement contradicts Mr. Mandell's own statements in the email to Mr. Harp where he disputes Mr. Harp's criticisms of his work performance.

The District attaches Article V of the collective bargaining agreement. The salient portions of the agreement are as follows:

A. Definition

1. A 'grievance' is a formal written allegation by a Member of the Bargaining Unit that he or she has been adversely affected by a violation or misinterpretation of a written provision of this Agreement. A similar allegation filed by the Association shall also qualify as a "grievance." Appeal of any law, district policy, or administrative decision not covered by this Agreement shall not be subject to the grievance procedure.

5. A "grievance form" is a mutually agreed upon form between the District and the Association that should be used when filing a formal grievance.

C. Formal Level I

1. A formal written grievance must be presented to the immediate supervisor. This will included [sic] a clear, concise statement of the alleged grievance, the circumstances involved, the decision rendered at the informal conference, and the specific remedy sought. Formal grievances are to be filed on the agreed upon grievance form.

2. A written statement must be presented to the immediate supervisor. This statement shall be a clear, concise statement of the alleged grievance, the circumstances involved, the decision rendered at the informal conference, and the specific remedy sought.

3. A conferee may be present at this or any other level of the procedure.

4. The immediate supervisor shall communicate his/her decision to the employee in writing within ten (10) days after receiving the written statement. If the immediate supervisor does not respond within the time limits, the grievant may appeal to the next level.

5. Within the above time limits either party may request a personal conference.

The grievance procedure ends in binding arbitration.

Respondent also attaches copies of Mr. Mandell's October 2, 2006 resignation, and a February 12, 2006 print out from the California Commission on Teacher Credentialing web page, stating that Gregory Keith Mandell holds no credentials. In the comments section of the letter of resignation that Mr. Mandell provided on October 2, 2006, Mr. Mandell wrote the following:

Mike Martinez, Asst. Superintendent, made the false statement that I am not enrolled in National University's teacher credential program. Made t[he] statem[ent] on 9/29/[06] at the 8[:30] meeting. (Emphasis in original.)

A note appears at the bottom of the form in a different handwriting that states, "Spoke to Greg re: his statement that I made a 'false statement.' He indicated that he made an error and he was not enrolled in a Program. MM 10/2/06."

Mr. Mandell replied to the District's position statement, refuting some of the claims made therein. In particular, Mr. Mandell states that on September 29, Ms. Valles stated to him in the presence of witnesses that she was exercising her right under the Education Code to terminate his employment, effective immediately. He was also ordered to hand over his building and classroom keys at the conclusion of the September 29 meeting. He further states that the resignation he submitted on October 2, 2006 was 'forced' as a result of his termination on September 29. He argues that the District's conduct establishes that it did take adverse actions against him, and that he did not quit – he was fired.

Charging Party also provides evidence that he passed the CBEST exam administered to all credentialed teachers, holds a PhD in Chemistry from UC Davis, and has at least 18 credits in mathematics, the subject matter he was assigned to teach. These three circumstances, Charging Party states, satisfy the California Commission on Teacher Credentialing's requirements for "certification prior to the first day of [a teacher's] employment." Charging Party states that his employment with Respondent was contingent upon demonstrating that he had met these minimum requirements. Having satisfied these three requirements, Charging Party argues that the District's reasons for terminating his employment mid-year were a pretext for its real reason – that of discriminating against him for his protected activity.

Finally, Charging Party states that at the time he was fired, the reasons he was given were that the District had "performance concerns," and he was "not a good fit" for the job.

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 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.]

Charging Party has failed to establish a nexus between the protected conduct and the adverse act for the following reasons. By his own admission, Mr. Mandell was informed at the time that he was terminated, that one of the reasons he was being terminated was because he was not enrolled in a teacher credentialing program. Mr. Mandell states in his charge that he was also told during the September 29 meeting that there were some performance issues and he was not a good fit [for the job]. That Mr. Mandell was given multiple reasons for his termination does not establish that the District gave inconsistent or contradictory justifications for his termination. Rather, it appears that throughout the time frame in question, Respondent has consistently stated that Mr. Mandell's lack of status in a credentialing program was grounds for termination.

Additionally, Charging Party claims that he has established the employer's cursory investigation of the employee's misconduct. However, Mr. Mandell was never accused of

“misconduct” as such – he was informed that there were performance issues, and that he was not currently enrolled in a credentialing program. As I pointed out in my February 16, 2007 Warning Letter, attached, Charging Party fails to provide any facts that the District failed to follow the proper policy with regard to terminating teachers for failure to maintain proper certification. This deficiency was not corrected in Mr. Mandell’s First Amended Charge.

Finally, Charging Party claims that he has established that the employer’s justification for its conduct at the time was exaggerated, vague or ambiguous. This argument is based on Charging Party’s claim that his inactive status in National University’s credentialing program did not disqualify him from eligibility to teach in California. The veracity of this claim is not at issue. Whether the employer properly construed the California Commission on Teacher Credentialing’s requirements for proper teacher certification does not establish that the employer did not, in fact, terminate him for its belief that he failed to maintain an active status in a credentialing program.

Therefore, I am dismissing the charge based on the facts and reasons contained in this and my February 16, 2007 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 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 during a regular PERB business day. (Regulations 32135(a) and 32130; see also Government Code section 11020(a).) A document is also considered "filed" when received by facsimile transmission before the close of business 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
(916) 322-8231

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

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.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also 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.)

Final Date

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

Sincerely,

TAMI R. BOGERT
General Counsel

By _____
Alicia Clement
Regional Attorney

Attachment

cc: Eduard Erslovas, Attorney
Ruiz & Sperow, LLP

PUBLIC EMPLOYMENT RELATIONS BOARD

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



February 16, 2007

Gregory K. Mandell

Re: Gregory K. Mandell v. San Leandro Unified School District
Unfair Practice Charge No. SF-CE-2589-E
WARNING LETTER

Dear Mr. Mandell:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on December 27, 2006. Gregory K. Mandell alleges that the San Leandro Unified School District (District) violated the Educational Employment Relations Act (EERA)¹ by discriminating against him for his protected activity.

My investigation revealed the following. Mr. Mandell was a math teacher at Bancroft Middle School in the San Leandro Unified School District and a member of the certificated bargaining unit represented by the San Leandro Teachers' Association.

On September 18, 2006, Mr. Mandell filed a grievance against Bancroft Middle School Vice Principal Alex Harp. On September 25, 2006, Mr. Mandell filed a complaint to Bancroft Middle School Administrators. Both complaints apparently addressed Mr. Mandell's belief that he was being denied his right to suspend disruptive students from his classroom. A meeting was scheduled for September 27, 2006 with Mr. Mandell, Mr. Harp, and two union representatives to discuss Mr. Mandell's grievance. The meeting was cancelled on the morning of September 27, however, due to a lack of substitute teachers to cover the classrooms of all those teachers who would be in attendance at the meeting. The meeting was rescheduled for September 29, 2006. On the morning of September 29, Mr. Mandell, Principal Mary Ann Valles, Union Representative Tom Morse, and Assistant Superintendent Mike Martinez were in attendance. The grievance was not discussed at the meeting. Instead, Ms. Valles informed Mr. Mandell that he was being fired, for "performance concerns," and that he was "not a good fit," for the job. Ms. Valles refused to provide any details. Prior to this meeting, Mr. Mandell was not informed of any performance related issues.

In its response, the District makes several arguments. First, the District argues that Mr. Mandell never filed a grievance – rather, he sent several emails to administrators, complaining

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.

that the District was failing to comply with the Education Code with regard to student suspensions. Second, the District argues that Mr. Mandell resigned, and that the District never took any adverse action against him. Third, the District argues that even assuming Mr. Mandell had established that he engaged in protected activity and the District took adverse actions against him, Mr. Mandell has failed to establish any nexus between his protected activity and the adverse acts. Finally, the District argues that Mr. Mandell had misinformed the District about his eligibility to teach, and when the District learned that Mr. Mandell was not in a teacher credential program in September 2006, it would have fired him regardless of his protected activity.

The District attaches Article V of the collective bargaining agreement. The salient portions of the grievance are as follows:

A. Definition

1. A 'grievance' is a formal written allegation by a Member of the Bargaining Unit that he or she has been adversely affected by a violation or misinterpretation of a written provision of this Agreement. A similar allegation filed by the Association shall also qualify as a "grievance." Appeal of any law, district policy, or administrative decision not covered by this Agreement shall not be subject to the grievance procedure.

5. A "grievance form" is a mutually agreed upon form between the District and the Association that should be use when filing a formal grievance.

C. Formal Level I

1. A formal written grievance must be presented to the immediate supervisor. This will included [sic] a clear, concise statement of the alleged grievance, the circumstances involved, the decision rendered at the informal conference, and the specific remedy sought. Formal grievances are to be filed on the agreed upon grievance form.

2. A written statement must be presented to the immediate supervisor. This statement shall be a clear, concise statement of the alleged grievance, the circumstances involved, the decision rendered at the informal conference, and the specific remedy sought.

3. A conferee may be present at this or any other level of the procedure.

4. The immediate supervisor shall communicate his/her decision to the employee in writing within ten (10) days after receiving the written statement. If the immediate supervisor does not respond within the time limits, the grievant may appeal to the next level.

5. Within the above time limits either party may request a personal conference.

The grievance procedure ends in binding arbitration.

Respondent also attaches copies of Mr. Mandell's October 2, 2006 resignation, and a February 12, 2006 print out from the California Commission on Teacher Credentialing web page, stating that Gregory Keith Mandell holds no credentials.

Mr. Mandell replied to the District's position statement, refuting some of the claims made therein. In particular, Mr. Mandell states that on September 29, Ms. Valles stated to him in the presence of witnesses that she was exercising her right under the Education Code to terminate his employment, effective immediately. He was also ordered to hand over his building and classroom keys at the conclusion of the September 29 meeting. He further states that the resignation he submitted on October 2, 2006 was 'forced' as a result of his termination on September 29. He argues that the District's conduct establishes that it did take adverse actions against him, and that he did not quit – he was fired.

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 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.]

Charging Party states that he filed a grievance, while Respondent claims that he failed to use the grievance form, and simply emailed his boss with some complaints about a failure to comply with the Education Code. Similarly, Charging Party and Respondent dispute the events on September 29. Even assuming Charging Party filed a valid "grievance" as defined by the collective bargaining agreement, and that the District fired him on September 29, the charge fails to present facts establishing that he was fired because he filed a grievance. Charging Party fails to establish that other teachers have been allowed to work in the absence of proper certification; or that the District failed to follow policy with regard to terminating teachers for failure to maintain proper certification. As Charging Party fails to demonstrate these or any other nexus factors, the charge must 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.

SF-CE-2589-E
February 21, 2007
Page 5

If I do not receive an amended charge or withdrawal from you before March 7, 2007, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Alicia Clement
Regional Attorney

AC