

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



ERIC M. MOBERG,

Charging Party,

v.

SAN MATEO COUNTY OFFICE OF
EDUCATION,

Respondent.

Case No. SF-CE-2638-E

PERB Decision No. 1946

February 29, 2008

Appearances: Eric M. Moberg, on his own behalf; San Mateo County Counsel by Eugene Whitlock, Attorney, for San Mateo County Office of Education.

Before McKeag, Wesley and Rystrom, Members.

DECISION

WESLEY, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Eric M. Moberg (Moberg) of a Board agent's dismissal of his unfair practice charge. The charge alleged that the San Mateo County Office of Education (SMCOE) violated the Educational Employment Relations Act (EERA)¹ by retaliating against Moberg for his exercise of protected rights.

The Board has reviewed the entire record in this matter, including the unfair practice charge and amended charge, the response from SMCOE, the warning and dismissal letters, Moberg's appeal, and the SMCOE's response. The Board affirms the dismissal of the charge, on the following basis.

BACKGROUND

Moberg is a teacher with the SMCOE and is a member of the San Mateo County Educators Association (Association). Moberg alleges that he acted as a representative on

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

behalf of another employee, Waithira Njenga (Njenga), on June 7, 2007,² and that he filed a grievance on his own behalf on June 8 citing what he terms “rude and disrespectful behavior” by SMCOE’s Associate Superintendent Jeannie Bosley (Bosley).

On June 7, Moberg requested a copy of his personnel file from the SMCOE’s human resources department. On June 13, Bosley emailed Moberg to schedule a meeting to discuss Moberg’s behavior on June 7 when he requested his personnel file. In the email, Bosley suggested the afternoon of June 15 for the meeting. In response to the email Moberg responded with a series of questions, including: “By what authority do you insist that I meet with you during my vacation? Would you see that I received pay for my time? Do you assert that you are somehow my supervisor and can direct my attendance at a meeting?”

On June 27, Njenga sent an email to the SMCOE superintendent requesting to meet on June 28 to discuss her level III grievance. The June 28 meeting date seemed to be rescheduled from an earlier date when Njenga was unable to meet with a union representative present. Moberg acted as Njenga’s representative for the level III meeting on June 28 with the SMCOE’s superintendent.

On June 28, Bosley wrote a letter of reprimand to Moberg because of his rude and disrespectful behavior on June 7 when he requested his personnel file from SMCOE office staff. The letter began, “at your request I am putting this oral reprimand in writing in lieu of delivering it verbally at a meeting that I attempted to schedule with you.”

On July 1, Moberg filed a grievance alleging that Bosley retaliated against him by harassing him with demands that he meet with her during his vacation and by sending him a written reprimand containing false accusations.

²All date references are to the year 2007.

BOARD AGENT'S FINDINGS

On September 10, the Board agent issued a warning letter finding that Moberg failed to state a prima facie case. The warning letter stated that while Moberg alleged a legal conclusion that he was reprimanded for protected activity, he failed to provide facts to support the legal conclusion. Moberg amended his charge and the Board agent sent a dismissal letter on November 7. The dismissal letter concluded that Moberg failed to allege facts establishing a nexus between his protected activity in representing another bargaining unit member and his reprimand for rudeness. The Board agent found that Moberg failed to provide any examples or instances to establish a prima facie case of discrimination based on disparate treatment. The Board agent further concluded that he failed to state a prima facie case of discrimination based upon SMCOE's departure from the SMCOE's established procedures. The Board agent found that Moberg requested or precipitated SMCOE's departure from established procedure by requesting that an oral reprimand be reduced to writing.

MOBERG'S POSITION

In his charge and amended charge Moberg asserts that the SMCOE retaliated against him as a result of his protected activities on June 7 and 8. Moberg further asserts that Bosley's June 28 reprimand contains falsehoods and was given to him because he engaged in protected activity. According to Moberg's charge, all of the alleged facts support a finding that "if you represent grievants at level 2, we will find a way to reprimand you" and "if you represent grievants at level 3, we will officially reprimand you in writing."

Moberg alleges that there are several departures from standard procedure at SMCOE which support his charge of retaliation. Historically, Association members have not been reprimanded for being rude or disrespectful; they have not been required to make appointments to see their personnel files as Article 16.5 of the collective bargaining agreement states that unit members may view their personnel files "during normal business hours"; no other

Association member has been accused of disrupting staff for requesting to review their personnel file without an appointment; and there is no history of written “oral” reprimands.

On appeal Moberg argues that he has demonstrated a prima facie case. Stressing the fact that the Board agent found that he established temporal proximity between his protected conduct and the reprimand, Moberg argues that he has alleged other facts to demonstrate a nexus. Moberg argues first that he has demonstrated disparate treatment in that other employees were not reprimanded for rude behavior. He also argues that nexus is demonstrated in the SMCOE’s failure to adequately investigate whether a reprimand was warranted for his conduct on June 7, instead basing the adverse action on vague, exaggerated and false accusations.

SMCOE’S POSITION

The SMCOE’s response argues that Moberg’s charge has no merit and fails to state a prima facie case. SMCOE disputes some of Moberg’s factual assertions, for example SMCOE asserts that other employees have received an oral reprimand for similar conduct and that Moberg’s oral reprimand was reduced to writing based on Moberg’s request.

DISCUSSION

To establish a prima facie case of retaliation in 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 (North Sacramento)), 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 that might demonstrate the employer’s unlawful motive. (Novato; North Sacramento.)

Moberg’s appeal reiterates the same facts alleged in his charge and amended charge. Moberg is able to establish the first two prongs of the Novato test -- that he engaged in protected conduct under EERA and that the SMCOE was aware of that conduct. Moberg represented another bargaining unit employee in grievance proceedings and filed his own grievance, conduct of which SMCOE was aware. It is also clear that the letter of reprimand was an adverse action under EERA. Thus, the central dispute surrounds whether or not Moberg alleges sufficient facts to support the allegation that the SMCOE’s reprimand was issued because of his protected conduct and thereby retaliation. Moberg argues that it is “obvious” that the SMCOE’s June 28 reprimand for his alleged rudeness on June 7 is retaliation for his representing Njenga on the same day.

We agree with the Board agent that Moberg failed to demonstrate a prima facie case of retaliation and that his charge was appropriately dismissed. Although Moberg established that the reprimand was issued close in time to his protected activity, he fails to plead sufficient facts to demonstrate other evidence of a nexus between his protected activity and the reprimand.

Disparate treatment

Moberg alleges that SMCOE treated him differently than other similarly situated employees based on his alleged “rude” behavior. As an example of disparate treatment, Moberg alleged that he filed a grievance due to Bosley’s “rude and disrespectful” behavior toward him and that she was not reprimanded. The allegations as to Bosley’s different treatment do not state a prima facie case, however, as Bosley and Moberg are not similarly situated. (Madera County Office of Education (1999) PERB Decision No. 1334 [the Board rejected an argument for disparate treatment when the charging party failed to present evidence about similarly situated employees].)

Moberg filed a grievance about Bosley’s behavior alleging a contract violation, but his charge contains no allegations that the grievance process had concluded or that the grievance was sustained. In contrast, there was a finding by the manager of the human resources department that Moberg actually engaged in rude behavior and the reprimand was the discipline for the conduct. Moberg and Bosley are not similarly situated employees as one situation involves a grievance about rude behavior via a process that had not concluded, and the other involves discipline for behavior which was determined to have occurred. The facts as alleged are not sufficient to support a finding of disparate treatment.

Departure from standard procedures

Moberg’s allegations related to the SMCOE’s departure from standard procedures are also not sufficient to state a prima facie case. The Board agent addressed Moberg’s argument

that his written “oral” reprimand was a departure from procedure, finding that if SMCOE departed from its established procedures in giving Moberg a written reprimand, it was at his own request. We agree. The reprimand states that it was reduced to writing at Moberg’s request, and Moberg did not refute that assertion.

Moberg’s other statements about the SMCOE’s departures from standard procedures also fail, as Moberg merely alleges conclusions without including facts or evidence to support them. Although a charging party’s facts will be taken as true at this stage of review, a charge must still contain a “clear and concise statement of the facts and conduct alleged to constitute an unfair practice.” (PERB Reg.³ 32615(a)(5); San Juan Unified School District (1977) EERB⁴ Decision No. 12.)

ORDER

The unfair practice charge in Case No. SF-CE-2638-E is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Members McKeag and Rystrom joined in this Decision.

³PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

⁴Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board.