STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CHRISTINE L. FELICIJAN & WAYNE HETMAN, Charging Parties, v. SANTA ANA EDUCATORS ASSOCIATION, Respondent.	Case No. LA-CO-1226-E PERB Decision No. 2008 March 10, 2009

Appearances: Christine L. Felicijan & Wayne Hetman, on their own behalf; California Teachers Association by Brenda E. Sutton-Wills, Attorney, for Santa Ana Educators Association.

Before McKeag, Neuwald and Dowdin Calvillo, Members.

DECISION

DOWDIN CALVILLO, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Christine L. Felicijan (Felicijan) and Wayne Hetman (Hetman) (collectively Charging Parties), and Santa Ana Educators Association (Association), to the proposed decision of an administrative law judge (ALJ). The unfair practice charge and complaint alleged that the Association breached its duty of fair representation by failing to fairly represent Felicijan and Hetman in disputes with the Santa Ana Unified School District (District) over inappropriate materials contained in their personnel files. The ALJ ruled that, for the period of time Charging Parties were on a reemployment list pursuant to Education Code section 44978.1, they were not "employees" as

defined in section 3540.1(j) of the Educational Employment Relations Act (EERA),[1] and therefore the Association had no duty to fairly represent them at that time.

The Board has reviewed the entire record in this case, including but not limited to, the unfair practice charge, the complaint and answer, the hearing transcripts and exhibits, the ALJ's proposed decision, the Charging Parties' exceptions and the Association's exceptions. Based on this review, the Board reverses the ALJ's proposed decision and remands this matter to the ALJ for further hearing on the merits of the allegations in the complaint.

BACKGROUND

Because only the issue of Charging Parties' employment status is before the Board on appeal, we relate only the facts relevant to that issue.

Charging Parties' Placement on the 39-Month Reemployment List

Felicijan and Hetman were certificated employees of the District and members of a bargaining unit represented by the Association. The District placed both on a 39-month reemployment list pursuant to Education Code section 44978.1 because they had exhausted available leave and were still unable to perform their duties for medical reasons.[2]

The parties stipulated that Hetman was on the 39-month reemployment list at all times relevant to the allegations in the complaint. Felicijan was placed on the reemployment list on June 27, 2006 and thus, was on the reemployment list for a portion of the time relevant to the complaint.

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

[2]As discussed in more detail below, Education Code section 44978.1 requires an employer to place a certificated employee who is unable to perform his or her duties for medical reasons and has exhausted available leave on a 39-month reemployment list. When the individual is released by a doctor to return to work, he or she must be reinstated to a position equivalent to that held before placement on the reemployment list.

Complaint and Answer

On July 9, 2007, the Office of the General Counsel issued a complaint alleging that the Association breached its duty of fair representation by its conduct on August 16 and October 21, 2005, June 30, 2006, and in January 2007. Paragraph 1 of the complaint alleged: "Charging Parties are employees within the meaning of Government Code section 3540.1(j)."

On August 13, 2007, the Association filed its answer to the complaint. The answer generally denied the allegation that Charging Parties were employees. It also raised the affirmative defense that "Charging Party Hetman was not an employee under EERA after December 12, 2006" and therefore allegations of unlawful conduct toward him in 2007 must be stricken from the complaint. The answer did not raise an affirmative defense regarding Felicijan.

The PERB Hearing

On the first day of hearing, the ALJ, on his own motion and without advance notice to the parties, bifurcated the hearing to first take evidence on whether Charging Parties were employees of the District at the time of the alleged violations. Neither party objected to the bifurcation. Before the presentation of evidence, the Association stated its position that "to the extent the parties are validly on the 39-month rehire list they are employees." Charging Parties took the same position. Nonetheless, the ALJ ruled that Charging Parties' employment status was a jurisdictional issue on which he was obliged to "make a correct conclusion of law."

Over the remainder of that day and all of the following day, the parties presented evidence of Charging Parties' employment status from 2005 through 2007.[3] At the end of the second day of hearing, the ALJ informed the parties that they could either: (1) proceed to the scheduled third day of hearing and present evidence on the merits of the case, or (2) postpone presenting the remainder of the case on the merits pending a ruling on the jurisdictional issue. The parties chose the second option.

ALJ's Proposed Decision

The ALJ found the Association had no duty to represent Charging Parties in their disputes with the District over their personnel files because they were not employees of the District at the time of the violations alleged in the complaint, except for the alleged violations involving Felicijan that occurred before her placement on the 39-month reemployment list. Relying on Hacienda La Puente Unified School District (1988) PERB Decision No. 685 (Hacienda La Puente), the ALJ reasoned that the definition of "employee" in EERA section 3540.1(j) covers only those individuals currently employed by a public school employer. The ALJ found that the plain language of Education Code section 44978.1 indicates that individuals on a 39-month reemployment list are not currently employed, because, if they remained employees, there would be no need for them to be "returned to employment" when they are medically able to work.

As further support, the ALJ noted that one of the letters the District sent to Felicijan regarding her placement on the 39-month reemployment list indicated that she may be eligible for unemployment insurance benefits. Having found that Charging Parties were not employees under EERA while they were on the 39-month reemployment list, the ALJ concluded that the

[3]During the first day of hearing, the ALJ also heard testimony on the merits of the case from two of Charging Parties' witnesses so that they would not have to return to testify another day. No part of these witnesses' testimony is relevant to the issue of Charging Parties' employment status and the Board has not considered that testimony in rendering this decision.

Association had no duty to represent them during that time. Accordingly, the ALJ dismissed the entire complaint as to Hetman and also dismissed the allegations involving Felicijan that were based on conduct after June 27, 2006.

Charging Parties' Exceptions

Charging Parties except to the ALJ's reliance on Hacienda La Puente to find that they were not "employees" under EERA while they were on the 39-month reemployment list. First, Charging Parties argue that they remained current employees while on the reemployment list because Education Code section 44978.1 gives them an "absolute right" to return to work. Thus, they contend, the reemployment list constituted an approved leave of absence and they therefore remained employees pursuant to California State Employees Association (Hard, et al.) (1999) PERB Decision No. 1368-S. They also claim the ALJ improperly relied on the colloquial meaning of "reemployment" to find they were not employees. Second, Charging Parties claim that, even if they were not employees, they were applicants for reemployment and thus covered under EERA by virtue of the Legislature's amendment of EERA in 1989 to overrule Hacienda La Puente and include applicants in the definition of "employee" under EERA.

Charging Parties also challenge several rulings at the hearing. Most importantly, they except to the ALJ's refusal to compel the District to testify at the hearing. Charging Parties assert that testimony by District employees would have helped clarify their employment status and that their case was prejudiced because the ALJ refused to compel such testimony. Charging Parties also claim the ALJ failed to accommodate their disabilities and prejudiced their case by not giving them advance notice that he would require them to present evidence about their employment status. Finally, Hetman argues that his agreement to the stipulation

that he was on the 39-month reemployment list at all relevant times did not mean he agreed to accept the ALJ's interpretation of the term "reemployment" in the proposed decision.

Association's Exceptions

The Association raises two points in its exceptions. First, the Association argues that the ALJ's ruling that individuals on a 39-month reemployment list pursuant to Education Code section 44978.1 are not employees is too broad because it applies to employment status in all cases, not just those involving the duty of fair representation. Second, the Association contends that placement on the 39-month reemployment list does not end the individual's employment because the Education Code requires notice and an opportunity for a hearing before the employment relationship can be terminated.

DISCUSSION

EERA section 3544.9 requires an employee organization certified as the exclusive representative of a bargaining unit to "fairly represent each and every employee in the appropriate unit." EERA section 3540.1(j) defines "employee" as "any person employed by a public school employer except persons elected by popular vote, persons appointed by the Governor of this state, management employees, and confidential employees." The issue in this case is whether a person on a 39-month reemployment list pursuant to Education Code section 44978.1 remains an "employee" for purposes of the duty of fair representation under EERA during the 39 month period.

Education Code section 44978.1 states in full:

> When a certificated employee has exhausted all available sick leave, including accumulated sick leave, and continues to be absent on account of illness or accident for a period beyond the five-month period provided pursuant to Section 44977, and the employee is not medically able to resume the duties of his or her position, the employee shall, if not placed in another position, be placed on a reemployment list for a period of 24 months if the employee is on probationary

> status, or for a period of 39 months if the employee is on permanent status. When the employee is medically able, during the 24- or 39-month period, the certificated employee shall be returned to employment in a position for which he or she is credentialed and qualified. The 24-month or 39-month period shall commence at the expiration of the five-month period provided pursuant to Section 44977.

The ALJ found the statute's use of the term "reemployment" dispositive. According to the proposed decision, "[i]f one is currently employed . . . there is no need for 'reemployment.'" As the ALJ recognized, the term "reemployment" typically involves an individual returning to service following a separation from employment. (See, e.g., Ed. Code sec. 44931 [reemployment of former certificated employee who resigned]; Ed. Code sec. 45308 [reemployment of laid off classified employee].) Thus, as the term is commonly used, a "reemployment list" is a list of individuals whose employment has been terminated, usually by lay off, but who are eligible for reemployment. (E.g., Ed. Code sec. 45298 [classified employees "laid off because of lack of work or lack of funds are eligible to reemployment for a period of 39 months and shall be reemployed in preference to new applicants"].)

The typical operation of a reemployment list is demonstrated by Education Code sections governing classified employees. Education Code section 45192 provides, in relevant part:

> When all available leaves of absence, paid or unpaid, have been exhausted and if the employee is not medically able to assume the duties of the person's position, the person shall, if not placed in another position, be placed on a reemployment list for a period of 39 months. When available, during the 39-month period, the person shall be employed in a vacant position in the class of the person's previous assignment over all other available candidates except for a reemployment list established because of lack of work or lack of funds, in which case the person shall be listed in accordance with appropriate seniority regulations.

In short, this section provides that when a person on the reemployment list is medically able to return to work and a vacant position exists, the person will have a rehire preference over other candidates. Thus, the person is not guaranteed reinstatement when he or she is cleared to return to work, but must apply for an open position, if one exists. Consistently with this language, courts have held that placement of a classified employee on the section 45192 39-month reemployment list terminates the person's employment. (Trotter v. Los Angeles County Bd. of Education (1985) 167 Cal.App.3d 891, 895 [213 Cal.Rptr. 841]; see Jones v. Los Angeles County Office of Education (2005) 134 Cal.App.4th 983, 990 [36 Cal.Rptr.3d 617] [stating that case about placement of employee on section 45192 reemployment list "involves plaintiff's discharge and defendant's refusal to reemploy her"].) Similarly, placement of a classified employee on a 39-month reemployment list pursuant to Education Code section 45195 ends the individual's employment.[4] (Davis v. Los Angeles Unified School Dist. Personnel Com. (2007) 152 Cal.App.4th 1122, 1131 [62 Cal.Rptr.3d 69].)

The 39-month reemployment list established for certificated employees by Education Code section 44978.1 differs in significant ways from those established under sections 45192 and 45195. Section 44978.1 provides that if an individual on the list becomes medically able

[4]Education Code section 45195, which applies to classified employees who have suffered a nonindustrial accident or illness, states in relevant part:

> If at the conclusion of all leaves of absence, paid or unpaid, the employee is still unable to assume the duties of his or her position, the employee shall be placed on a reemployment list for a period of 39 months.
>
> At any time, during the prescribed 39 months, the employee is able to assume the duties of his or her position the employee shall be reemployed in the first vacancy in the classification of his or her previous assignment. The employee's reemployment will take preference over all other applicants except for those laid off for lack of work or funds under Section 45298 in which case the employee shall be ranked according to his or her proper seniority.

to work during the 39-month period, "the certificated employee shall be returned to employment in a position for which he or she is credentialed and qualified." (Emphasis added.) Unlike the sections for classified employees, section 44978.1 contains no language about vacant positions or a preference in reemployment over other applicants or candidates. In the only published court of appeal decision addressing section 44978.1,[5] Veguez v. Governing Bd. of the Long Beach Unified School Dist. (2005) 127 Cal.App.4th 406 [25 Cal.Rptr.3d 526], the court interpreted the above-quoted language to mean that reinstatement is not conditioned "on the availability of a position." (Id. at p. 423.) Rather, the court held that section 44978.1 guarantees a right to reinstatement during the 39-month period once the individual is cleared by his or her doctor to return to work. (Ibid.) This strongly resembles a return from a leave of absence pursuant to Education Code section 44973, which provides that a certificated employee returning from a leave of absence "be reinstated in the position held by him at the time of the granting of the leave of absence." Thus, based on the language of the statute itself, placing an individual on the 39-month reemployment list constitutes the beginning of an unpaid medical leave of absence rather than a termination of the individual's employment.

The legislative history of Education Code section 44978.1 further sheds light on the unique nature of the section's 39-month reemployment list. Section 44978.1 was added to the Education Code in 1998 as part of S.B. 1019. (27B West's Ann. Ed. Code (2006 ed.) foll. sec. 44978.1, p. 557.) That bill sought to end the potential for abuse of sick leave by certificated

[5]Two non-precedential decisions have addressed the employment status of an individual on a section 44978.1 reemployment list. In an unpublished decision, the Second District Court of Appeal stated that placement of an employee on the section 44978.1 reemployment list was not a dismissal and thus the employee "retained his status as permanent employee." (Hockenberg v. Inglewood Unified School District (Apr. 6, 2005, B172453, pp. 29-30) [nonpub. opn.].) More recently, a superior court observed that "[n]othing in section 44978.1 indicates that an employee's placement on a reemployment list is a resignation or other separation from his or her employment." (California Teachers Association v. Elk Grove Unified School District (Super. Ct. Sacramento County, 2008, 06CS01190, p. 19).)

employees. (Assem. Com. on Education, Analysis of Sen. Bill No. 1019 (1997-1998 Reg. Sess.) as amended January 20, 1998, p. 3.) Prior to S.B. 1019, "each year an employee would be able to collect another 10 days of full-pay sick leave and another five months of differential pay, without ever returning to work." (Id., at p. 2.) S.B. 1019 eliminated a certificated employee's ability to receive a new allotment of sick leave and differential pay each year by declaring that once those benefits have been exhausted in a single school year, an employee who remains medically unable to return to work because of the same injury or illness must be placed on a 39-month reemployment list. (Ibid.) Thus, it appears the Legislature intended section 44978.1 to create an unpaid leave status for such employees in lieu of earning new paid leave each school year when they continued to be absent due to the same injury or illness. Importantly, the legislative history contains nothing to indicate the Legislature intended placement on the 39-month reemployment list to end the employment relationship between the certificated employee and the school district.

For the above reasons, we conclude that placement of an employee on a 39-month reemployment list pursuant to Education Code section 44978.1 does not constitute a separation from service. Thus, a person on that list remains an employee of the school district throughout the 39-month period. As noted, the parties stipulated that Hetman was on a section 44978.1 reemployment list at all times relevant to the allegations in the complaint. Further, Felicijan was on the same reemployment list as of June 27, 2006 and it is undisputed that she was an employee of the District at all relevant times prior to that date. Accordingly, Charging Parties were "employees" of the District, as defined in EERA section 3540.1(j), at all times relevant to

the allegations in the complaint.[6] For this reason, the Association owed Charging Parties a duty of fair representation at those times.

ORDER

The Board hereby REVERSES the ALJ's proposed decision and REMANDS this matter to the ALJ to conduct a hearing for the purpose of taking additional evidence on the merits of the allegations in the complaint, and, upon completion of the hearing, make recommended findings of fact and conclusions of law in consideration of the additional evidence and the existing record.

Members McKeag and Neuwald joined in this Decision.

[6]In light of this ruling, we need not address Charging Parties' exceptions to the ALJ's procedural rulings at the hearing.