STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

NATOMAS TEACHERS ASSOCIATION, CTA/NEA, Charging Party, v. NATOMAS UNIFIED SCHOOL DISTRICT, Respondent.	Case No. SA-CE-2645-E PERB Decision No. 2362 March 25, 2014

Appearances: California Teachers Association by Jacob F. Rukeyser, Attorney, for Natomas Teachers Association, CTA/NEA; Atkinson, Andelson, Loya, Ruud & Romo by Scott K. Holbrook, Attorney, for Natomas Unified School District.

Before Martinez, Chair; Huguenin and Banks, Members.

DECISION[1]

HUGUENIN, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Natomas Teachers Association, CTA/NEA (NTA) from a partial dismissal by the Office of the General Counsel of NTA's unfair practice charge. NTA's charge, as amended, alleged, inter alia, that the Natomas Unified School District (District) violated the Educational Employment Relations Act (EERA)[2] when, after the NTA refused the District's demand that NTA waive provisions of the parties' bargained agreement as to staffing a District middle school, the District retaliated against NTA and employees represented by

[1] PERB Regulation 32320(d), provides in pertinent part: "Effective July 1, 2013, a majority of the Board members issuing a decision or order pursuant to an appeal filed under section 32635 [Board Review of Dismissals] shall determine whether the decision or order, or any part thereof, shall be designated as precedential." Having met none of the criteria enumerated in the regulation, the decision herein has not been designated as precedential. (PERB Regs. are codified at Cal. Code Regs., tit. 8, § 31001 et seq.)

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

NTA by: (1) preparing and circulating a charter petition which would, if approved, remove employees assigned to the school in question from NTA's bargaining unit; and (2) granting the charter petition prepared and circulated by the District which purported to remove teachers assigned to the school in question from NTA's bargaining unit.

PERB's Office of the General Counsel declined to issue a complaint on the retaliation allegations, concluding that PERB lacks authority over school district decisions to grant or deny petitions for charter schools.[3]

We have reviewed the unfair practice charge, the amended charge, the partial warning and partial dismissal letters, the appeal and the entire record in light of relevant law. Based on this review, we will reverse the partial dismissal and remand the case to the Office of the General Counsel for the issuance of a complaint alleging retaliation. We do so because our precedents teach that where a charging party alleges a viable legal theory supporting the alleged violation, a complaint should issue despite existence of a legal theory opposing a violation.[4]

PROCEDURAL HISTORY

NTA filed its initial unfair practice charge on May 8, 2012. The District filed its initial response on June 4, 2012. The Office of the General Counsel issued a warning letter on July 31, 2012.

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[3] PERB Regulation 32630 allows a Board agent to "refuse to issue a complaint, in whole or in part." We note, without deciding, that partial dismissals seem more appropriate for allegations arising from separate facts where some of those facts allege prima facie unfair practices and others do not. Where the same set of facts is alleged to support distinct violations, parsing the respective violations to dismiss some while issuing a complaint on others, risks delay and or duplication, if the dismissal is challenged successfully on appeal. A seemingly more expeditious solution would be that if any of the alleged violations arising from the same alleged facts goes to complaint, all would, thus permitting the parties to make a record and the administrative law judge (ALJ) to decide which violations, if any, are supported by the record.

[4] *Eastside Union School District* (1984) PERB Decision No. 466 (*Eastside*).

NTA filed an amended charge on August 24, 2012. The District filed its response to the amended charge on September 21, 2012.

On February 7, 2013, the Office of the General Counsel issued a complaint alleging that the District interfered with NTA and employee rights guaranteed by EERA and failed and refused to bargain in good faith with NTA. However, the Office of the General Counsel dismissed NTA's retaliation allegations.

NTA timely filed its appeal of the partial dismissal. The District timely filed its opposition on May 16, 2013.

FACTUAL BACKGROUND[5]

The District and NTA are parties to a collective bargaining agreement (CBA) which was in effect at all times relevant herein. The CBA contains an article (Article XI) regarding the transfer and reassignment of NTA bargaining unit members. Article XI describes the procedures and return rights for voluntary and involuntary transfers, reassignments, displacements and staff reductions.

[5] Because this matter comes before the Board on appeal from dismissal for failure to state a prima facie case, we are concerned here, as was the Office of the General Counsel, with whether the charging party alleged a prima facie case, not with making findings of fact or weighing the parties' conflicting allegations. (*San Juan Unified School District* (1977) EERB Decision No. 12 [prior to January 1978, PERB was known as the Educational Employment Relations Board or EERB]; *Golden Plains Unified School District* (2002) PERB Decision No. 1489.) PERB regulations require that the respondent "shall be apprised of the [charging party's] allegations, and may state in its position on the charge during the course of the [Office of the General Counsel's] inquiries." (PERB Reg. 32620(c).) On review of a dismissal, we stand in the shoes of the Office of the General Counsel and thus may consider additional facts, if any, provided below by a respondent provided that these additional facts were proffered under oath in compliance with PERB regulations, complement without contradicting the facts alleged in the charge, and were undisputed by the charging party. (*Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M; *Lake Tahoe Unified School District* (1993) PERB Decision No. 994; *Riverside Unified School District* (1986) PERB Decision No. 562a.)

At the end of the 2009-2010 school year, the District temporarily closed its Leroy Greene Middle School (LGMS) site for renovations. Renovations at LGMS were to take place over the next two school years (2010-2011 and 2011-2012). The students and teachers from LGMS were relocated temporarily to other school sites within the District. The District assured LGMS teachers that they would return to LGMS when it reopened in the 2012-2013 school year.

On or about September 14, 2011, the District's board unanimously approved the reopening of LGMS as the Leroy Greene Magnet Center (LGMC) and appointed Angela Herrera (Herrera) as the founding principal of LGMC.

On or about November 3, 2011, Interim District Superintendent Walt Hanline (Hanline) approached NTA President Kristen Rocha (Rocha) at the District office. After stating that he was acting on a request by Herrera, Hanline asked Rocha for an agreement with NTA, viz., a memorandum of understanding, suspending Article XI of the NTA-District CBA, to permit Herrera freely to choose staff members for the LGMC. On NTA's behalf Rocha declined, replying: "I don't see the need to suspend Transfer and Reassignment, that is a negotiable thing." Rocha indicated as well that the District should make a formal bargaining demand, that the District had ample time to comply with Article XI of the CBA, and that all of the former LGMS staff had been classified as "Highly Qualified Teachers" under the No Child Left Behind Act. Hanline responded: "You are forcing me to have a District charter rather than a magnet school."

On November 9, 2011, the District governing board considered an action item, submitted by Hanline, authorizing District officials to proceed with plans to reopen LGMS as a grade 7-12 academic center dependent charter school, rather than as the magnet school authorized by the governing board's action of September 14, 2011. The action item was not a

charter petition, which would come later. The action item included a copy of Article XI from the CBA along with an introductory paragraph stating:

> The administration believes that the present restrictions associated with the teacher transfer language, included within the contract between the District and the Natomas Teachers Association, will not enable for the flexibility to achieve the results expected. [*Sic*]

As reflected in the District governing board's minutes, Article XI played a central role in the decision to reopen the Leroy Greene site as a charter school:

> Due to constraints within the teachers [*sic*] contract, in order to allow Ms. Herrera the flexibility to select her own staff, the Administration is requesting that the Board approve the recommendation to develop the school as a charter school.

In addition, in response to a District governing board member's question about the difference between a dependent charter school and a magnet school, the District governing board's minutes noted Hanline's reply as follows:

> Dr. Hanline responded that the magnet school would be governed by the contract language. Approval of a dependent charter would need to go through the process as an independent charter with the same petition requirements. The NTA contract with the District would not apply.

(Emphasis added.) Hanline then further informed the governing board that the District would have preferred the magnet alternative however, "informal discussions with the leadership of NTA was not supportive regarding alternative language related to transfer language in the contract being waived for one year."

Two months later, on or about January 18, 2012, Herrera submitted to the District a petition to establish the Leroy Greene Academy Charter School (LGA), a dependent charter

school eventually serving grades K-12.[6] The petition also named LGA as the public school employer. Moreover, although LGA had not yet hired any certificated employees, the petition stated that "the Charter school Employees have chosen to not be represented by a collective bargaining unit." (Charter Petition, p. 24.)

On January 25, 2012, the District board unanimously granted the charter of the LGA, as described in the January 18, 2012 petition.

PARTIAL DISMISSAL

On February 7, 2013, the Office of the General Counsel dismissed NTA's allegations that on and after November 9, 2011, the District sponsored and supported the conversion of LGMS from a magnet school to a dependent charter school in retaliation for NTA's refusal to waive Article XI of its CBA with the District.

The Office of the General Counsel determined that PERB lacked jurisdiction over the District's "*decision* to approve the charter petition." (Dismissal Ltr., p. 5, emphasis in original.) The Board agent relied on Education Code section 47611.5(e), which states:

> The approval or a denial of a charter petition by a granting agency pursuant to subdivision (b) of Section 47605 shall not be controlled by collective bargaining agreements nor subject to review or regulation by the Public Employment Relations Board.

The Office of the General Counsel concluded that NTA's retaliation allegations appear "to pertain only to a decision to adopt a charter petition," and thus implicated the prohibition stated in Education Code section 47611.5(e) that PERB not review or regulate "approval or denial of a charter petition." (Dismissal Ltr., p. 5.)

The Office of the General Counsel relied on PERB's decision in *San Francisco Unified School District* (2001) PERB Decision No. 1438 (*San Francisco*) and *Chula Vista Elementary*

[6] The charter petition proposed opening LGA with grades 7-8 and expanding by one grade each year until it becomes a grade 7-12 site in the 2016-2017 school year. The charter petition also proposed opening its elementary school program at a later, unspecified date.

School District (2004) PERB Decision No. 1647, to conclude that "NTA's allegations stem from the District's decision to approve the charter petition–a decision which falls outside of PERB's jurisdiction." (Warning Ltr., p. 6.)

NTA'S CONTENTIONS ON APPEAL

NTA raises several contentions supporting its position that a complaint should be issued on its retaliation allegations. We take each in turn.

First, NTA urges that Education Code section 47611.5(e) only divests PERB of authority to review or regulate a school district's final approval or denial of a charter petition. By its very terms, Education Code section 47611.5(e) only shields approval or denial of a charter petition pursuant to Education Code section 47605(b), which, notes NTA, "outlines the mechanics by which a governing board issues final approval or denial of the charter petition." Thus, urges NTA, PERB retains full authority to review all preliminary charter petition actions taken by a public school employer, including: (1) the initial recommendation to consider a charter conversion; (2) the decision to authorize the drafting of a charter petition; and (3) the decision to circulate a charter petition. Thus, NTA reasons, where any such preliminary decision is made for an unlawful reason such as retaliation for the exercise of EERA rights, PERB would have jurisdiction.

Second, urges NTA, PERB's Office of the General Counsel relied on authority legally and factually distinguishable from the instant case. In *San Francisco, supra,* PERB Decision No. 1438, the Board held that school districts are excused from bargaining over conversion of a district school to a charter school. However, the conduct challenged in *San Francisco* occurred prior to adoption in 1999 of Education Code section 47611.5 subjecting charter schools to EERA. Moreover, notes NTA, *San Francisco*, involved a lawful charter school conversion where the charging party made no allegation that the school district had decided to

convert a school cite to charter status in retaliation for the exercise of EERA rights or another unlawful purpose.

Moreover, though not cited by the Office of the General Counsel, NTA distinguishes *United Teachers of Los Angeles v. Los Angeles Unified School District* (2012) 54 Cal.4th 504 (*UTLA*), in which the union challenged a charter conversion on the ground that the district had violated bargained-for procedures regarding the petitioning process for charter schools. *UTLA* is distinguishable from the instant case, urges NTA, because: (1) in *UTLA*, the court addressed Education Code section 47611.5(e) only with respect to whether a provision of a collective bargaining agreement could control a school district's final approval or denial of a charter petition; (2) the challenged charter conversion in *UTLA* involved a third party's charter petition, not a district-sponsored petition; and (3) there was no claim in UTLA that the charter petition had been pursued for an unlawful reason.

Third, NTA argues that PERB should follow *McFarland Unified School Dist. v. Public Employment Relations Board* (1991) 228 Cal.App.3d 166, in which the court held that PERB has jurisdiction to review a school district's exercise of discretion under the Education Code, when the conduct also constitutes an alleged unfair practice. Thus, argues NTA, where a school district governing board exercises discretion conferred by the Education Code, but is unlawfully motivated in so doing, PERB likewise has EERA authority to find that the District's actions reflect unlawful motive violating EERA and based on such a finding to order an appropriate make-whole remedy.

DISTRICT'S POSITION

The District relies on Education Code section 47611.5(e), urging that the 1999 amendments to the Charter Schools Act are inflexible Education Code provisions that "occupy the field" and directly prohibit PERB from exercising jurisdiction over the approval or denial

of a charter school. Thus, the District contends that PERB's Office of the General Counsel correctly determined that PERB had no jurisdiction over NTA's retaliation allegations and those allegations were properly dismissed. Moreover, argues the District, PERB has "absolutely no jurisdiction to order a revocation of the Charter School," so that even if NTA successfully proved up its retaliation case, PERB's remedy might not include make whole relief, viz., reversing the governing board's decision to approve the charter petition.

The District maintains that Education Code section 47611.5(e) "expressly prohibits" PERB from reviewing or regulating the decision to approve or deny a charter petition, and that this includes a prohibition against reviewing "the alleged motive or reasons to negate such approval." The District notes that Education Code section 47611.5(e) is distinguishable from other statutes such as EERA section 3541.5(b).[7] The language of Education Code section 47611.5(e) urges the District, contains a stronger prohibition against PERB review or regulations of a district decision to approve or deny a charter petition, than was used in EERA section 3541.5(b). According to the District, the phrase "that would not also constitute an unfair practice" in EERA section 3541.5(b), allows PERB to issue a complaint in a matter which requires interpretation of labor agreements despite PERB's not having jurisdiction to enforce such agreements. Thus, claims the District, the Legislature could have included similar language in Education Code section 47611.5(e) granting PERB jurisdiction to review EERA violations involving a decision to grant or deny a charter petition where the decision also constituted an unfair practice, but did not do so.

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[7] EERA section 3541.5(b) states:

> The board shall not have the authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on an alleged violation of any agreement that would not also constitute an unfair practice under this chapter.

The District urges that *UTLA, supra,* 54 Cal.4th 504 should be read to exclude from review or regulation by PERB, the entire charter approval process under Education Code section 47611.5(e), not merely the governing board's decision to approve or deny the charter petition.

DISCUSSION

Standard of Review in Dismissal Cases

In processing an unfair practice charge, the role of a Board agent is to investigate the charge to determine if an unfair practice has been committed. However, the Board's regulations do not "empower agents to rule on the ultimate merits of a charge." (*City of Pinole* (2012) PERB Decision No. 2288-M (*Pinole*), pp. 11-12; citing *Eastside, supra,* PERB Decision No. 466; PERB Regs. 32620 and 32640.) "[W]here the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Eastside,* p. 7, emphasis added.) The Board has construed this precept to mean that a complaint should issue to test viable competing theories of law. (*Pinole*; *City of San Jose* (2013) PERB Decision No. 2341-M; *County of San Joaquin* (2003) PERB Decision No. 1570-M.) Therefore, if NTA's charge alleges a viable legal theory that an unfair practice has occurred, a complaint should issue.

The Prima Facie Case of Retaliation

The Board recently summarized the prima facie case for retaliation in *Palo Verde Unified School District* (2013) PERB Decision No. 2337 (*Palo Verde*):

> 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 guaranteed by EERA; (2) the employer had knowledge of the employee's exercise of those rights; (3) the employer took action against or adverse to the interest of the employee; and (4) the employer acted because of

the employee's exercise of the guaranteed rights. *Novato* [*Unified School District* (1982)] PERB Decision No. 210 [*Novato*.]

Unlawful motive is "the specific nexus required in the establishment of a prima facie case" of retaliation. "Direct proof of motivation is rarely possible, since motivation is a state of mind which may be known only to the actor. Thus, . . . unlawful motive can be established by circumstantial evidence and inferred from the record as a whole." (*Novato, supra,* PERB Decision No. 210, at p. 6; *Carlsbad Unified School District* (1979) PERB Decision No. 89; *Republic Aviation Corp. v. NLRB* (1945) 324 U.S. 793; *Radio Officers' Union v. NLRB* (1954) 347 U.S. 17, 40-43.) [Fn. omitted.]

[¶] . . . [¶]

Upon proof that anti-union animus played a part in the employer's decision to act, the burden then shifts to the employer to prove that its actions would have been the same notwithstanding the employee's having engaged in protected activity and the employer's anti-union animus. (*McFarland* [*Unified School District* (1988)] PERB Decision No. 786, aff'd *McFarland Unified School Dist. v. Public Employment Relations Bd.* (1991) 228 Cal.App.3d 166 (*McFarland*); *McPherson v. Public Employment Relations Board* (1987) 189 Cal.App.3d 293, 304; (*McPherson*); *Novato, supra,* PERB Decision No. 210; *Martori Brothers Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721, 729-730; *Wright Line* (1980) 251 NLRB 1083 (*Wright Line*).) In such cases the employer has both the burden of going forward with the evidence and the burden of persuasion. (*Hunter Douglas, Inc.* (1985) 277 NLRB 1179; *Hyatt Regency Memphis* (1989) 296 NLRB 259.) Proof of an alternative, non-discriminatory reason for the challenged action is insufficient standing alone to overcome the prima facie case. The employer must prove that it had both an alternative non-discriminatory reason for its challenged action, and that the challenged action would have occurred regardless of the employee's protected activity and the employer's anti-union animus. (*Chula Vista Elementary School District* (2011) PERB Decision No. 2221 (*Chula Vista,*), citing *The TM Group, Inc. and Kimberly Grover* (2011) 357 NLRB No. 98, citing *Hicks Oils & Hicksgas, Inc.* (1989) 293 NLRB 84, 85; *Framan Mechanical Inc.* (2004) 343 NLRB 408, 411-412; *Roure Bertrand Dupont, Inc.* (1984) 271 NLRB 443 (*Roure Bertrand*).)

(*Palo Verde, supra,* PERB Decision No. 2337, pp. 10-13, emphasis in original.)

We conclude that NTA has alleged a prima facie case of retaliation, as follows:

1. Exercise of EERA rights -- employees exercised EERA rights on and before November 9, 2011, when NTA negotiated Article XI providing transfer rights and on November 3, 2011, when NTA declined the District's demand for a waiver of Article XI in respect to staffing of LGMC;

2. Employer knowledge -- the District knew of the negotiation of Article XI and of NTA's refusal to waive it;

3. Adverse employer action in response to the exercise of EERA rights -- immediately upon learning from NTA of its refusal to waive Article XI in respect to staffing LGMC, the District informed NTA that rather than seek to bargain on the applicability of Article XI to the reopened LGMC, the District would instead actively pursue removal of the Leroy Greene school site and its staff from NTA's bargaining unit, and thereafter, the District carried through on this threat by: (1) seeking on November 9, 2011, the approval from the District governing board for the charter scheme; (2) thereafter using District staff, including Herrera, to craft and then circulate a charter petition which contained provisions stating that LGA would be an EERA employer separate from the District and that Leroy Greene teachers would not exercise EERA rights for the purpose of representation in their employer-employee relations; and (3) thereafter in January 2012, granting the Leroy Greene charter petition after it was signed and filed with the District, thereby establishing LGA as an EERA employer separate from the District and precluding (or at least discouraging) LGA teachers from exercising their EERA rights to representation.

4. Employer acted "because of" employees' exercise of guaranteed rights.[8]

Hanline's statements to Rocha and to the school board provide direct evidence of retaliatory motive. Hanline recommended that the District pursue the charter school process, because NTA refused to waive the transfer and reassignment provisions of the CBA. Similarly, the school board was aware of Hanline's rationale when it approved his recommendation to embark on the charter school process. We conclude, therefore, that NTA has alleged facts demonstrating direct evidence of unlawful motive for the District's initiation of the process to convert the Leroy Greene site to a charter school.

Alternatively, we deem that NTA has alleged sufficient circumstantial evidence of unlawful motive, which we find, inter alia, in Hanline's statements to Rocha and to the school board and in the suspicious timing of the school board's approval of Hanline's recommendation to initiate the process to convert the Leroy Greene site to a charter school. We also deem suspicious the timing of the school board's immediate consideration, without delay for study or review, of the petition to convert the Leroy Greene site to a charter school.

On this basis, we conclude that NTA stated prima facie a retaliation violation. The District's claim, that were PERB to find a retaliation violation that it would be unable to remedy the violation by ordering that the District rescind or annul its approval of the LGA's charter granted by the District in January 2012, is unpersuasive. We are unwilling to deem our jurisdiction impaired because one of the possible remedies that we might consider, in the event of a finding of unlawful conduct, would arguably be beyond our authority to direct.

To summarize, we conclude that, at the least, we here face viable competing theories of law: NTA claims that commencing in November 2011, and thereafter, the District undertook a

[8] As noted in footnote 5 above, in an appeal from a dismissal by the Office of the General Counsel, we assume, as we must, that the essential facts alleged in the charge are true. (*San Juan USD*, *supra*, EERB Decision No. 12.)

series of actions motivated unlawfully by NTA's refusal to abrogate certain provisions of its bargained agreement with the District, while the District responds that pursuant to Education Code section 47611.5(e) PERB lacks authority over District governing board decisions to grant or disapprove charter school petitions, and that, in any event, were PERB to find a retaliation violation as alleged, PERB would lack authority to order the District reverse its decision granting the charter school petition.

We conclude that the question of whether Education Code section 47611.5(e) divests PERB of its exclusive initial jurisdiction to determine if an unfair practice has been committed, is an issue for determination in the first instance by an ALJ after a hearing at which factual and legal claims, including if appropriate the legislative history of Education Code section 47611.5(e), may be thoroughly assessed. Likewise a matter for determination in the first instance by an ALJ is PERB's authority to issue a remedy, and what remedy might be appropriate, in the event that it is determined the District's determination to convert the Leroy Greene site to a charter school was infected with unlawful motivation.

Thus, we conclude, as did the California Supreme Court in its recent decision concerning the arbitration of Los Angeles charter school issues,[9] that making a final determination on the merits of the jurisdiction and remedial authority issues at this juncture would be premature. Accordingly, we remand this dispute to the Office of the General Counsel for issuance of a complaint, so that the parties may present their conflicting legal theories, including those regarding PERB's jurisdiction, PERB's authority to order a remedy and what remedy, if any, might be appropriate, to an ALJ, with the opportunity for additional review by this Board following a decision by an ALJ in the event either or both parties seek such review.

[9] *UTLA*, *supra,* 54 Cal.4th 504.

ORDER

The partial dismissal of the unfair practice charge in Case No. SA-CE-2645-E is hereby REMANDED to the Office of the General Counsel for the issuance of a complaint in accordance with this decision.

Chair Martinez and Member Banks joined in this Decision.