STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JOSEPH OMWAMBA, Charging Party, v. BERKELEY UNIFIED SCHOOL DISTRICT, Respondent.	Case No. SF-CE-3152-E PERB Decision No. 2529 June 16, 2017

Appearances: Joseph Omwamba, on his own behalf; Atkinson, Andelson, Loya, Ruud & Romo by Anna J. Miller, for Berkeley Unified School District.

Before Gregersen, Chair; Banks and Winslow, Members.

DECISION[1]

GREGERSEN, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Joseph Omwamba (Omwamba) from a dismissal (attached) by the Office of the General Counsel of his unfair practice charge against the Berkeley Unified School District (District). The charge, as amended, alleged that the District violated the Educational Employment Relations Act (EERA)[2] by: (1) retaliating against him for engaging

[1] PERB Regulation 32320, subdivision (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 [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 Regulations 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.

in protected activity; (2) violating his *Weingarten*[3] right to representation; (3) violating the evaluation procedures provided for in the collective bargaining agreement between the Berkeley Federation of Teachers (BFT) and the District; and (4) violating provisions of the Education Code.

The Board has reviewed the case file in its entirety and has fully considered the relevant issues and contentions on appeal. Based on this review, the Board finds the warning and dismissal letters accurately describe the allegations included in the unfair practice charge, as amended. The warning and dismissal letters are well reasoned and in accordance with applicable law. We therefore dismiss the appeal and adopt the warning and dismissal letters as the decision of the Board itself, as supplemented by the discussion below.

DISCUSSION

In the original charge, Omwamba alleged that the District failed to comply with various provisions of the collective bargaining agreement between BFT and the District. The amended charge included the additional legal theory alleging that the District also violated Education Code section 44031. As the Office of the General Counsel correctly noted, PERB's jurisdiction is limited to resolving claims of unfair practices, as defined, which violate the Acts enforced by PERB. (See, e.g., *Los Angeles Unified School District* (1984) PERB Decision No. 448.) PERB lacks jurisdiction to enforce other statutory schemes. (*State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2018-S.) Thus, it is not within PERB's jurisdiction to enforce the Education Code, and PERB may not independently remedy violations of the Education Code. (*Santa Ana Unified School District* (2013) PERB

[3] In *National Labor Relations Board v. J. Weingarten, Inc.* (1975) 420 U.S. 251 (*Weingarten*), 420 U.S. 251, the U.S. Supreme Court granted employees the right to representation during disciplinary interviews.

Decision No. 2332.) In addition, PERB lacks jurisdiction to adjudicate pure contract disputes or enforce contracts between parties. (*Compton Community College District* (1991) PERB Decision No. 915, at p. 7.) Since PERB may only interpret the Education Code to the extent necessary for PERB to harmonize its provisions with the EERA and with other statutes that are under PERB's jurisdiction, the Office of the General Counsel properly dismissed the allegation that the District violated the Education Code. (*Ibid.*)

On appeal, Omwamba appears to assert that the Office of the General Counsel failed to take into account the Board's prior holding in *Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*) with respect to violations of the Education Code. We do not, however, find *Novato* persuasive in this context. In *Novato*, the Board's discussion of Education Code section 44031 and *Miller v. Chico Unified School District* (1979) 24 Cal.3d 703 was concerned with whether a school district had departed from established procedures when dealing with the charging party, i.e., as evidence of unlawful motive, not as an independent violation of EERA as was alleged here. Therefore, the Office of the General Counsel correctly dismissed Omwamba's allegations that the District violated evaluation procedures provided for in the collective bargaining agreement and portions of the Education Code.

With regard to Omwamba's allegation that the District violated his *Weingarten* right to representation, the Office of the General Counsel correctly noted that the unfair practice charge, as amended, did not include any facts indicating that Omwamba either requested representation for the October 5, 2015 meeting or that the District denied him representation at this meeting. Therefore, we agree with the Office of the General Counsel that Omwamba failed to state a prima facie case on this matter. On appeal, Omwamba identifies an additional

Weingarten violation not alleged in the unfair practice charge, as amended. Specifically, Omwamba asserts that he first requested and was denied union representation on September 24, 2015, during an exchange with District Vice Principal McDonald. PERB Regulation 32635, subdivision (b) states in relevant part: "Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." Since Omwamba has not shown any good cause to present the new factual allegation, we therefore disregard it.

With regard to Omwamba's allegation that the District retaliated against him by denying his request to have an alternate evaluation procedure, the Office of the General Counsel correctly noted that when an adverse action pre-dates protected activity, temporal proximity is not established. (*Colton Joint Unified School District* (2003) PERB Decision No. 1534.) Since the only protected activity articulated by Omwamba in either the original charge or the amended charge was the request for union representation at a meeting on October 14, 2015, such activity occurred after the District denied Omwamba's request on October 5, 2015. We therefore agree with the Office of the General Counsel that Omwamba failed to provide facts to allege or establish that he engaged in protected activity *prior to the* District's October 5, 2015 denial.

For all the reasons discussed above, we dismiss the appeal and adopt the warning and dismissal letters as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. SF-CE-3152-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Banks and Winslow joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1021
Fax: (510) 622-1027

August 18, 2016

Joseph Omwamba

Re: *Joseph Omwamba v. Berkeley Unified School District*
Unfair Practice Charge No. SF-CE-3152-E
DISMISSAL LETTER

Dear Mr. Omwamba:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on October 21, 2015. Joseph Omwamba (Mr. Omwamba or Charging Party) alleges that the Berkeley Unified School District (District or Respondent) violated the Educational Employment Relations Act (EERA or Act)[1] by violating the evaluation procedures provided for in the applicable labor agreement.

Charging Party was informed in the attached Warning Letter dated May 12, 2016 that the above-referenced charge did not state a prima facie case. Charging Party was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, the charge should be amended. Charging Party was further advised that, unless the charge was amended to state a prima facie case or withdrawn prior to June 2, 2016, the charge would be dismissed. Subsequently, an extension of time was granted.

On June 14, 2016, Charging Party filed an amended charge. On July 5, 2016, the District filed a verified position statement in response to the amended charge.[2]

The amended charge does not cure the deficiencies discussed in the Warning Letter and it does not state a prima facie case. Accordingly, the charge is dismissed based upon the facts and reasons set forth in the May 12, 2016 Warning Letter and the facts and reasons set forth herein.

[1] EERA is codified at Government Code section 3540 et seq. PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the EERA and PERB Regulations may be found at www.perb.ca.gov.

[2] On November 30, 2015, the District had filed a verified position statement in response to the original charge.

Summary of Facts

As summarized in the Warning Letter, Charging Party is a teacher at the District, in a position exclusively represented by the Berkeley Federation of Teachers (BFT). On October 5, 2015, school Vice Principal McDonald came to Charging Party's classroom to schedule a performance evaluation. At that time, Charging Party requested an alternative evaluation under section 15.3.5 of the applicable collective bargaining agreement (CBA) between the District and BFT. This is when Charging Party first learned that a parent complaint had been made against him on approximately September 24, 2015. Charging Party saw the complaint on a computer screen, but was not given a copy of it, and still has not been given a copy of it.

The amended charge did not add any new facts to those already provided in the original charge. The amended charge adds an additional legal theory, alleging that the District violated Education Code section 44031.

It is noted that there is a typographical error in the Warning Letter. Page four, the second full paragraph, should read as follows:

> It appears that Charging Party engaged in some protected activity on October 14, by having union representation in his meeting with McDonald and Principal Pasarow. (*Jurupa Unified School District* (2015) PERB Decision No. 2420, at p. 10.) Charging Party alleges the adverse action taken against him was that, on October 5, McDonald denied Charging Party's request to have an alternate evaluation procedure. However, this alleged adverse action occurred **before** the alleged protected activity. When an adverse action pre-dates protected activity, temporal proximity is not established. (*Colton Joint Unified School District* (2003) PERB Decision No. 1534.) To the extent that Charging Party was attempting to enforce the CBA on October 5, by requesting the alternative evaluation procedure, he may be considered to have engaged in protected activity. But there are no facts at all to allege or establish that McDonald denied Charging Party's request *because of* his protected activity. Therefore, a prima facie case of discrimination under the EERA is not stated.

Discussion

PERB's jurisdiction is limited to resolving claims of unfair practices, as defined, which violate the Acts enforced by PERB. (See, e.g., *Los Angeles Unified School District* (1984) PERB Decision No. 448.) PERB lacks jurisdiction to enforce other statutory schemes. (*State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2018-S.) For example, PERB has no jurisdiction to enforce the Penal Code (*State of California (Department of Corrections)* (2003) PERB Decision No. 1559-Sa), Labor Code (*State of California (Department of Personnel Administration), supra*, PERB Decision No. 2018-S), Education Code (*Fremont Unified School District* (1997) PERB Decision No. 1240), other provisions of

the Government Code (*Ventura County Community College District* (1996) PERB Decision No. 1167), or Federal law (*Ibid*).

Thus, it is not within PERB's jurisdiction to enforce the Education Code, and PERB may not independently remedy violations of the Education Code. (*Santa Ana Unified School District* (2013) PERB Decision No. 2332.) PERB may only interpret the Education Code to the extent necessary for PERB to harmonize its provisions with the EERA and with other statutes that are under PERB's jurisdiction. (*Ibid.*) For example, in determining whether a settlement agreement between a union and a school employer is valid for the purposes of determining whether EERA has been violated, PERB may look to provisions of the Education Code requiring ratification of agreements by governing boards of school employers. (*Id.* at pp. 12-14.)

Here, Charging Party alleges a violation of Education Code section 44031. This section allows a school employee the right to inspect his or her personnel records, and prohibits derogatory information being entered in the personnel file unless the employee has the opportunity to see it. PERB lacks authority to enforce this provision.

As stated in the Warning Letter, Charging Party does not state a prima facie case of a violation of EERA. Thus, the charge must be dismissed.

Right to Appeal

Pursuant to PERB Regulations, Charging Party 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. (Cal. Code Regs., tit. 8, § 32635, subd. (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. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (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 PERB 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. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
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. (Cal. Code Regs., tit. 8, § 32635, subd. (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 Cal. Code Regs., tit. 8, § 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. (Cal. Code Regs., tit. 8, § 32135, subd. (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. (Cal. Code Regs., tit. 8, § 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,

J. FELIX DE LA TORRE
General Counsel

By _____
Laura Z. Davis
Senior Regional Attorney

Attachment

cc: Anna Miller

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
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Fax: (510) 622-1027

August 10, 2016

Joseph Omwamba

Re: *Joseph Omwamba v. Berkeley Unified School District*
Unfair Practice Charge No. SF-CE-3152-E
WARNING LETTER

Dear Mr. Omwamba:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on October 21, 2015. Joseph Omwamba (Mr. Omwamba or Charging Party) alleges that the Berkeley Unified School District (District or Respondent) violated the Educational Employment Relations Act (EERA or Act)[1] by violating the evaluation procedures provided for in the applicable labor agreement.

Summary of Facts

Charging Party is a teacher employed by the District. He is, presumably, a member of the certificated bargaining unit exclusively represented by the Berkeley Federation of Teachers (BFT). BFT and the District are signatories to a Collective Bargaining Agreement (CBA), in effect from July 1, 2015 to June 30, 2017.

Article 15 of the CBA governs the evaluation process. Article 15.3.5 of the CBA states:

> By mutual agreement between the teacher and principal/designee, a permanent teacher receiving a Summative Evaluation with an overall rating of "Distinguished" or "Proficient" may participate in alternative evaluation procedures in his/her subsequent evaluation year. Alternative evaluation procedures shall be determined by the B-PAR Panel and shall be in accordance with the Stull Act.

Article 15.7.1 provides that teachers must be given notice of, and an opportunity to review, material placed in their personnel files.

[1] EERA is codified at Government Code section 3540 et seq. PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the EERA and PERB Regulations may be found at www.perb.ca.gov.

Article 15.7.5 states that no documents will be used for the purpose of reviewing the performance of a teacher unless the teacher has access to the documents.

Article 15.8 of the CBA concerns formal complaint proceedings.

For his evaluation in the 2013-2014 school year, Charging Party received "Proficient" or "Distinguished" for all categories. The evaluator was Vice Principal McDonald.

On October 5, 2015,[2] McDonald came to Charging Party's classroom to schedule an evaluation. Charging Party asked to have an alternative evaluation (i.e., under CBA Article 15.3.5). McDonald said no, because there were past complaints and concerns about Charging Party's teaching. McDonald then showed Charging Party a "parent complaint" on his computer. The complaint was about events on back to school night, which was September 24. Thus, Charging Party did not know about the complaint for eleven days. Charging Party ended the meeting, fearing that it was a disciplinary meeting implicating his *Weingarten* rights.

Charging Party has not yet been given a copy of the parent complaint. He alleges this is a violation of the CBA, Article 15.8.

On October 14, Charging Party met with McDonald, BFT Representative Dan Plonsey, and Principal Sam Pasarow. The meeting was to discuss Charging Party's evaluation. McDonald again rejected Charging Party's request for an alternative evaluation.

Charging Party is concerned that McDonald is keeping a secret personnel file to use against him. He believes that the denial of his "privilege of the Alternative Evaluation Process" is an adverse action.

On November 19, Charging Party filed with PERB "additional evidence." This additional evidence consists of a staff bulletin outlining the parent complaint process.

On November 30, the District filed a verified position statement.

Discussion

A. PERB Does Not Enforce Contracts

EERA section 3541.5(b) states:

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

[2] All subsequent dates herein are to the 2015 calendar year unless otherwise stated.

Charging Party alleges that the District failed to comply with various provisions of the CBA, including Article 15.3.5 (alternative evaluation procedures) and Article 15.8 (formal complaints). PERB does not have the jurisdiction to adjudicate pure contract disputes or enforce contracts between the parties. (*Compton Community College District* (1991) PERB Decision No. 915, at p. 7.) Therefore, the alleged failure of the District to comply with provisions of the CBA does not state a prima facie case of the laws enforced by PERB.

B. The *Weingarten* Standard

An employee required to attend an investigatory interview with the employer is entitled to union representation where the employee has a reasonable basis to believe discipline may result from the meeting. PERB adopted the *Weingarten*[3] rule in *Rio Hondo Community College District* (1982) PERB Decision No. 260. In order to establish a violation of this right, the charging party must demonstrate: (a) the employee requested representation; (b) for an investigatory meeting; (c) which the employee reasonably believed might result in disciplinary action; and (d) the employer denied the request. (See *Redwoods Community College District v. Public Employment Relations Board* (1984) 159 Cal.App.3d 617 (*Redwoods*); *Fremont Union High School District* (1983) PERB Decision No. 301; see also, *Social Workers' Union, Local 535 v. Alameda County Welfare Department* (1974) 11 Cal.3d 382.)

Charging Party alleges that he ended the October 5 meeting with McDonald when he became concerned that the meeting was becoming disciplinary in nature. Charging Party does not allege that he requested representation for this meeting, nor does he allege that the District denied him representation at this meeting. Therefore, the elements of a *Weingarten* violation, stated above, are not met, and a prima facie case is not established.

C. Adverse Action as Retaliation

To demonstrate that an employer discriminated or retaliated against an employee 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; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).) In determining whether evidence of adverse action is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*Palo Verde Unified School District* (1988) PERB Decision No. 689.) 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

[3] In *National Labor Relations Board v. Weingarten* (1975) 420 U.S. 251 (*Weingarten*), the U.S. Supreme Court granted employees the right to representation during disciplinary interviews.

> 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 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 (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the employer's failure to offer the employee justification at the time it took action (*Oakland Unified School District* (2003) PERB Decision No. 1529) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive (*North Sacramento School District*, *supra*, PERB Decision No. 264; *Novato*, *supra*, PERB Decision No. 210).

It appears that Charging Party engaged in some protected activity on October 14, by having union representation in his meeting with McDonald and Principal Pasarow. (*Jurupa Unified School District* (2015) PERB Decision No. 2420, at p. 10.) Charging Party alleges the adverse action taken against him was that, on October 5, McDonald denied Charging Party's request to have an alternate evaluation procedure. However, this alleged adverse action occurred after the alleged protected activity. When an adverse action pre-dates protected activity, temporal proximity is not established. (*Colton Joint Unified School District* (2003) PERB Decision No. 1534.) To the extent that Charging Party was attempting to enforce the CBA on October 5, by requesting the alternative evaluation procedure, he may be considered to have engaged in protected activity. But there are no facts at all to allege or establish that McDonald denied Charging Party's request *because of* his protected activity. Therefore, a prima facie case of discrimination under the EERA is not stated.

For these reasons the charge, as presently written, does not state a prima facie case.[4] If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies

[4] In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make "a

explained above, Charging Party may 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 an authorized agent of 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 an amended charge or withdrawal is not filed on or before **June 2, 2016**,[5] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Laura Z. Davis
Senior Regional Attorney

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determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where 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." (*Ibid.*)

[5] A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile or electronic mail. (PERB Regulation 32135.)