

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



EDMUND L. CARBONEAU,	)	Case Nos.	LA-CE-1188
	)		LA-CE-1240
Charging Party,	)		LA-CE-1335
	)		LA-CE-1392
v.	)		LA-CE-1217
	)		LA-CE-1247
POWAY UNIFIED SCHOOL DISTRICT,	)		LA-CE-1371
	)		LA-CE-1468
Respondent.	)	PERB Decision No.	303
)		
	)	April 14, 1983	

Appearances: Edmund L. Carboneau, in pro. per.; Clifford D. Weiler, Attorney (Brown & Conradi) for Poway Unified School District.

Before Jaeger, Morgenstern and Burt, Members.

DECISION

JAEGER, Member: This case is before the Public Employment Relations Board (Board) on exceptions filed to a proposed decision dismissing Edmund Carboneau's charges alleging that the Poway Unified School District (District) violated subsection 3543.5(a) of the Educational Employment Relations Act (EERA) .1

EERA is codified at Government Code section 3540 et seq. Section 3543.5 provides in relevant part:

It shall be unlawful for a public school employer to:

- (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to

We have reviewed the administrative law judge's (ALJ's) proposed decision in light of the entire record in this matter and, finding it free from prejudicial error, affirm the dismissal of Carboneau's charges in their totality.

FACTS

Edmund Carboneau was hired by the District as a bus driver on September 10, 1979. He became a permanent employee on March 17, 1980. He was terminated from employment with the District on April 13, 1981. At all times, Service Employees International Union, Local 102 (SEIU) was the exclusive representative of Carboneau's negotiating unit.

The District had no substantial problems with Carboneau's performance during most of his probationary period. On February 28, 1980, he was assigned to a bus route whose riders had a reputation for being disorderly. On his first and second days on that route, Carboneau experienced serious problems maintaining order.

In the past, when drivers had difficulty controlling disorderly students on their buses, the existing practice was for them to submit referral forms to the District concerning their problems with particular students. Two referrals concerning the same student could result in the termination of

discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

his or her bus riding privileges. As a result of Carboneau's problem maintaining discipline on February 28 and 29, 1980, and on occasions thereafter, Carboneau submitted a large number of referrals concerning numerous students.

In response to Carboneau's attempt to maintain discipline and enforce safety regulations, a number of complaints were made by students and parents to District officials. On March 5, a meeting was held in which Carboneau, District Transportation Director Everett Caudel, the dean of the school involved and several parents were in attendance. At the meeting, Carboneau was counseled as to proper methods for maintaining discipline, and it was agreed to cancel all previous referrals.

On April 25, 1980, another incident occurred on Carboneau's bus route, which resulted in additional referrals and parental complaints. In response to this incident, Carboneau met again with the transportation director and the dean to discuss the problems he was experiencing. The transportation director testified that, by April 25, he had concluded that Carboneau would have to "shape up or ship out."

On April 30, Carboneau again met with the transportation director, the dean, the principal of one of the schools, and a teacher assigned to bus monitoring duties. Carboneau was advised to have a less rigid attitude toward the maintenance of discipline, not to back children into a corner, and to discipline them in private if possible.

On May 1, Carboneau attended another meeting with the transportation director and District officials. The transportation director testified that, at this point, he felt that Carboneau was "having more problems with student control than anyone should have."

On May 2, while taking students home after school, Carboneau experienced what he termed a "riot" on his bus. In order to restore order, Carboneau left his route, drove back to the school and then parked the bus for one-half hour while he waited for assistance. School officials arrived and helped restore order, and the bus route was continued. The District received a number of complaints from parents concerning the fact that their children had arrived home over an hour late from school, and that Carboneau was an unduly harsh disciplinarian.

On May 5, a conference was held in which Carboneau, Transportation Director Caudel, the principal of the Black Mountain School and approximately six parents participated. Once again, Carboneau was counseled to be more "tolerant and understanding of children's point of view."

That same day, Caudel informed Carboneau that he was transferring him to another bus route because he was unable, in his opinion, to handle the children on bus route 18. Caudel agreed with Carboneau that discipline had to be maintained and rules enforced, but told Carboneau that he should not be so "overbearing."

On May 5, 1980, Superintendent Robert Reeves first became aware of Carboneau's problems maintaining discipline. After reviewing Carboneau's letter describing the May 2 incident, the superintendent concluded that steps should be taken to terminate him from employment. The superintendent testified that Carboneau's personnel file would not, at that time, have justified termination, and he ordered that a case be built against him.

On May 6, Caudel again counseled Carboneau as to the proper way of maintaining order.

On May 15, Carboneau had a meeting with Caudel, Assistant Superintendent Abbott, and Mrs. Darlene Toft, SEIU shop steward. Mr. Carboneau objected to the methods by which the District attempted to maintain discipline, which he considered to be ineffective.

Parental complaints continued to arrive during May, and the District held several meetings with Carboneau at which SEIU Shop Steward Toft was present.

In late May, Carboneau, in conjunction with SEIU, complained that his new route reduced his hours by more than the 15 minutes permitted in the District Personnel Commission rules. The grievance was settled by the reinstatement of Carboneau's hours.

On June 26, 1980, the transportation director formally requested that Carboneau's personnel record be analyzed with a view towards possible termination. It was determined, however,

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not to proceed immediately with the dismissal because Carboneau had not received his latest evaluation in a timely fashion, nor was there adequate evidence of progressive discipline.

On August 6, the superintendent had a conference with Carboneau, in which Carboneau was informed that he would receive his evaluation when he returned to work in the fall.

On September 3, 1980, the first work day of the school year, Carboneau received a largely negative evaluation of his performance.

Throughout the fall, the District began to build a case against Carboneau. The ALJ found that the District singled out Carboneau for bus inspections, documentation, and other "discriminatory" acts designed to provide sufficient documentation to support termination.²

Meanwhile between June 4, 1980 and November 10, 1980, Carboneau filed approximately 50 grievances, complaining of the District's discriminatory conduct towards him. He also wrote numerous letters to the media, public agencies, and elected officials.

²In general, the ALJ characterized the District's conduct with respect to Carboneau in the fall of 1980 as an attempt "not merely [to] build Carboneau's file . . . [but to] generate as much unfavorable material as possible by giving Carboneau more difficult work orders than other employees and by documenting all of Carboneau's past errors. . . ." We find that the ALJ's finding of fact is supported by the record as a whole. Santa Clara Unified School District (9/26/79) PERB Decision No. 104

The only other protected activity in which Carboneau engaged was his participation in the preparation of SEIU's contract proposals in the fall of 1979.³

DISCUSSION

In Novato Unified School District (4/30/82) PERB Decision No. 210, the Board clarified the test developed in Carlsbad Unified School District (1/30/79) PERB Decision No. 89 for resolving alleged violations of subsection 3543.5(a). Under Novato, where a party has alleged discrimination, he or she has the initial burden of making a showing sufficient to support the inference that protected activity was a motivating factor in the employer's decision to take adverse personnel action. In recognition of the fact that direct evidence of motivation is seldom available, we have held that it may be demonstrated circumstantially. Accord, Republic Aviation Corp. v. NLRB (1945) 324 U.S. 793 [16 LRRM 620]. If the charging party is able, by direct or circumstantial evidence, to raise the inference that the employer was in any way motivated to take adverse personnel action by its knowledge of the employee's protected activity, the burden shifts to the employer to

3There is disputed evidence as to whether the District was aware of Carboneau's participation in the formulation of contract proposals. We need not resolve this dispute, since, as is discussed infra, even if the District was aware of Carboneau's participation in protected activities, there is no evidence that such conduct was a motivating factor in the decision to terminate him.

demonstrate that it would have acted as it did regardless of the employee's participation in protected activity. Novato, supra; Wright Line, A Division of Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169].

The ALJ found that the District reached a firm decision to terminate Carboneau on May 5, 1980. Applying the first prong of the Novato test, he found that Carboneau's minimal protected activity prior to May 5 was not a motivating factor in the decision to terminate him.

Whether or not the District reached the decision to terminate Carboneau on May 5, 1980 is not, in our opinion, determinative of the issues in this case. When the record is viewed in its totality, including Carboneau's protected activities between May 5, 1980 and his termination in April of 1981,⁴ there is insufficient evidence to support the conclusion that Carboneau's protected activities were a motivating factor in the decision to terminate him. While it is clear that the District made every effort to build a case against Carboneau, and may perhaps have treated him more harshly than other employees, the evidence will not support a finding that this disparate treatment was in any way motivated by Carboneau's protected activities.

⁴After May 5, Carboneau engaged in the following protected activities: (1) he sought representation by SEIU Shop Steward Toft; and (2) he filed numerous grievances. See North Sacramento School District (12/20/82) PERB Decision No. 264.

We deny the charging party's motion to reopen the record, as there is no basis upon which the Board can conclude that the charging party was deprived of the opportunity to make a full presentation of his case. See San Joaquin Delta Community College District (3/16/83) PERB Decision No. 261b. We further deny the respondent's request for attorney's fees, since the record does not support a finding that the unfair practice charges brought by Mr. Carboneau were frivolous. King City Joint Union High School District (3/3/82) PERB Decision No. 197. Finally, we deny the respondent's request to present oral argument before the Board.

ORDER

Upon review of the entire record in this case, the Public Employment Relations Board ORDERS that the charges filed in Case Nos. LA-CE-1188, 1240, 1335, 1392, 1217, 1247, 1371, and 1468 are DISMISSED.

Members Morgenstern and Burt joined in this Decision.