STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

VINCENT DARRYL WOODS, Charging Party, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondent.	)	Case No. LA-CE-2908 PERB Decision No. 874 April 10, 1991

Appearances: Vincent Darryl Woods, on his own behalf; Rochelle J. Montgomery, Assistant Legal Adviser, for Los Angeles Unified School District.

Before Shank, Camilli and Carlyle, Members.

DECISION AND ORDER

SHANK, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Vincent Darryl Woods (Woods) to a proposed decision of a PERB administrative law judge (ALJ). The proposed decision dismissed the complaint, which alleged the Los Angeles Unified School District (District) unlawfully discriminated and retaliated against Woods in violation of Section 3543.5(a) of the Educational Employment Relations Act (EERA).[1] The Board has

[1]EERA is codified at Government Code section 3540 et seq. Section 3543.5 (subsequently amended by Chapter 313 of the Statutes of 1989, effective January 1, 1990), stated, in pertinent part, as follows:

> It shall be unlawful for a public school employer to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise

reviewed the entire record in this case, including the proposed decision, Woods' exceptions, the District's response thereto, and the transcript of the hearing, and, in accord with the discussion below, finds it appropriate to remand this case for the taking of additional evidence.

The Board notes that Woods' statement of exceptions was filed one day late. However, the Board excuses this late filing for good cause (PERB Regulation section 32136[2]). Further, as the District responded to Woods' statement of exceptions, the Board had the opportunity to consider both Woods' and the District's arguments.

We also note that Woods has filed a late request for oral argument (PERB Regulation section 32315). Because this case is being remanded so that the hearing may be reopened, the Board finds it is not necessary to decide whether or not to direct oral argument in this case.

Finally, the District argues that Woods' statement of exceptions was not filed in accordance with PERB Regulation section 32300. We find that the District's argument has merit. Woods' statement of exceptions was a one-page document which was uncomprehensible and contained no references to the ALJ's proposed decision. However, once an appeal is filed, the Board

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

[2]PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

is not constrained from considering sua sponte legal issues not raised by the parties when necessary to correct a mistake of law. (Apple Valley Unified School District (1990) PERB Order No. Ad-209a.) To the extent that the ALJ instructed Woods that he must, under EERA, establish that he encouraged other employees to join and support an employee organization, particularly in light of the amended complaint, the instruction constituted a narrow and misleading statement of the law.

At the October 16, 1990 hearing in this case, the ALJ granted the District's motion to dismiss the complaint, on the grounds that Woods failed to establish a prima facie violation of EERA. In order to establish a prima facie case, the charging party must prove: (1) the employee engaged in protected activity; (2) the employer had knowledge of such protected activity; and (3) adverse action was taken against the employee as a result of such protected activity. (Novato Unified School District (1982) PERB Decision No. 210.)

The ALJ's proposed decision dismissed the complaint on the grounds that Woods failed to establish that he engaged in the first element of a prima facie case, protected activity. The Board finds that the ALJ reached this conclusion, in substantial part, by narrowing the focus of the hearing to the allegations in the original complaint and disregarding those allegations contained in the amended complaint. For instance, at the hearing, the ALJ stated that it was Woods' burden

". . . to establish that you [Woods] exercised some rights guaranteed by the Educational Employment Relations Act, namely, encouraging other employees to join and support an employee organization." (Emphasis added.) In addition, at the hearing, the ALJ repeatedly advised Woods that he was required to establish that he engaged in the activity alleged in the original complaint dated May 29, 1990 (i.e. encouraging other employees to join and support an employee organization). However, by Order of an administrative law judge, dated August 13, 1990, the complaint was amended to add the further allegations, inter alia:

> During 1987, 1988, and 1989, the Charging Party exercised rights guaranteed by the EERA by protesting or expressing dissatisfaction regarding the lack of equality in job assignments, by addressing other working conditions, and by advising management of his intention to involve the union in his protests.

During the hearing, any instruction from the ALJ to Woods regarding Woods' burden of establishing the exercise of some protected activity should have, at a minimum, reflected the allegations of protected activity contained in the amended complaint.

Furthermore, at the hearing, the ALJ characterized the August 13 amendment as mere background. The ALJ's characterization of the amendment to the complaint as background was erroneous and misleading.[3]

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[3]The ALJ's questioning of the witnesses and statements to the parties during the hearing perpetuated the ALJ's narrow application of the law concerning Woods' burden of production on the issue of protected activity.

Moreover, it is significant that Woods did present evidence which may be sufficient to establish protected activity. Woods' direct supervisor, Edward Flowers (Flowers), testified that Flowers' supervisor told him that Woods had a meeting set with a union representative, and Flowers should make sure it was not done on work time. William Charles Hunt, III (Hunt), a co-worker of Woods, testified that a union representative came out to "visit" with Woods concerning various job-related issues, and that whenever Woods met with Ernest Cutley, gardening supervisor and the District's primary witness, Woods wanted his union representative present to represent him (see e.g. California State University, Sacramento (1982) PERB Decision No. 211-H; California State University, Long Beach (1987) PERB Decision No. 641-H). Although the District did not have an opportunity to present its case, the uncontroverted testimony of Flowers and Hunt, absent a showing of evidence to the contrary, may be sufficient to establish that Woods did engage in protected activity.

Based upon the foregoing, the Board ORDERS the hearing be reopened and that Woods and the District be permitted to introduce additional evidence including, but not limited to, additional testimony of those witnesses who testified at the hearing on October 16, 1990. This case, is therefore, REMANDED to the Chief Administrative Law Judge who is to proceed in accord with the above discussion.

Members Camilli and Carlyle joined in this Decision.