STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ASSOCIATION OF PUBLIC SCHOOL SUPERVISORY EMPLOYEES,	)	
Charging Party,	)	Case No. LA-CE-3087
v.	)	PERB Decision No. 918
LOS ANGELES UNIFIED SCHOOL DISTRICT,	)	January 7, 1992
Respondent.	)	

Appearances: Wanda Robinson, Regional Representative, for Association of Public School Supervisory Employees; Rochelle J. Montgomery, Attorney, for Los Angeles Unified School District.

Before: Hesse, Chairperson; Camilli and Carlyle, Members.

DECISION

CARLYLE, Member: This case is before the Public Employment Relations Board (Board) on appeal by the Association of Public School Supervisory Employees (APSSE) to a Board agent's dismissal of a charge (attached hereto) that the Los Angeles Unified School District (District) violated the Educational Employment Relations Act (EERA) section 3543.5(a) and (b).[1] The Board has reviewed

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.5 states, in pertinent part:

> It shall be unlawful for a public school employer to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an

the dismissal and, finding it to be free of prejudicial error, adopts it as the decision of the Board itself in accordance with the discussion below.

On appeal, APSSE argues that its member, Don Baity (Baity), requested a meeting with District representatives under the Personnel Commission Rule (Rule) 702(D),[2] which concerns a review of performance evaluations, and not under Rule 893, which provides for a grievance procedure. Therefore, APSSE contends, the Board agent's reliance on Rule 893 was in error.

The letter from the District representative to Baity demonstrates that the District had notice that APSSE was

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applicant for employment or reemployment.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

[2]Rule 702(D) states:

1. Review of the performance evaluation by the next higher level of administrative authority may be made before or after an individual evaluation conference is held with each employee. Any comments recorded on the performance evaluation form by the reviewer shall be signed and shown to the supervisor who made the evaluation and to the employee.

2. Employees and evaluators are encouraged to arrive at a mutual understanding and acceptance of the evaluation during the conference. An employee who believes that the evaluation is improper may go to the evaluator's immediate supervisor to resolve differences. If a permanent employee has received one or more checks in the "below work performance standards" column and remains dissatisfied after review by the evaluator's supervisor, the procedures provided in Rule 893 may be used.

proceeding under Rule 702. Nevertheless, the failure to reschedule a meeting under this rule or Rule 893 did not constitute a prima facie case of unilateral change.[3] In this case, the failure to reschedule one meeting is insufficient to show a policy change by the District that had a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members. (Grant Joint Union High School District, supra. PERB Decision No. 196.)

APSSE also contends that the Board agent's failure to apply the relation back doctrine to the allegations of retaliation and interference raised for the first time in its amended charge was in error. The allegations of retaliation and interference concerned events surrounding Baity's demotion. However, the allegations alleged in the original charge solely concern the failure of the District to reschedule a meeting regarding a performance evaluation. The original charge and the amended charge raise allegations of different issues based on different events and, therefore, the doctrine of relation back is

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[3]To state a prima facie case of a unilateral change the charging party must allege facts sufficient to establish: (1) the employer breached or altered the party's written agreement or own established past practice; (2) such action was taken without giving the exclusive representative notice or an opportunity to bargain over the change; (3) the change is not merely an isolated breach of the contract, but amounts to a change of policy (i.e., has a generalized effect or continuing impact upon bargaining unit members' terms and conditions of employment); and (4) the change in policy concerns a matter within the scope of representation. (Grant Joint Union High School District (1982) PERB Decision No. 196; Pajaro Valley Unified School District (1978) PERB Decision No. 51; Davis Unified School District, et al. (1980) PERB Decision No. 116.)

inapplicable. (Burbank Unified School District (1986) PERB Decision No. 589.)

Finally, even assuming that the allegations raised in the amended charge were timely filed, there is no prima facie showing of retaliatory conduct on the part of the District. The only information provided by APSSE is that a District representative signed the Notice of Intent to Dismiss for Baity 23 days after a request for the performance evaluation review. However, timing alone is not sufficient for an inference of unlawful motive. (Los Angeles Community College District (1989) PERB Decision No. 748.)

The charge in Case No. LA-CE-3087 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairperson Hesse and Member Camilli joined in this Decision.

STATE OF CALIFORNIA PETE WILSON, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Boulevard, Suite 650
Los Angeles, CA 90010-2334
(213) 736-3127

August 30, 1991

Wanda Robinson
1543 W. Olympic Blvd., Suite 200
Los Angeles, California 90015

Re: DISMISSAL AND REFUSAL TO ISSUE COMPLAINT,
Unfair Practice Charge No. LA-CE-3087,
Association of Public School Supervisory Employees v. Los Angeles Unified School District

Dear Ms. Robinson:

I indicated to you in my attached letter dated August 7, 1991, that the above-referenced charge did not state a prima facie case. You were advised that if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, you should amend the charge accordingly. You were further advised that unless you amended the charge to state a prima facie case, or withdrew it prior to August 14, 1991, the charge would be dismissed.

On August 20, 1991, I received from you an amended charge. The amended charge appears to make two arguments relevant to the original charge: (1) that Don Baity and APSSE were proceeding not under Rule 893 (the grievance procedure) but rather under Rule 702 (which provides for review of performance evaluations) and (2) that the failure to reschedule the Step 2 meeting was in retaliation for Don Baity's prior protected activity.

Despite these arguments, the original allegations, as amended, still fail to state a prima facie violation of the EERA, for the reasons that follow.

It seems difficult to support the argument that Baity and APSSE were not proceeding under Rule 893. Baity's use of a grievance form and APSSE's request for a Step 2 meeting both invoke Rule 893, not Rule 702. In any case, it still does not appear that the failure to reschedule one meeting, under either Rule, amounted to a policy change with a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members. (See Grant Joint Union High School District (1982) PERB Decision No. 196.)

The argument that the failure to schedule the meeting was retaliatory is not supported by relevant allegations of fact.

The amended charge does not dispute the facts set forth in my August 7 letter: that the meeting was scheduled, that it was canceled because of Tamara Dorfman's jury service, and that APSSE did not request that it be rescheduled. Although the charge argues that Principal Maria Reza intended to retaliate against Baity, it does not allege that Reza had any involvement in any decision not to reschedule the meeting. Furthermore, there is no allegation that Tamara Dorfman, who apparently was responsible for not rescheduling the meeting, evidenced any intent to retaliate against Baity. The original allegations, as amended, therefore do not state a prima facie case of retaliation. (See Novato Unified School District (1982) PERB Decision No. 210.)

I am therefore dismissing the original allegations, as amended, based on the facts and reasons contained in this letter and in my August 7 letter.

The amended charge also includes the following new allegations, which were not contained in the original charge:

> (1) The Respondent retaliated against Baity by demoting him from a Plant Manager III, to the position of custodian; (2) denied, interfered and or restrained Baity from filing a grievance regarding his 1990 performance evaluation, thereby unilaterally changing the performance evaluations grievance procedures; (3) denied Baity the right to be represented by the Association at a performance evaluation meeting which the employee reasonably believed would result in discipline, or, in the alternative, was surrounded by highly unusual circumstances; and (4) denied Baity the right to be represented by the Association, a nonexclusive representative, by unilaterally changing a policy permitting representation at performance evaluation meetings.

The performance evaluation mentioned in these new allegations was dated August 22, 1990. Baity filed his grievance concerning the evaluation on September 11, 1990. Baity was served with a Notice of Unsatisfactory Service recommending his demotion on November 28, 1990. APSSE allegedly discovered on February 4, 1991, that the District had ignored Baity's right to a pre-disciplinary meeting, at which APSSE could have represented him.

Based on the facts stated above, the new allegations in the amended charge do not state a prima facie case within the

jurisdiction of the Public Employment Relations Board (PERB), for the reasons that follow.

Government Code section 3541.5(a) provides in part that PERB "shall not . . . issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The amended charge was filed on August 20, 1991. The new allegations in the amended charge do not "relate back" to the original charge, because the new allegations raise different issues based on different events. (See Burbank Unified School District (1986) PERB Decision No. 589.)

The six-month limitation period ran out for the unfair practices alleged in the new allegations before the amended charge was filed. The six-month limitation period for the alleged retaliatory demotion began to run on November 25, 1990, when Baity received notice of the recommended demotion, even though the demotion did not become final until later. (See Los Angeles Unified School District (1991) PERB Decision No. 894.) The other alleged unfair practices also occurred in 1990 and were known to APSSE no later than February 4, 1991. The new allegations in the amended charge, filed more than six-month later, are therefore dismissed as untimely.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, you 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 (California Code of Regs., tit. 8, sec. 32635(a)). To be timely filed, the original and five copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing (California Code of Regs., tit. 8, sec. 32135). Code of Civil Procedure section 1013 shall apply. The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

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 calendar days following the date of service of the appeal (California Code of Regs., tit. 8, sec. 32635(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 California Code of Regs., tit. 8, sec. 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail postage paid and properly addressed.

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 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 (California Code of **Regs., tit.** 8, sec. 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,

JOHN W. SPITTLER
General Counsel

By _____
Thomas J. Allen
Regional Attorney

Attachment

cc: Rochelle J. Montgomery

STATE OF CALIFORNIA PETE WILSON, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Boulevard, Suite 650
Los Angeles, CA 90010-2334
PERB (213) 736-3127

August 7, 1991

Wanda Robinson
1543 W. Olympic Blvd., Suite 200
Los Angeles, California 90015

Re: WARNING LETTER, Unfair Practice Charge No. LA-CE-3087, Association of Public School Supervisory Employees v. Los Angeles Unified School District

Dear Ms. Robinson:

In the above-referenced charge, the Association of Public School Supervisory Employees (APSSE) alleges that the Los Angeles Unified School District (District) unilaterally changed grievance procedures. This conduct is alleged to violate Government Code sections 3543.5(a) and (b) of the Educational Employment Relations Act (EERA).

My investigation of this charge reveals the following facts. APSSE is an employee organization and a nonexclusive representative. Don Baity is an APSSE member and an employee of the District in a unit for which there is no exclusive representative. Unit members are covered by a multi-step grievance procedure, under District Personnel Commission Rule 893. Section B.9 of that Rule provides as follows:

> If a grievance is not processed by the grievant at any step in accordance with the time limits of this Rule, it shall be deemed withdrawn. If the District fails to respond to the grievance in a timely manner at any step, the running of its time limit shall be deemed a denial of the grievance and termination of the step in question, and the grievant may proceed to the next step. All time limits and grievance steps may be shortened, extended or waived, but only by mutual written agreement.

It is alleged that on or about November 20, 1990, APSSE requested that the District proceed to Step 2 of the procedure on a grievance concerning a performance evaluation of employee Baity, but that the District "intentionally ignored the request." It is further alleged that the District "thereby has unilaterally changed its procedures regarding the grievance procedure" and has

violated Baity's right to be represented and APSSE's right to represent him.

In a letter to me dated June 25, 1991, District Assistant Legal Adviser Rochelle J. Montgomery gives the following account of the Baity grievance proceedings, which you have not disputed:

> Step 1 of the grievance was heard on or about October 25 at which time Mr. Baity's grievance was denied. The District notified the Charging Party of its denial on or about October 31. Subsequent thereto, on or about November 5, the Charging Party requested a Step 2 meeting. Pursuant to this request, Tamara Dorfman, Personnel Representative for the District, contacted APSSE representative Wanda Robinson to schedule the Step 2. Ultimately, the Step 2 was scheduled for February 20, 1991. Just prior to the meeting, on or about February 5, Tamara Dorfman was called to jury duty. Soon thereafter, Ms. Dorfman contacted Wanda Robinson and informed her of her jury service. Additionally, Ms. Dorfman informed Ms. Robinson on or about February 20 that she remained on jury duty and that the Step 2 meeting would have to be rescheduled. Soon thereafter, Ms. Dorfman ended her jury services. Despite the fact that Ms. Dorfman and Ms. Robinson met on several occasions in formal hearings related to the same employee (Baity), at no time did Ms. Robinson request the rescheduling of the Step 2. Rather, the charging party chose to file the instant charges.

Based on the facts stated above, the charge does not state a prima facie violation of the EERA, for the reasons that follow.

Under Grant Joint Union High School District (1982) PERB Decision No. 196, an unlawful unilateral change must amount to a change of policy, which has a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members. The District's failure to reschedule a Step 2 meeting on the Baity grievance does not appear to amount to a policy change with such an impact or effect.

On the contrary, the District's established grievance policy contemplates that the District will sometimes fail to respond to a grievance in a timely manner. Section B.9 of Rule 893 provides that if that happens "at any step, the running of its time limit shall be deemed a denial of the grievance and the termination of the step in question, and the grievant may proceed to the next step." It appears, however, that when the District failed to reschedule the Step 2 meeting on the Baity grievance, Baity and APSSE did not proceed to Step 3, nor did they request that the Step 2 meeting be rescheduled.

APSSE argues that although under Section B.9 it could proceed to Step 3 without a Step 2 response it could not proceed to Step 3 without a Step 2 meeting. This does not appear to be sensible reading of Section B.9, however, and there is no factual allegation that supports it.

For these reasons, the charge as presently written does not state a prima facie case. If there are any factual inaccuracies in this letter or any additional facts that would correct the deficiencies explained above, please amend the charge accordingly. 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 must be signed under penalty of perjury by the charging party. The amended charge must be served on the respondent and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before August 14, 1991, I shall dismiss your charge. If you have any questions, please call me at (213) 736-3127.

Sincerely,

Thomas J. Allen
Regional Attorney