STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SANTA MARIA ELEMENTARY EDUCATION ASSOCIATION, CTA/NEA,	)	
Charging Party,	)	Case No. LA-CE-3119
v.	)	PERB Decision No. 924
SANTA MARIA-BONITA ELEMENTARY SCHOOL DISTRICT,	)	February 24, 1992
Respondent.	)	

Appearances: Charles R. Gustafson, Attorney, for Santa Maria Elementary Education Association, CTA/NEA; Biddle & Hamilton by W. Craig Biddle, Attorney, for Santa Maria-Bonita Elementary School District.

Before Camilli, Carlyle and Caffrey, Members.

DECISION AND ORDER

CAFFREY, Member: This case is before the Public Employment Relations Board (Board) on appeal by the Santa Maria Elementary Education Association, CTA/NEA (Association) to a Board agent's dismissal (attached hereto) of its unfair practice charge. In its charge, the Association alleged that the Santa Maria-Bonita Elementary School District violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA)[1] by

[1]EERA is codified at Government Code section 3540 et seq. EERA 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

unilaterally changing policy and retaliating against an employee.

The Board has reviewed the dismissal, and finding it to be free of prejudicial error, adopts it as the decision of the Board itself.

The unfair practice charge in Case No. LA-CE-3119 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Camilli and Carlyle joined in this Decision.

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guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

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

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

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

December 4, 1991

Charles R. Gustafson
California Teachers Association
P.O. Box 92888
Los Angeles, CA 90009-2888

Re: DISMISSAL AND REFUSAL TO ISSUE COMPLAINT, Unfair Practice Charge No. LA-CE-3119, Santa Maria Elementary Education Association, CTA/NEA v. Santa Maria-Bonita School District

Dear Mr. Gustafson:

I indicated to you in my attached letter dated November 21, 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 December 2, 1991, the charge would be dismissed.

I have not received either a request for withdrawal or an amended charge. I am therefore dismissing the charge based on the facts and reasons contained in my November 21 letter.

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: W. Craig Biddle

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

November 21, 1991

Charles R. Gustafson
California Teachers Association
P. O. Box 92888
Los Angeles, CA 90009-2888

Re: WARNING LETTER, Unfair Practice Charge No. LA-CE-3119, Santa Maria Elementary Education Association, CTA/NEA v. Santa Maria-Bonita School District

Dear Mr. Gustafson:

In the above-referenced charge, the Santa Maria Elementary Education Association, CTA/NEA (Association) alleges that the Santa Maria-Bonita School District (District) unilaterally changed policy and retaliated against an employee, in alleged violation of Government Code sections 3543.5(a), (b), and (c) of the Educational Employment Relations Act (EERA).

My investigation of the charge reveals the following facts.

The Association and the District were parties to a collective bargaining agreement for the term July 1, 1988, to June 30, 1991. Section 19.2 of the agreement deals with "Dismissal/Long-Term Suspension of Probationary Employees." Section 19.2.3 provides in relevant part as follows:

> If the notice of dismissal or suspension is given, the employee shall have fifteen (15) days from receipt of the notice of dismissal or suspension to submit to the Board of Trustees a written request for a hearing.

On or about March 11, 1991, The District gave probationary employee Karen Burow a "Notice of Nonreemployment" that stated as follows:

> In accordance with Education Code 44929.21, you are hereby notified that the Governing Board has determined not to reemploy you as a certificated employee in the Santa-Maria-Bonita School District for the next succeeding year, 1991-92.

By a letter dated March 13, 1991, Burow requested from the District a hearing under section 19.2.3 of the agreement. On or

about April 11, 1991, the District denied Burow's request, stating that Burow had "neither a statutory nor a contractual right to a hearing in this matter."

Paragraph 14 of the charge (added by amendment) reads in full as follows:

> The District aforementioned actions were taken because of Karen Burow's insisting that the District provide her the same contractual program of support it had provided many other employees in the past even though the District's personnel director had indicated to the Association that he did not like the past practice, would not follow it, and if the Association did not like it, they could take him to court. Two days after Karen Burow completed the period of program support, with evaluations which had been sufficient for retention in the past for other employees, the personnel director contacted her for a meeting that day at 4:00 p.m. without giving her time to contact a representative to be present with her. At the meeting the personnel director informed her that she would not be rehired and told her that he could dismiss her even if she were teacher of the year.

In a telephone conversation on November 19, 1991, you informed me that the "contractual program of support" mentioned in this paragraph was established by section 9.2 of the collective bargaining agreement, which provides in part as follows:

> Any Member who receives a negative evaluation shall participate in a program designed to improve the appropriate areas of the Member's performance. The program may be initiated at any time during the school year but shall last at least 80 school days.

You further informed me that Burow received a negative evaluation on May 25, 1990, and participated in a "program of support" beginning October 8, 1990. You were unable, however, to identify any way in which Burow "insisted" on her contractual rights other than by simply participating in the program. You were also unable to identify any way in which Burow's participation in the program caused the District to nonreemploy her. On the contrary, your theory seemed to be that Burow's participation in the

"program of support" should have had an effect on the District's decision but did not.

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

As noted in Grimsley v. Board of Trustees (1987) 189 Cal.App.3d 1440, 1446 [235 Cal.Rptr. 85], for more than 50 years there has been a sharp distinction between the procedures for dismissing probationary employees during the school year and the procedures for not reemploying probationary employees for the ensuing school year. The procedures for dismissal are governed by Education Code section 44948.3, which was mirrored by Section 19.2 of the collective bargaining agreement here. The procedures for nonreemployment are governed by Education Code section 44929.21, which was cited by the District in its "Notice of Nonreemployment" to Burow. The collective bargaining agreement did not address procedures for nonreemployment.

If the collective bargaining agreement did address procedures for nonreemployment, it would be preempted by the Education and Government Codes. In Fontana Teachers Assn. v. Fontana Unified School Dist. (1988) 201 Cal.App.3d. 1517, 1524-26 [247 Cal.Rptr. 761] and Bellflower Education Assn. v. Bellflower Unified School Dist. (1991) 228 Cal.App.3d 805, 811-12 [279 Cal.Rptr. 179], it was held that collective bargaining agreements are preempted as to causes and procedures relating to nonreemployment. In Fontana Teachers Assn., supra, it was specifically held that a school district had "the absolute right" to nonreemploy a probationary employee "without any redress by way of administrative hearing or appeal" (201 Cal.App.3d at 1526). In Bellflower Education Assn., supra, it was held that nonreemployment of probationary employees "without the need for hearing and appeal" was a school district's "exclusive right and statutory duty" and could not be "relegated to the collective bargaining process" (228 Cal.App.3d at 812). It therefore cannot be said that the District's denial of a hearing on Burow's nonreemployment constituted a unilateral change of policy within the scope of the duty to negotiate.

A school district may not use nonreemployment as a means of retaliation for protected activity. McFarland Unified School District (1990) PERB Decision No. 786. The charge, however, does not state facts sufficient for a prima facie showing of retaliation. To demonstrate retaliation, a charging party must show that: (1) the employee exercised rights under the EERA, (2) the employer had knowledge of the exercise of those rights, and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employee because of

the exercise of those rights. Novato Unified School District (1982) PERB Decision No. 210; Carlsbad Unified School District (1979) PERB Decision No. 89; Department of Developmental Services (1982) PERB Decision No. 228-S; California State University (Sacramento) (1982) PERB Decision No. 211-H.

The charge does not clearly identify, and you have been unable to identify, how employee Burow exercised rights under the EERA. The charge also does not identify, and you have been unable to identify, facts which demonstrate that the District's decision to nonreemploy Burow was because of her exercise of her rights.

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 December 2, 1991, I shall dismiss your charge. If you have any questions, please call me at (213) 736-3127.

Sincerely,

Thomas J. Allen
Regional Attorney