

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



APPLE VALLEY CLASSIFIED)	
EMPLOYEES ASSOCIATION,)	
)	
Charging Party,)	Case No. LA-CE-3095
)	
v.)	PERB Decision No. 963
)	
APPLE VALLEY UNIFIED SCHOOL)	December 7, 1992
DISTRICT,)	
)	
Respondent.)	
)	

Appearance: California Teachers Association by Charles R. Gustafson, Attorney, for Apple Valley Classified Employees Association.

Before Hesse, Chairperson, Camilli and Carlyle, Members.

DECISION AND ORDER

CARLYLE, Member: This case is before the Public Employment Relations Board (Board) on appeal by the Apple Valley Classified Employees Association (Association) of the Board agent's partial dismissal, attached hereto, of its charge alleging that the Apple Valley Unified School District violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA).¹

¹EERA is codified at Government Code section 3540 et seq. 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 applicant for employment or reemployment.

The Board finds the Association's claim on appeal, that the Board agent showed bias, is unsupported by any factual assertions and is therefore without merit. Moreover, having reviewed the dismissal de novo, we find the dismissal to be free of prejudicial error and adopt it as the decision of the Board itself.²

The Board hereby AFFIRMS the Board agent's partial dismissal in Case No. LA-CE-3095.

Chairperson Hesse and Member Camilli joined in this Decision.

-
- (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.

²Chairperson Hesse finds that on the transferring of bargaining unit work allegation, a prima facie case has been established and that a complaint should be issued.

PUBLIC EMPLOYMENT RELATIONS BOARD



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



July 8, 1992

Charles R. Gustafson, Esq.
Dept. of Legal Services
California Teachers Association
P.O. Box 92888
Los Angeles, California 90009-2888

Re: PARTIAL DISMISSAL OF CHARGE
Unfair Practice Charge No. LA-CE-3095,
Apple Valley Classified Employees
Association v. Apple Valley Unified School District,
Second Amended Charge

Dear Mr. Gustafson:

On June 14, 1991, you filed the above referenced charge. It was placed in abeyance on July 29, 1991. On February 19, 1992, you filed the First Amended Charge. After receiving your letter dated June 4, 1992, the case was taken out of abeyance on June 8, 1992. You allege that the Apple Valley Unified School District (District) committed unlawful reprisals/discrimination; interference, denial of representation, and unilateral changes in violation of Government Code section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA).

I indicated to you, in my attached letter dated June 23, 1992, that the First Amended Charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended these allegations to state a prima facie case or withdrew them prior to June 30, 1992, the charge would be dismissed.

On June 26, 1992, I received a Second Amended Charge which changed/added to some of the paragraphs. Other than paragraph 3.g., I determined that the Second Amended Charge contained the same or similar problems that were indicated in my letter dated June 23, 1992. I telephoned your office around 10:00 a.m. on July 2, 1992, to obtain additional information. I was advised by Anita that you would be in later in the day. I left a message to call and indicated that I had some questions on this case. At 1:10 p.m., Amy called me the same day and indicated that she learned that you would not be coming in that day, and that your office was closed on Friday, July 3, 1992. She advised me that you would be in around 10:00 a.m. on July 6, 1992, and that you would call me back at that time. To date, I have not heard from.

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you. Since you have not returned my call, I am therefore dismissing all allegations in the Second Amended Charge, except for paragraph 3.g., based on the above and the facts and reasons contained in my June 23, 1992 letter.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, you may obtain a review of this dismissal of certain allegations contained in the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. 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 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing. (Cal. 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 (20) calendar days following the date of service of the appeal. (Cal. 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 Cal. 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 (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

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be accompanied by proof of service of the request upon each party. (Cal. Code of Regs., tit. 8, sec. 32132.)

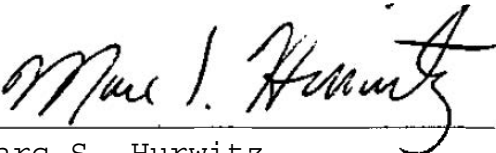
Final Date

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



Marc S. Hurwitz
Regional Attorney

Attachment

cc: Steve Andelson, Esq. and Robert L. Sammis, Esq.

PUBLIC EMPLOYMENT RELATIONS BOARD



Los Angeles Regional Office
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(213) 736-3127



June 23, 1992

Charles R. Gustafson, Esq.
California Teachers Association
Dept. of Legal Services
P.O. Box 92888
Los Angeles, California 90009-2888

Re: WARNING LETTER, Unfair Practice Charge No. LA-CE-3095,
Apple Valley Classified Employees Association v. Apple
Valley Unified School District, First Amended Charge

Dear Mr. Gustafson:

On June 14, 1992 you filed the above referenced charge. It was placed in abeyance on July 29, 1991. On February 19, 1992, you filed the First Amended Charge. After receiving your letter dated June 4, 1992, the case was taken out of abeyance on June 8, 1992. You allege that the Apple Valley Unified School (District) committed unlawful reprisals/discrimination, interference, denial of representation, and unilateral changes in violation of Government Code section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA).

The First Amended Charge as presently written does not state a prima facie violation of the EERA for the reasons that follow. At paragraphs 3a. through 3m., you have alleged approximately 13 acts/instances of reprisal/discrimination (involving about 5 employees), including several alleged threats (or interference). PERB Regulation 32615(a)(5) (California Code of Regulations, title 8, section 32615(a)(5)) requires that a charge contain a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." In order to state a prima facie reprisal/discrimination violation of EERA section 3543.5(a), the 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 imposed¹ or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees

¹Paragraph 3j. involving Association officer Chuck Eiding appears to allege insufficient facts, in part, since it may not even allege an adverse action. This is because your Exhibit B memo dated October 17, 1991, criticizing Chuck Eiding, was sent from one Supervisor to another. Also, it does not reflect that a copy was placed in the employee's personnel file.

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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.

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor, 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, (2) the employer's departure from established procedures and standards when dealing with the employee, (3) the employer's inconsistent or contradictory justifications for its actions, (4) the employer's cursory investigation of the employee's misconduct, (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons, or (6) any other facts which might demonstrate the employer's unlawful motive. Novato Unified School District, supra; North Sacramento School District (1982) PERB Decision No. 264. As presently written, this First Amended Charge at paragraphs 3a. through 3m. provides vague allegations, insufficient facts and legal conclusions. It fails to clearly and concisely (who, what, when, where, and how) demonstrate with sufficient facts the above required elements and factors, and therefore, does not state a prima facie violation of section 3543.5(a).²

For several alleged instances involving threats/interference with protected rights, you have not stated a prima facie violation of EERA section 3543.5(a) as you have not clearly and concisely (who, what, when, where and how) demonstrated with sufficient facts that the District's conduct tends to or does result in some

²Regarding paragraph 3i., even if sufficient facts were alleged, it appears that the allegations involving the June 18, 1991 memo to Pres. Dennis Ryan are untimely and will be dismissed since the amended charge was filed February 19, 1992. EERA section 3541.5(a). There is no relation back as paragraph 3i. was raised for the first time in the amended charge on February 19, 1992. This problem will also apply to parts of paragraph 3j. involving Association officer Chuck Eiding. All allegations in paragraph 3j. of unlawful conduct occurring prior to August 19, 1991 are untimely and will be dismissed.

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harm to employee rights. Carlsbad Unified School District (1979) PERB Decision No. 89.

You also allege in part at paragraph 3h. that the District denied Steve Smith representation at a meeting on or about June 7, 1991. Under NLRB v. Weingarten, Inc. (1975) 420 U.S. 251, 43 L. Ed.2d 171 and Redwoods Community College District v. PERB (1984) 159 Cal. App.3d 617, you are required to show that Mr. Smith requested representation, that the request was for an investigatory meeting (questions were asked), and that he reasonably believed that the interview might result in disciplinary action against him. Absent the discipline element, representation is granted under EERA only in "highly unusual circumstances." As you have alleged insufficient facts to clearly and concisely show these required elements, a prima facie Weingarten violation has not been shown.

Paragraph 4 alleges that due to the actions of the District involving withholding timely approval of vacation (3b.), use of break time (3e.), and denial of a representative (3h.), the District has committed an unlawful unilateral change. In determining whether a party has violated section 3543.5(c) of EERA, the PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. Stockton Unified School District (1980) PERB Decision No. 143. Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. Walnut Valley Unified School District (1981) PERB Decision No. 160; Grant Joint Unified High School District (1982) PERB Decision No. 196. With respect to the unilateral change allegations, as you have not alleged sufficient facts to clearly and concisely demonstrate the elements of the Grant case, the allegations will be dismissed.

Paragraph 5 alleges that due to the establishment by the District of a work experience program, it has committed unlawful unilateral actions. Presently, paragraph 5 contains legal conclusions with insufficient facts to show the elements of the Grant case. Therefore, a prima facie case has not been stated and the allegations will be dismissed.

For these reasons, the amended 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

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accordingly. The amended charge should be prepared on a standard PERB unfair practice charge form clearly labeled Second 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 respondent³ and the original proof of service must be filed with PERB. If I do not receive a Second Amended Charge or withdrawal from you before June 30, 1992, I shall dismiss your charge. If you have any questions, please call me at (213) 736-3127.

Sincerely,



Marc S. Hurwitz
Regional Attorney

³Steve Andelson, Esq. and Robert L. Sammis, Esq.