STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

LORRAINE WYLER, Charging Party,	)	Case No. LA-CE-3204
v.	)	PERB Decision No. 971
LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondent.	)	February 8, 1993

Appearances: Paul Wyler, Attorney, for Lorraine Wyler; Terence McConville, Director, Litigation Research, for Los Angeles Unified School District.

Before Hesse, Chairperson; Caffrey and Carlyle, Members.

DECISION AND ORDER

HESSE, Chairperson: This case is before the Public Employment Relations Board (Board) on appeal by Lorraine Wyler of a Board agent's dismissal (attached hereto) of her charge that the Los Angeles Unified School District violated section 3543.5(a) of the Educational Employment Relations Act (EERA)[1] by discharging her as a substitute teacher in retaliation for her protected activity.

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[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 guaranteed by this chapter.

The Board has considered the entire record in this case. We have reviewed the dismissal and, finding it to be free of prejudicial error, adopt it as the decision of the Board itself.

The unfair practice charge in Case No. LA-CE-3204 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Caffrey and Carlyle joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

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

August 20, 1992

Paul Wyler, Esq.
Los Angeles Office of Appeals
Unemployment Insurance Appeals
300 S. Spring St., Rm. 1502
Los Angeles, California 90013-1204

Re: DISMISSAL AND REFUSAL TO ISSUE COMPLAINT
Unfair Practice Charge No. LA-CE-3204,
Lorraine Wyler v. Los Angeles Unified School District

Dear Mr. Wyler:

In the above referenced charge, which was filed on June 26, 1992, Mrs. Wyler, a substitute teacher, alleges that the Los Angeles Unified School District (District) retaliated against her, in alleged violation of Government Code section 3543.5 of the Educational Employment Relations Act (EERA).

I indicated to you, in my attached letter dated August 11, 1992, that the above-referenced charge did not state a prima facie case, and that one allegation must be deferred to arbitration . 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 the charge to state a prima facie case or withdrew it prior to August 18, 1992, the charge would be dismissed.

You telephoned me on August 13, 1992 and indicated you just returned from vacation and would like an extension to around August 21, 1992. I suggested that instead, you review my warning letter dated August 11, 1992, and that you call me the following day on August 14, 1992. You telephoned me on August 14, 1992 and indicated, in part, that you wished to file an amended charge. I suggested that instead, you could provide me verbally with your clarifying/additional information, and that I would decide whether a prima facie case had been stated. You agreed to follow my suggestion and provided the following information. I will also relate relevant information appearing in your charge.

You disagreed with my conclusion that Mrs. Wyler failed to show a "nexus" between her protected activity and the adverse actions. You contend that she was discharged in October 1991 based upon Inadequate Service Reports (ISR's) in 1980, 1984, May 1991 and September 1991. On April 2, 1991, she was assaulted/punched (by a student) while working as a substitute at Thomas Edison Junior High School. She advised the school personnel. On April 4, 1991, you wrote a letter to various officials including the District regarding, in part, teacher safety. On April 19, 1991,

the Superintendent's reply letter indicated that an in-depth review was made and showed that there was no assault and battery, and that Mrs. Wyler had not mentioned the matter. On May 1, 1991, you wrote to the Superintendent and indicated, in part, that you hoped there had been no cover-up.

On April 30, 1991, Mrs. Wyler was substituting at Benjamin Banneker Special Education Center (BBSEC) and was assaulted/punched by a student. She reported the incident to the school authorities. By letter dated May 1, 1991, you wrote a letter regarding, in part, teacher safety to various officials, including the District. You did not receive a response. On May 8, 1991, Mrs. Wyler was issued an ISR regarding her service at BBSEC, which she disputes. (See my letter dated August 11, 1992 at pages 2-3.) You contend that the District showed no sympathy and that the ISR was a reprimand after your complaints about safety (including your letter dated May 7, 1991 referenced below). You pointed out that by letter dated May 21, 1991, Mrs. Wyler was warned by the District that if she received a second ISR that semester, it would result in her placement on the standby list. She was also advised that it was the District's practice to request a complete service fitness review for substitutes issued three or more ISR's. A grievance was filed over the May 1991 ISR and later settled/resolved in August 1991, which settlement you contend was unfair and one-sided due to the one year "sunset" provision. (See page 3 of the August 11, 1992 letter.)

On May 6, 1991, Mrs. Wyler was assaulted by a student while substituting at Samuel Gompers Junior High School. She reported the incident to the school authorities. On May 7, 1991, you wrote another letter to various officials, including the District, regarding teacher safety, but thereafter, did not receive a response.

On September 11, 1991, Mrs. Wyler received an ISR for her service at Bethune Middle School. You indicated to me that it involved "paperwork" problems and that Mrs. Wyler disputed the ISR. (See pages 3-4 of the August 11, 1992 letter.) A grievance was filed over the September 1991 ISR but in April 1992, UTLA decided not to take this grievance to arbitration. (See page 4 of the August 11, 1992 letter.) On October 18, 1991, Mrs. Wyler was discharged by the District. You contend this was retaliation for her prior protected activity including the grievance settled in August 1991. The dismissal was based on all of the prior ISR's. During our telephone conversation, you characterized this as the "linchpin". "But for the (District's) retaliatory motive, Mrs. Wyler would not have been dismissed."

Based upon all the information provided, the charge still fails to state a prima facie case, in part, since it fails to demonstrate a "nexus" between Ms. Wyler's protected activity and

the adverse actions. As indicated in the August 11, 1992 letter, the charge does not show any of the various ways to show nexus as indicated in Novato Unified School District (1982) PERB Decision No. 264. Another problem with your theory of retaliation is that the last ISR issued on September 11, 1991 came from a different person at a different school when compared to the May 8, 1991 ISR. There does not seem to be a connection other then speculation. Also, the review process conducted around October 1991 leading up to the dismissal on October 18, 1991, appears to be a normal occurrence based upon the District's letters to Ms. Wyler dated May 21, 1991 and September 30, 1991. These letters are referenced in my letter dated August 11, 1992 at pages 3 and 4.

Next, as indicated in my August 11, 1992 letter at page 5, the 1980, 1984, and May 8, 1991 ISR's, the August 1991 grievance settlement, and the October 18, 1991 dismissal are untimely and will be dismissed. Also, as indicated on page 6 of my August 11, 1992 letter, the allegations of reprisal involving the May 8, 1991 ISR must be deferred to arbitration and will be dismissed. In addition, the charge still does not indicate or establish **that** the settlement of the related grievance (the sunset **provision) is** repugnant to the purposes of the EERA. Thus, a prima facie violation has not been alleged.

Therefore, I am dismissing the charge based on the **facts and** reasons contained above and in my August 11, 1992 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. (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"[1] 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

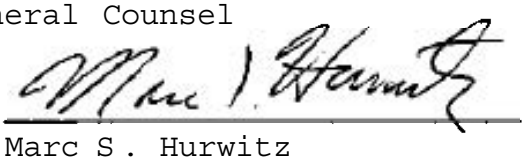
A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall 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: Mr. Terry McConville, Director of Litigation Research, Office of the Special Counsel to the Superintendent, Los Angeles Unified School District

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 11, 1992

Paul Wyler, Esq.
Los Angeles Office of Appeals
Unemployment Insurance Appeals
300 S. Spring St., Rm. 1502
Los Angeles, California 90013-1204

Re: WARNING LETTER, Unfair Practice Charge No. LA-CE-3204, Lorraine Wyler v. Los Angeles Unified School District

Dear Mr. Wyler:

In the above referenced charge, which was filed on June 26, 1992, Mrs. Wyler, a substitute teacher, alleges that the Los Angeles Unified School District (District) retaliated against her, in alleged violation of Government Code section 3543.5 of the Educational Employment Relations Act (EERA).

My investigation of the charge (including the companion case against United Teachers - Los Angeles, Unfair Practice Charge No. LA-CO-599, which I dismissed on August 7, 1992) reveals the following adverse actions. In 1980, 1984, May 8, 1991 and September 11, 1991, Mrs. Wyler received Inadequate Service Reports (ISR's). On October 18, 1991, Charging Party was dismissed by the District from substitute status.

The charge fails to state a prima facie violation of EERA within the jurisdiction of PERB. To demonstrate a violation of EERA section 3543.5(a), the charging party must show that: (1) the employee exercised rights under 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.)

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 charge seems to show adverse actions by the District, protected activity by the Charging Party, and that the District had knowledge thereof. But there are no facts alleged to demonstrate a connection (nexus) between her protected activity and the adverse actions.

I brought this to your attention during our telephone conversation on or about July 19, 1992 and gave you an opportunity to respond. You generally indicated the following information. You believe that the 1980 and 1984 ISR's show the District's retaliatory motive and that we should look at the whole picture. You believe that the May 8, 1991 ISR (Benjamin Banneker Special Education Center (BBSEC) containing multi-handicapped students) shows that the District's actions are retaliatory. As indicated in the charge and during our telephone conversation, it is alleged that Mrs. Wyler was assaulted by a student in late April 1991 at BBSEC. Complaints were made concerning Mrs. Wyler's safety in April and May 1991 (protected activity). This ISR was issued after several of the safety complaints were made. In addition, you indicated that the May 1991 ISR states that Mrs. Wyler was fearful for her safety. This ISR states for her dates of service on April 29 and 30, 1991 that,

> Substitute teacher, Mrs. Lorraine Wyler, should not be reassigned to Banneker Special Education Center. She has difficulty relating to our mentally retarded students. She was observed just sitting at the desk throughout her first day's assignment. The second day, the assistant principal went in to help her get organized. She was sitting and expressed fear of some of the students. She stated she felt they did not belong in school. She complained that one of the boys was after her and had grabbed her wrist. She later

complained of being ill. We released her from her assignment about 11:15 a.m. on Tuesday, April 30.

We have a genuine concern about Mrs. Wyler's health and welfare. We also have a concern about her ability to handle and control the behaviors of some of our more difficult students.

Based on the above information, I still do not find a connection (nexus) between Mrs. Wyler's protected activity and the May 1991 ISR. This is because none of the various ways to show nexus, as indicated above in Novato, are present. The fact the ISR mentions that Mrs. Wyler expressed fear of some of the students does not, by itself, show an unlawful motive by the District. I note that in a letter to Mrs. Wyler from the District dated May 21, 1991, she was warned that if she received a second ISR that semester, it would result in her placement on the standby list[1]. She was also advised that it was the District's practice to request a complete service fitness review for substitutes issued three or more ISR's. The review is made to determine if a dismissal should be recommended. On May 28, 1991, UTLA filed a grievance regarding the May 1991 ISR. On July 26, 1991, the District notified UTLA and Mrs. Wyler that the grievance would be denied. On August 15, 1991, the District offered to resolve/settle the grievance by indicating that the ISR would be "sunset" after one year as long as there were no other ISR's issued during this period. UTLA urged Mrs. Wyler to accept the settlement as the best possible procedure. Mrs. Wyler believed the settlement was unwise[2] as it contained a "trap" but based on the advice of UTLA, she agreed to the settlement. She feared if she did not take the settlement, that UTLA would not process her grievance diligently should additional proceedings be required. It is alleged that the District "was then waiting and lurking for another incident to occur so that it could proceed with its retaliatory motive." I find this allegation to be unsupported and conclusory based upon the information provided.

You indicated during our telephone conversation that the September 11, 1991 ISR was retaliatory as it lacked merit, and the District issued the ISR without any basis or grounds to support it. For dates of service (at Bethune Middle School for seventh grade - Core students) of August 21 through September 11, 1991, the ISR indicates that Mrs. Wyler,

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[1]Being on the standby list puts a substitute in the lowest calling priority and name requests cannot be honored. Being on this list lasts for six working months.

[2]It is alleged that the settlement was concluded "on a very unfair and one-sided basis, namely, that the Inadequate Service Report of May 8, 1991 would be 'sunset' for a year provided no other Inadequate Service Report would be issued during that year."

1. Failed to attend period by period faculty meeting announced in daily bulletin.

2. Failed to submit daily counts to counseling office.

3. Failed to keep grades for students. Upon release 9/11/91, Ms. Wyler had insufficient grades for students. All student grades had been written in a dot code on the attendance roster. Ms. Wyler was unable to provide adequate grades.

Based on the information provided, I find that Mrs. Wyler has not demonstrated that this ISR was issued in retaliation for her prior protected activity (no nexus). I note that UTLA filed a grievance on or about September 28, 1991. In April 1992, UTLA's Grievance Review Committee (GRC) advised Mrs. Wyler that it had decided not to take this grievance to arbitration. I also note that by letter dated September 30, 1991 to Mrs. Wyler, the District referred to ISR's in 1984, May 1991 and September 1991 (3 total). This letter indicated in part that as an additional ISR was issued in September 1991, a complete service fitness review had been requested to determine whether she ought to be dismissed as a substitute teacher.

It is alleged that due to the ISR's, on October 18, 1991, the District issued a letter dismissing Mrs. Wyler from substitute status. It is further alleged that the District's action in issuing the ISR's, supposedly participating in an "unfair" settlement of the May 1991 ISR, and in dismissing Mrs. Wyler, "all were tied up and connected with a retaliatory motive on the part of the district." It is alleged that the District wishes not to publicize assaults on teachers and is apprehensive about this subject. It is alleged that "a public airing of the working conditions of all teachers, including substitute teachers, would be beneficial to the public and not a cover-up thereof. The district acted unfairly in discharging or dismissing the charging party." I do not find sufficient facts alleged to support the conclusion that there was a cover-up. During our telephone conversation, you indicated that a nexus was shown by the fact that the dismissal was retaliatory and that the prior ISR's were used. I disagree and find that you have not demonstrated a nexus between the dismissal and the prior protected activity. I reach this same conclusion even when the "whole picture" is taken into consideration. The Charging Party has not clearly and concisely demonstrated any of the factors establishing nexus. Thus, a prima facie violation of EERA section 3543.5(a) has not been stated.

Next, EERA does not allow a complaint to issue regarding a charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. EERA section 3541.5(a)(1). It is the charging Party's burden, as part of the prima facie case, to prove the charge was timely filed.

Furthermore, there is no longer any equitable tolling of the six month limitations period. The Regents of the University of California (1990) PERB Decision No. 826-H. This charge was filed on June 26, 1992. We may only consider alleged unlawful conduct of the District occurring after on or about December 26, 1991. Therefore, all allegations of unlawful conduct by the District occurring before this date, are untimely and will be dismissed. This includes the ISR's in 1980, 1984, and May 8, 1991[3], as well as the August 1991 settlement (assuming the settlement is an adverse action, without deciding the issue), and the dismissal on October 18, 1991[4].

Next, section 3541.5(a) of the EERA states, in pertinent part, that PERB shall not:

> Issue a complaint against conduct also prohibited by the provisions of the [collective bargaining agreement in effect] between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration.

In Lake Elsinore School District (1987) PERB Decision No. 646, PERB held that this section established a jurisdictional rule requiring that a charge be dismissed and deferred if: (1) the grievance machinery of the agreement covers the matter at issue

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[3]The May 8, 1991 ISR and grievance filed thereafter caused tolling of the statute of limitations only until the grievance machinery was exhausted with the settlement of the grievance in August 1991. See EERA section 3541.5(a)(2). You requested additional tolling since the settlement required that there be no more ISR's during a one year period. I find that tolling and the grievance procedure were exhausted when the settlement was reached in August 1991. Thus, the May 1991 ISR is untimely.

[4]I note that you indicated that based upon advice from UTLA, Mrs. Wyler appealed the dismissal by your letter to the District dated October 25, 1991. The District responded negatively on October 31, 1991. The Charging Party then sent a letter to a member of the Board of Education, Mark Slavkin, requesting reconsideration. On December 2, 1991, Mr. Slavkin referred the matter to a Deputy Superintendent for response. At this time, you have not received any further response. Based on the information provided, tolling will only occur during the time the Charging Party took to exhaust the grievance machinery. EERA section 3541.5(a)(2). You did not file a grievance under Article V of the Agreement between UTLA and the District effective June 26, 1989 through June 30, 1991. Therefore, there is no tolling and the October 1991 dismissal is untimely, and will be dismissed.

and culminates in binding arbitration; and, (2) the conduct complained of in the unfair practice charge is prohibited by the provisions of the agreement between the parties. PERB Regulation 32620(b)(5) (Cal. Code of Regs., tit. 8, sec. 32620(b)(5)) also requires the investigating Board agent to dismiss a charge where the allegations are properly deferred to binding arbitration.

These standards are met with respect to the allegations of reprisal involving the May 8, 1991 ISR. First, the grievance machinery of the Agreement covers the dispute raised by the unfair practice charge and culminates in binding arbitration. Article V, section 19.0 of the Agreement provides, in part, that "The arbitration panel's decision shall be final and binding upon the grievant(s), the District and UTLA." Second, the conduct complained of in this charge that the District unlawfully retaliated against Mrs. Wyler is arguably prohibited by Article X, section 7.0 of the Agreement.

Article X, section 7.0 of the Agreement appears to permit an ISR to be grieved by the substitute teacher. It provides that,

> The site administrator may, for cause, issue a day-to-day substitute employee a notice of inadequate service. Such a notice shall, absent compelling circumstances, be issued within ten working days after the date(s) of service, with a copy to the employee (either in person or by certified mail to the employee's address of record). Prior to issuance of such a notice, the site administrator shall make a reasonable effort to contact and confer with the substitute regarding the allegations. In addition to the grievance procedure, the employee may attach a written response to the report within ten working days from date received. The written response becomes a permanent part of the record.

I note that a grievance was filed and ultimately settled. EERA section 3541.5(a)(2) allows PERB to have discretionary jurisdiction to review a settlement to determine if the settlement/arbitration award is repugnant to the purposes of the EERA. The charge does not indicate or establish that the settlement (the sunset provision) is repugnant, and therefore, a prima facie violation has not been alleged.

Accordingly, this specific allegation must be deferred to arbitration and will be dismissed. (See PERB Reg. 32661 [Cal. Code of Regs., tit. 8, sec. 32661]; Los Angeles Unified School District (1982) PERB Decision No. 218; Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81a.)

If there are any factual inaccuracies in this letter or any additional facts which would require a different conclusion than the one explained above, please amend the charge. 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 be signed under penalty of perjury by the Charging Party. The amended charge must be served on the Respondent[5] and the original proof of service filed with PERB. If I do not receive an amended charge or withdrawal from you before August 18, 1992, I shall dismiss your charge without leave to amend. If you have any questions, please call me at (213) 736-3127.

Sincerely,

Marc S. Hurwitz
Regional Attorney

[5]Mr. Terry McConville, Director of Litigation Research, Office of the Special Counsel to the Superintendent, Los Angeles Unified School District.