STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SOUTH TAHOE EDUCATORS ASSOCIATION, CTA/NEA,	)	
Charging Party,	)	Case No. S-CE-1501
v.	)	PERB Decision No. 994
LAKE TAHOE UNIFIED SCHOOL DISTRICT,	)	April 30, 1993
Respondent.	)	

Appearances: California Teachers Association by Ramon E. Romero, Attorney, for South Tahoe Educators Association, CTA/NEA; Girard & Vinson by Allen R. Vinson, Attorney, for Lake Tahoe Unified School District.

Before Hesse, Caffrey, and Carlyle, Members.

DECISION

HESSE, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal of a Board agent's dismissal of an unfair practice charge filed by the South Tahoe Educators Association, CTA/NEA (Association). The Board agent found that the charge which alleged that the Lake Tahoe Unified School District (District) violated sections 3543.5(a) and (b) of the Educational Employment Relations Act (EERA or Act),[1] failed

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. 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

to state a prima facie case.

FACTS

On August 12, 1992, the Association filed an unfair practice charge against the District alleging that it took adverse action against an employee, Les Wright (Wright), in retaliation for his protected activities. According to the charge, Wright had filed a lawsuit against the District claiming disparate treatment of female students in athletic programs in violation of federal law and, on specified occasions, had openly criticized management and supervisory employees on behalf of himself and other bargaining unit employees.

In addition, protected activities referenced in the charge include a prior unfair practice charge that also alleges retaliation against Wright.[2]

The initial unfair practice charge includes three allegations of retaliatory adverse action. The first concerns a derogatory disciplinary memoranda issued to Wright by Mike

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> employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
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> (b) Deny to employee organizations rights guaranteed to them by this chapter.

[2]Attached to the unfair practice charge is the charge and complaint issued in the previous case, Lake Tahoe Unified School District. Case No. S-CE-1429. It details many of the same protected activities as are listed in the instant charge and refers to a dozen adverse actions allegedly taken in retaliation for Wright's protected activity. The parties entered into a settlement agreement in that case. Terms of the agreement relevant to the instant case are quoted and discussed below.

Greenfield (Greenfield), the Vice Principal at South Tahoe Middle School. The memo, dated February 14, 1992, is based on Wright's alleged failure to directly supervise students in his physical education class. A second derogatory disciplinary memo was issued by Greenfield on April 14, 1992. It concerns Wright's alleged use of pejorative statements when referring to his students. The charge also alleges that on April 27, 1992, Greenfield issued a teacher evaluation report to Wright that included a "performance needs improvement" rating under the category of "personal qualities." The comments written in the report refer to the matter described in the April 14 disciplinary memo.

The Association charges that these adverse actions were taken against Wright because of his protected activities. It asserts that the District's unlawful motive is evidenced by the fact that the allegations concerning Wright's misconduct are false, exaggerated, misleading and based on a cursory investigation of the alleged misconduct. The Association also argues that the District has not imposed discipline on other members of the bargaining unit based on conduct similar to that described in the memos issued to Wright.

On September 15, 1992, the Board agent advised the Association that, after reviewing the Board's ruling in Novato Unified School District (1982) PERB Decision No. 210, and Moreland Elementary School District (1982) PERB Decision No. 227, she concluded that the charge failed to demonstrate sufficient

nexus to state a prima facie violation of EERA section 3543.5(a).

On September 26, 1992, the Association filed an amended charge in which it embellished the factual allegations concerning the adverse actions described in the original charge and added two additional allegations. With regard to the allegation concerning the disciplinary memo referring to Wright's failure to supervise students, the amended charge stated that Rich Alexander (Alexander) personally participated in the District's investigation of the incident and attempted to cover up his involvement. According to the charge, Alexander, who is the principal at South Tahoe Middle School, has a great deal of personal animosity toward Wright because Alexander has frequently been the focus of Wright's criticism in the past.[3]

The amended charge also asserted that Wright did not fail to supervise his class because the majority of his students were involved in a volleyball game that was being watched by another physical education teacher. The Association claimed that the District treated Wright in a disparate manner and departed from established procedures and standards because no other bargaining unit member had ever been disciplined for "momentarily being

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[3]In the amended charge, Alexander is named in three instances of alleged protected activity. In Case No. S-CE-1429, the prior unfair practice charge upon which a settlement agreement was reached, Alexander is alleged to have committed approximately 13 specific acts of retaliation against Wright. In addition, paragraph six of the settlement agreement states: "So long as Mr. Rich Alexander is the principal of the school where Mr. Wright is assigned, all evaluations of Mr. Wright shall be conducted by a site vice principal and approved by the superintendent and not Mr. Alexander."

outside the presence of his/her students even though it happens all the time with the knowledge of District administrators." The amended charge stated that, on the day in question, the 20 students in Wright's class were involved in a "free activity day" during which time it was not unusual for students to be in different locations during class. The charge states:

> Thus, it is a normal occurrence for Les Wright to be outside the presence of at least some of his students on a regular basis and District administrators have not disciplined him for that fact prior to this incident even though they have had knowledge of that practice.

The amended charge expanded on the factual assertions relevant to Wright's alleged use of pejorative language. Again, the charge states that Alexander personally participated in the District's investigation and attempted to cover up his involvement. The Association disputes the basis for the disciplinary memo, claiming that Wright did not do what the memo accuses him of doing and suggests that the students who complained were upset with Wright because he had cut them from the volleyball team. The Association states that Greenfield's encouragement that the students put their complaints in writing was a departure from the District's established practice in investigating student complaints. The Association also argues that the memo reflects a departure from established disciplinary standards because it refers to comments made in Wright's previous evaluation for which he was rated "Meets or Exceeds Districts Standards."

The third allegation repeated from the original charge concerns the April 27 evaluation issued by Greenfield. In the amended charge, the Association asserts that the evaluation contravenes provisions of the settlement agreement reached in Case No. S-CE-1429 by departing from the agreed-upon procedures for the evaluation of Wright during the 1991-92 and 1992-93 school years.[4] The amended charge also states that the

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[4]Provisions of the settlement agreement relied on by the Association in this case are as follows:

> 1) The Lake Tahoe Unified School District (District) will issue to Les Wright, a teacher employed by the District, a new evaluation covering the first semester of the 1991-92 school year. This evaluation shall be issued prior to the completion of the first semester and will be identical to the evaluation of June 7, 1991, with the following exceptions:
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> A) In Category III, Management of Responsibilities, the rating shall be changed from 2 to 1 and all comments shall be eliminated, and
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> B) In Category V, Classroom and Environmental Control, the following comment shall be added to the comment already listed there:
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> Mr. Wright will implement alternative disciplinary strategies so as to reduce his reliance upon detention.
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> . . . . . .
>
> 5) The next formal evaluation of Mr. Wright following the evaluation to be completed for the first semester of the 1991-92 school year shall be the evaluation at the completion of the 1992-93 school year. During the time between the signing of this agreement and the 1992-93 evaluation, the District will be entitled to complete for Mr. Wright the same types of classroom supervision and provide the same type of instructions

settlement agreement was based on the provision in the parties' collective bargaining agreement that limits the evaluation of a tenured teacher to once every two school years.

The amended charge added two allegations that did not appear in the original charge. The first involves the claim that on March 9, 1992, Alexander failed to thank Wright for assisting in the after-hours set up of gym equipment. According to the charge, Alexander thanked all other physical education teachers for their help in the South Tahoe Middle School Bulletin. The Association contends this omission is another example of the District's disparate treatment of Wright.

The second allegation added to the amended charge concerns Wright's dismissal as the girls' volleyball coach on September 9, 1992. According to the charge, Wright requested to continue as coach at the end of the 1991-92 school year, but was denied the post despite the fact that coaches are customarily given the same assignment from year to year if they request it. Greenfield's explanation that Wright was denied the coaching position because he did not turn in a note requesting the assignment is false, according to the Association, because Wright requested the assignment in writing at the end of the prior school year and because no separate note had been demanded in the past.

On October 19, 1992, the Board agent dismissed the charge. With regard to the memo involving Wright's alleged failure to

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as it would for any other tenured teacher employed by the District.

supervise his students, she stated that, because Wright was injured when he was away from the students, consistent with standard procedures, Alexander investigated the cause of Wright's injuries. Greenfield conducted the investigation regarding Wright's supervision of his class.

The Board agent also stated that Wright's students were engaged in three different activities and that only those playing volleyball were supervised. In addition, she said, the teacher who was supervising the game complained that Wright frequently left his class unsupervised. Noting that the District does not allow teachers to leave their students unsupervised, the Board agent said that the charge failed to state a prima facie case.

With regard to Alexander's failure to thank Wright for his help with the equipment move, the Board agent said that the list provided to Alexander "inadvertently did not contain Mr. Wright's name." In addition, she said, Alexander thanked Wright in the very next bulletin when he became aware of Wright's involvement in the move. She concluded that this discrimination claim had no merit because the District's action was an oversight that was quickly remedied.

In the Board agent's discussion of the adverse action stemming from Wright's alleged use of pejorative language, she acknowledged the Association's claim raised in the amended charge that Alexander participated in the investigation. But she reiterated her conclusion that the charge failed to demonstrate the requisite nexus.

The Board agent found no merit in the Association's assertion that the District had violated the terms of the settlement agreement. She based this conclusion on the fact that the teacher evaluation report given to Wright was required by the terms of the collective bargaining agreement to be completed before a teacher may be given a "Needs to Improve" rating. With regard to the language in the settlement agreement granting the District the right to conduct normal supervision and instruction of Wright, the Board agent concluded that it was the District's intent to preserve its right to take appropriate action, if necessary.

Finally, the Board agent found the allegation that Wright's dismissal as volleyball coach was retaliatory was without merit. She said that the District sent a letter to all teachers on August 10, 1992, requesting that they inform the principal by September 1, 1992, in writing, if they wished to serve in the coaching position for the upcoming year. Concluding that Wright failed to request in writing that he would like to return as volleyball coach, the Board agent found that the District made assignments based on the interest indicated by written notices it received from the certificated staff.

Finding no additional facts to demonstrate the necessary connection between the adverse action and the protected conduct, the Board agent dismissed the charge.

Association's Appeal

On November 12, 1992, the Association filed an appeal of the dismissal. In addition to arguing that the factual allegations were sufficient to establish a prima facie case of retaliation, the Association took issue with the manner in which the unfair practice charge was processed. In particular, it was critical of the fact that the Board agent failed to telephone the Association before issuing either the warning letter or the letter of dismissal and, in so doing, failed to comply with PERB Regulation 32620.[5] The Association also asserted that the Board agent

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[5]PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq. PERB Regulation 32620 pertains to charge processing. It states:

> (a) When a charge is filed, it shall be assigned to a Board agent for processing.
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> (b) The powers and duties of such Board agent shall be to:
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> (1) Assist the charging party to state in proper form the information required by section 32615;
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> (2) Answer procedural questions of each party regarding the processing of the case;
>
> (3) Facilitate communication and the exchange of information between the parties;
>
> (4) Make inquiries and review the charge and any accompanying materials to determine whether an unfair practice has been, or is being, committed, and determine whether the charge is subject to deferral to arbitration, or to dismissal for lack of timeliness.
>
> (5) Dismiss the charge or any part thereof as provided in section 32630 if it is determined that the charge or the evidence is insufficient to establish a prima facie case;

erroneously reached the conclusion that the charge did not state a prima facie case because she failed to assume that the allegations in the charge were true, as is required by Board precedent. (See San Juan Unified School District (1977) PERB Decision No. 12.) Instead, the Association argues, the Board agent weighed the evidence and determined that the District's version of the facts were true.

District's Response

The District submitted an answer to the appeal on December 3, 1992. It supports the Board agent's analysis of the charge and argues that PERB Regulation 32620 does not require the Board agent to make telephone contact with the charging party. The District also argues that the Board agent did not specifically reject any factual allegation made by the Association. Citing Riverside Unified School District (1986) PERB Decision No. 562a, the District argues that, where responsive pleadings expand without contradicting facts alleged in the charge, the additional facts may form a proper basis for

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or if it is determined that a complaint may not be issued in light of Government Code sections 3514.5, 3541.5 or 3563.2 or because a dispute arising under HEERA is subject to final and binding arbitration.

(6) Issue a complaint pursuant to section 32640.

(c) The respondent shall be apprised of the allegations, and may state its position on the charge during the course of the inquiries.

summary dismissal.

DISCUSSION

The Association raises strong objection to the manner in which the Board agent processed the unfair practice charge. While we do not agree that PERB Regulation 32620 mandates that a certain procedure or method of investigation must be utilized in all circumstances, the regulation does require that the Board agent investigating the charge facilitate communication and the exchange of information between the parties, and make inquiries and review the charge and accompanying materials to determine if an unfair practice has been committed.

In this case, the Board agent made no inquiries of the Association even after she had contacted and elicited contradictory information from the District. This prevented the Association from responding to the District's assertions, and may have influenced her to credit the District's factual claims rather than to assume that the Association's statement of facts was true.

The Board agent is expected to discuss the charge with the respondent and, under Riverside Unified School District, supra, PERB Decision No. 562a, may dismiss a charge if the information provided by the respondent adds facts that defeat a prima facie case. However, a Board agent may not dismiss a charge because he/she believes the contradictory facts asserted by the respondent over those alleged by the charging party. As discussed below, the allegations included in this charge were

sufficient to state a prima facie case of retaliation and the Board agent's conclusion to the contrary was based on her failure to assume that the facts as alleged by the Association were true.

In order to establish a prima facie case of discrimination or retaliation, the unfair practice charge must allege that the employee engaged in activity protected by the Act; the employer was aware of that activity; the employer took adverse action against the employee; and its action was motivated by the protected activity. This is the test or standard adopted by the Board in Novato Unified School District, supra, PERB Decision No. 210.

Proof of a connection or "nexus" between the employee's protected activity and the employer's conduct is an essential element of a discrimination charge. However, since direct proof of unlawful motivation is often unavailable, the Board has identified certain circumstantial evidence that may establish the necessary nexus. These include: 1) timing of the employer's adverse action in relation to the employee's protected activity; 2) disparate treatment of the employee; 3) the employer's departure from established procedures and standards; 4) the employer's inconsistent or contradictory justifications for its actions; 5) the employer's cursory investigation of the employee's misconduct; 6) the employer's failure to offer the employee a justification at the time it took the action, or offering exaggerated, vague, or ambiguous reasons for its action. (See Moreland Elementary School District, supra, PERB Decision

No. 227.)

In this case, there is no dispute that Wright engaged in protected activities about which the District was aware. The amended charge details six separate instances where Wright exercised rights guaranteed by the Act. Indeed, one of the protected activities noted -- the previously filed unfair practice charge against the District -- itself refers to several additional examples of protected activities in which Wright engaged. What emerges from the allegations is that, since May 1989, Wright has repeatedly asserted his right granted by EERA section 3543 "to form, join, and participate in the activities of employee organizations . . . for the purpose of representation on all matters of employer-employee relations."

With one exception, it is also undisputed that the District took adverse action against Wright. Issuance of the derogatory disciplinary memos and the teacher evaluation report, as well as Wright's removal from the coaching position, all are adverse actions because they resulted in some injury to the employee.[6]

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[6]The District's failure to thank Wright for helping in moving gym equipment at the same time it thanked other teachers who did so is not an adverse action. In Palo Verde Unified School District (1988) PERB Decision No. 689, the Board applied an objective test to determine whether employer conduct actually resulted in injury. In this case, the injury to Wright caused by the District's failure to thank him for his after hours assistance is remote. While Wright may subjectively have perceived the omission of his name as an insult or a deliberate slight, the charge does not include factual allegations to substantiate harm based on an objective standard. While we do not view the failure to thank Wright as a retaliatory adverse action, we have considered it as part of the totality of circumstances in determining whether there was sufficient evidence to establish unlawful motive.

Thus, the central issue before the Board is whether the factual allegations in the amended unfair practice are sufficient to establish nexus so as to state a prima facie case of retaliation/discrimination. Weighing heavily in favor of that finding is the prior unfair practice charge and, in particular, Alexander's involvement throughout. Not only was he implicated in several of the protected activities cited in both charges, but he was also expressly named in the terms of the settlement agreement as someone who, in essence, should keep his distance from Wright. Given that background, we find Alexander's investigation into the matters involving gym class supervision and use of pejorative statements to raise a strong inference that the adverse actions were unlawfully motivated by Wright's prior protected activity. It is also noted that it was Alexander who, according to the allegations, deleted Wright from those thanked for their help in moving the gym equipment. Given the prominent role Alexander played in this and the prior unfair practice, we do not find that the passage of time between Wright's protected activities and the adverse actions defeats the inference of unlawful motive.

In addition to Alexander's possible animosity, there are other factors from which nexus may be inferred. In the case of Wright's failure to supervise his students, the charge asserts that the District treated Wright in a disparate manner and departed from established procedures and standards because no other teacher had been disciplined for momentarily being outside

the presence of his students. Similarly, in the case of Wright's use of pejorative language, the charge includes allegations that the District departed from established procedures and standards for investigating student complaints against teachers. Issuance of the teacher evaluation report, it is alleged, is a departure from established procedures and standards because it was done in direct conflict with the parties' prior settlement agreement and provisions of their collective bargaining agreement. Allegations concerning Wright's non-retention as volleyball coach also include assertions that the District's requirement that Wright submit a separate note seeking the assignment was a departure from past practice.

In sum, we find the allegations contained in the charge were sufficient to establish the requisite nexus between the adverse actions and Wright's protected activities. Alexander's involvement plus repeated assertions of disparate treatment and departure from past practice provide an adequate basis upon which to issue a complaint and proceed to hearing. The Board agent's conclusion to the contrary was based on her mistaken acceptance of factual assertions raised by the District, assertions to which the Association was given no opportunity to respond. In reaching this conclusion, we do not reach the merits of the case. The Board finds that a prima facie case of EERA section 3543.5(a) and (b) violations has been stated.

ORDER

The Board agent's dismissal is REVERSED in Case No.

S-CE-1501 and the charge is REMANDED to the General Counsel for the issuance of a complaint based upon the alleged violations of EERA section 3543.5(a) and (b).

Members Caffrey and Carlyle joined in this Decision.