STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

THOMAS ARTHUR ROMERO, Charging Party, v. ROCKLIN TEACHERS PROFESSIONAL ASSOCIATION, CTA/NEA, Respondent.	)	Case No. S-CO-342 PERB Decision No. 1112 August 10, 1995

Appearances: Thomas Arthur Romero, on his own behalf; California Teachers Association by A. Eugene Huguenin, Jr., Attorney, for Rocklin Teachers Professional Association, CTA/NEA.

Before Carlyle, Garcia and Caffrey, Members.

DECISION

CAFFREY, Member: This case is before the Public Employment Relations Board (PERB or Board) on an appeal filed by Thomas Arthur Romero (Romero) of a Board agent's dismissal of his unfair practice charge (attached hereto). In his charge, Romero alleged that the Rocklin Teachers Professional Association, CTA/NEA (Association) violated section 3543.6(a) of the Educational Employment Relations Act (EERA) by causing the Rocklin Unified School District (District) to violate his rights under EERA section 3543.5(a).[1]

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references are to the Government Code. Section 3543.6 states, in pertinent part:

> It shall be unlawful for an employee organization to:
>
> (a) Cause or attempt to cause a public school employer to violate Section 3543.5.

The Board has reviewed the entire record in this case, including the warning and dismissal letters, Romero's original and amended charge, his appeal and the Association's response thereto. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself in accordance with the discussion below.

ROMERO'S APPEAL

On appeal, Romero asserts that he was a member of the bargaining unit when the Association allegedly caused the District to violate his rights. In support of this assertion Romero points to the District's May 16, 1994 Contract Update Notice in which the District notified him than he would be retained as a permanent employee for the 1994-95 school year.

Romero also contends that the Association became aware of his status as a certificated employee when Association president Jewell McCoy (McCoy) signed the August 15, 1994 agreement. Romero insists that McCoy's long union experience and training is "sufficient to show that she knew [Romero] was a member of the bargaining unit." Finally, Romero concludes that the Association violated his rights when it sent a letter to employees about his

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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.

non-unit status which had the effect of "clouding the elections issue" in the decertification campaign.

DISCUSSION

Romero's appeal focuses on his assertion that he was a member of the bargaining unit, and that the Association was aware of that fact, at the time of the alleged unlawful conduct.

Subsequent to the May 16, 1994, Contract Update Notice, Romero was assigned to work as an assistant principal during the 1994-95 school year. Romero asserts that he did not perform any duties as assistant principal during the school year that would confer upon him supervisory or managerial status. Thus, Romero contends that he was appropriately a member of the certificated bargaining unit when the Association allegedly caused the District to violate his rights.

However, the job description for an assistant principal clearly states that an incumbent serves as a "member of the management team." The assistant principal acts as a principal in the principal's absence and assists in the "formulation and implementation of district policies." The assistant principal also assists in the "selection, placement, and performance evaluation of personnel in the school, including employment interviews." The hiring and assignment of employees are among the functions of a supervisory employee as specifically enumerated in EERA.[2]

[2]EERA section 3540.1(m).

Furthermore, the March 7, 1995 memo in which the District described Romero's assignment indicates that he "will resume his function as a certificated staff member" and "no longer be acting in the position of Assistant Principal." (Emphasis added.) The clear implication of this language is that Romero was performing the duties of assistant principal, and not of a certificated bargaining unit member, prior to March 7, 1995.

Romero also argues that the August 15, 1994 agreement establishes that the District and the Association agreed that he was in the certificated unit. However, that agreement provides only that Romero's assignment as an assistant principal was temporary and sets his salary. The language of the agreement does not address the placement of Romero in the bargaining unit.

These facts lead to the conclusion that Romero was acting in a managerial or supervisory capacity while serving as an assistant principal. Romero has failed to present facts sufficient to support his assertion that he was a member of the bargaining unit at the time of the alleged unlawful conduct.

Management employees are specifically excluded from the statutory definition of "employee" included in EERA section 3540.1(j). Accordingly, the Board has held that a management employee lacks standing to file an unfair practice charge under the EERA. (Hayward Unified School District (1981) PERB Decision No. 172.) Therefore, if Romero was serving as a management employee when functioning as an assistant principal,

as the job description of the position suggests, he would have no standing to file the instant charge.

Alternatively, Romero was functioning as a supervisory employee when serving as assistant principal. Unlike management employees, supervisory employees are not excluded from EERA's statutory definition of employee. However, PERB has held that a public school employer must maintain "strict neutrality" in the face of organizational activity. (Santa Monica Community College District (1979) PERB Decision No. 103; EERA section 3543.5(d).) An employer may restrict the participation of supervisory employees in the preelection activities of nonsupervisory employees in order to maintain a position of neutrality. (State of California (Department of Forestry) (1981) PERB Decision No. 174-S.) Therefore, if Romero was functioning as a supervisory employee when serving as an assistant principal, the District did not violate EERA section 3543.5 when it directed him to cease his participation in the activities of the certificated bargaining unit, regardless of the Association's involvement.

Based on the foregoing, the Board concludes that Romero has failed to state a prima facie case of an EERA violation.

ORDER

The unfair practice charge in Case No. S-CO-342 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Carlyle and Garcia joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916) 322-3198

April 27, 1995

Thomas A. Romero

Re: NOTICE OF DISMISSAL AND REFUSAL TO ISSUE COMPLAINT
Thomas Arthur Romero v. Rocklin Teachers Professional Association. CTA/NEA
Unfair Practice Charge No. S-CO-342

Dear Mr. Romero:

I indicated to you, in my attached letter dated April 18, 1995, 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 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 April 28, 1995, the charge would be dismissed.

On April 24, 1995, you filed a First Amended Charge in this matter by certified mail. The amended charge primarily attaches some documents which had previously been supplied to me in the course of my investigation, and reargues how the facts should be interpreted in this matter, though some additional facts are alleged.

Both the original charge and the amended charge allege that the Rocklin Teachers Professional Association, CTA/NEA (Association) complained to your employer, the Rocklin Unified School District (District), about your efforts in support of decertification of the Association while holding an assistant principal position, and thus unlawfully caused (or "incited") the District to violate your rights under Government Code section 3543.5(a). This conduct was unlawful, you contend, because you were not in fact performing any managerial or supervisory duties while serving as an assistant principal and because the Association was aware that you were not functioning as a manager or supervisor.

This latter conclusory allegation, however, lacks any supporting evidence in your charge. You rely particularly on the August 15, 1994 agreement which was signed by you, the District and an Association representative. The August 15 agreement, though, does not anywhere specify that your position would be included in the bargaining unit represented by the Association, and does specify that you would be "assigned temporarily to the duties of

an Assistant Principal." The August 15 agreement provides no facial evidence in support of your allegation.

You also rely on the March 7, 1995 notice from the District, again signed by you and the Association representative, concerning your appointment as a certificated staff member as evidence of the Association's knowledge that you were not previously performing the duties of a manager or supervisor. The March 7 document, however, also does not contain any express language in support of this assertion, and instead states that you would "no longer be acting in the position of Assistant Principal." [Emphasis added.]

These documents, on their face, do not support the conclusion which you allege, namely that the Association was knowingly making a "spurious" accusation when it complained of your conduct as an assistant principal.

Therefore, I am dismissing the charge based on the facts and reasons discussed above as well as those contained in my April 18, 1995 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" 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,

ROBERT THOMPSON
Deputy General Counsel

By _____
Les Chisholm
Regional Director

Attachment

cc: A. Eugene Huguenin, Jr.

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916) 322-3198

April 18, 1995

Thomas A. Romero

Re: WARNING LETTER
Thomas Arthur Romero v. Rocklin Teachers Professional Association
Unfair Practice Charge No. S-CO-342

Dear Mr. Romero:

You filed the above-referenced charge on March 1, 1995. Your charge alleges that the Rocklin Teachers Professional Association (Association) violated Government Code section 3543.6(a) by causing the Rocklin Unified School District (District) to violate your rights under section 3543.5 (a).

Investigation of this charge revealed the following relevant information. The Association, an affiliate of the California Teachers Association (CTA), is the exclusive representative of all certificated employees of the District, excluding "management, confidential, supervisory, and substitute employees." The exclusions are not otherwise specified by job title, but the District maintains a salary schedule for assistant principals which is separate and apart from the salary schedule included in the written agreement between the District and the Association. The agreement further defines the term "teacher" to refer to any employee included in the recognized unit.

Romero is a long-term (over 25 years) certificated employee of the District. During the 1993-94 school year, he held a temporary assignment as assistant principal. On May 15, 1994, he requested notification from the District as to his teaching assignment for the 1994-95 year. On May 16, 1994, he received a written notice (titled "Contract Update Notice for 1994-95") informing him of his election to serve as a permanent employee at 100% for the period July 1, 1994 - June 30, 1995. This notice also advised as to his placement on the salary schedule, referencing the schedule included in the agreement between the District and Association. The notice did not specify his teaching assignment.

By memorandum dated July 7, 1994, Romero was notified of a contract amendment for 1994-95 to reflect a temporary assignment as Assistant Principal, K-6, and his placement on the Assistant Principal salary schedule (with additional days and an increase in salary exceeding $6,000).

Romero responded to the contract amendment on July 10, 1994, referencing his earlier communications (verbal and written) with the District expressing his desire to revert to certificated status, and requesting a meeting to resolve the matter.

By letter dated August 11, 1994, Romero sent a follow-up letter which acknowledged the District had no open position available and the dislocation that would ensue if he were appointed to a teaching position, and confirmed his suggestion that he be placed on the certificated salary schedule and "function in the capacity of Assistant Principal." His written communications did not include it, but Romero verbally advised the District that he intended to continue serving as the local president of the American Federation of Teachers (AFT).[1]

On August 15, 1994, an agreement signed by the District, Romero and Jewell McCoy, the Association president, was submitted to the District Board of Trustees. The agreement described the situation as "unique" and its resolution as "not precedent setting;" confirmed the temporary assignment of Romero to the "duties of an Assistant Principal;" confirmed his placement on the certificated salary schedule (at the original rate communicated to him and thus at a reduced rate from the assistant principal schedule); and stated that Romero would be placed in the first available teaching position for which he is qualified. Romero received a contract amendment dated August 23, 1994, consistent with the agreement.

The job description of assistant principal indicates that an incumbent "serves as a member of the management staff" and performs duties which include assisting in the "selection, placement and performance evaluation of personnel in the school, including employment interviews." Romero denies having performed any duties during the 1994-95 school year which would bring him under the definition of either a supervisory or management employee, as those terms are defined in the Educational Employment Relations Act (EERA).[2]

Romero continued to serve as the AFT local president, and subsequently became involved in AFT's campaign to decertify the Association. On February 15, 1995, the District superintendent approached Romero and informed him that he could not be involved in the decertification campaign. The superintendent stated that

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[1]Romero was elected to a two-year term as president in the Spring 1994.

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

McCoy and a CTA representative had threatened to file an unfair practice charge against the District unless Romero ceased his activities. The superintendent telephoned Romero later the same day to instruct him to cease his activities in support of the decertification.

On February 16, 1995, the Association distributed a letter to all District certificated employees that stated Romero was violating the EERA "by actively participating in the leadership of a teachers' union while he is serving as an administrator." The letter also stated that the Association had called this matter to the attention of the District and had been assured that the superintendent would request that Romero "cease and desist this activity at once."

Discussion

At issue here is not whether the District arguably interfered with Romero's exercise of rights guaranteed under EERA, but rather whether the Association's conduct was such that it independently violated EERA by causing the District to commit such a violation.

Even crediting Romero's assertions that he at no time performed duties during the 1994-95 school year which would confer upon him supervisory or managerial status, it is significant that the August 15, 1994 agreement which Romero, the District and the Association's representative signed stated that Romero would be "assigned temporarily to the duties of an Assistant Principal." Romero does not contend that assistant principals are included as rank-and-file members of the certificated bargaining unit, nor dispute that assistant principals are generally and appropriately excluded from the unit.

There is also no evidence, from the documents provided by Romero, that he ever communicated in writing, to either the Association or the District, his intent to simultaneously serve as an Assistant Principal and as an active member of his AFT local. Nor is there any documentary evidence that would establish the Association's awareness of such intent on his part. Romero acknowledges that he has no direct knowledge of what information the District shared with the Association prior to the signing of the August 15, 1994 agreement.

Thus, the question posed by the charge is whether the Association's actions, by communicating its concerns to the District over the involvement of a temporary assistant principal in AFT's efforts at decertification and/or by publishing a letter saying that they had done so, violate the EERA.

The Board has long recognized freedom of speech rights of both employers and employee organizations. Generally, speech will be considered protected, even if defamatory and even if erroneous, unless it can be shown that such speech was made with malice and with knowledge it was false. (See, for example, State of California (Department of Transportation) (1983) PERB Decision No. 304-S and cases cited therein.)

The charge here fails to meet the standard because the facts as alleged do not establish on their face that the Association acted with knowledge that their concerns were misplaced or their allegations false. The charge thus fails to state a prima facie violation of the EERA by the Association.

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 additional facts which would correct the deficiencies 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 and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before April 28, 1995, I shall dismiss your charge. If you have any questions, please call me at (916) 322-3198, ext. 359.

Sincerely,

Les Chisholm
Regional Director