*** * * OVERRULED IN PART by *Visalia Unified School District* (2022) PERB Decision No. 2806 * * ***

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CHULA VISTA ELEMENTARY EDUCATION ASSOCIATION, CTA/NEA,	)	
Charging Party,	)	Case No. LA-CE-3777
v.	)	PERB Decision No. 1232
CHULA VISTA ELEMENTARY SCHOOL DISTRICT,	)	November 19, 1997
Respondent.	)	

Appearances; California Teachers Association by Rosalind D. Wolf, Attorney, for Chula Vista Elementary Education Association, CTA/NEA; Parham & Rajcic by Mark R. Bresee, Attorney, for Chula Vista Elementary School District.

Before Caffrey, Chairman; Dyer and Jackson, Members.

DECISION

DYER, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal from a Board agent's dismissal (attached) of an unfair practice charge filed by the Chula Vista Elementary Education Association, CTA/NEA (Association). As amended, the charge alleges that the Chula Vista Elementary School District (District) violated section 3543.5(a), (b), and (c) of the Educational Employment Relations Act (EERA)[1] when it discriminated against four unit members and

---

[1]**EERA** is codified at Government Code section 3540 et seq. EERA section 3543.5 provides, in relevant 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

unilaterally changed its policy regarding the Association's use of District facsimile machines.

The Board has reviewed the entire record in this case, including the Association's original and amended charge, the warning and dismissal letters, the Association's appeal and the District's response thereto. The Board finds the warning and dismissal letters to be free from prejudicial error and adopts them as the decision of the Board itself.[2]

DISCUSSION

On appeal, the Association notes that Scott Hopkins (Hopkins) was an Association site representative at the time of the District's allegedly adverse actions. The Association contends that Hopkins' status makes the timing of the District's action suspect. (Citing Novato Unified School District (1982) PERB Decision No. 210 at p. 7 (Novato) [noting that timing of

---

> 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.
>
> (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.

[2]By letter dated October 6, 1997, the Association informed the Board that it wished to withdraw those portions of its appeal concerning the discrimination allegations of Carol Owen and Sue Butler. Having considered the request, the Board concurs that it is consistent with the purposes of the EERA and in the best interests of the parties to grant the request.

adverse action may indicate unlawful motivation].) The Association's argument misses the mark.

In order to state a prima facie case for violation of EERA section 3543.5(a), a charge must allege facts illustrating 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, supra, PERB Decision No. 210 at p. 6.)

Because direct proof of unlawful motivation is rare, the Board allows charging parties to establish such motivation through the use of circumstantial evidence. (Ibid.) The Board has identified the following factors as indications that the District's actions sprung from an unlawful motive: (1) the timing of the employer's conduct in relation to the employee's performance of protected activity; (2) the employer's disparate treatment of the employee; (3) the employer's departure from established procedures and standards when dealing with the employee; (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 justification at the time it took the action or the offering of exaggerated, vague, or ambiguous

reasons; or (7) any other facts which might demonstrate the employer's unlawful motive. (Id. at p. 7.)

It is well established that representing members of an employee organization constitutes protected activity. (See, e.g., Los Gatos-Saratoga School District (1989) PERB Decision No. 742 at p. 2.) However, as the Board agent noted, the Association did not allege that Hopkins actually participated in representational or other protected activities around the time of the alleged adverse actions. Without some actual protected conduct, Hopkins' simple maintenance of his Association position, like maintaining his Association membership, is insufficient to satisfy the timing element of the Novato test. (See Novato at p. 7.) Although the Board agent found that the District did not "strictly follow" its normal investigatory procedures, this single indication is insufficient to state a prima facie case for discrimination. (Moreland Elementary School District (1982) PERB Decision No. 227 at p. 16.)

ORDER

The unfair practice charge in Case No. LA-CE-3777 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Caffrey and Member Jackson joined in this Decision.

STATE OF CALIFORNIA

PETE WILSON, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415) 439-6940

June 18, 1997

Rosalind Wolf
California Teachers Association
11745 E. Telegraph Road
Santa Fe Springs, CA 90670

Re: **DISMISSAL OF CHARGE**
Chula Vista Elementary Education Association, CTA/NEA v. Chula Vista Elementary School District
Unfair Practice Charge No. LA-CE-3777

Dear Ms. Wolf:

The above-referenced unfair practice charge, filed March 24, 1997, alleges the Chula Vista Elementary School District (District) discriminated against several bargaining unit members, and unilaterally changed the "facsimile policy." The Chula Vista Elementary Education Association (Association) alleges the conduct violates Government Code section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA or Act).

I indicated to you, in my attached letter dated May 21, 1997, that certain allegations contained in the 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 May 28, 1997, the allegations would be dismissed. I later extended this deadline to June 11, 1997.

On June 11, 1997, I received a first amended charge. The amended charge reiterates the original charge, and adds the following.

Scott Hopkins:

The amended charge again notes Mr. Hopkins is the Association Representative as Loma Verde Elementary School. Throughout the 1995-1996 school year, during Association picketing at the District office, Mr. Hopkins delivered, prepared and distributed picket signs, spoke in a bullhorn and led marches and rallies. In the Spring of 1996, Hopkins gave Superintendent Gil a brightly colored button which read "It's all the Superintendent's Fault."

On December 5, 1996, Hopkins was directed to appear for an interview as part of the District's investigation into a child abuse complaint by the parent of a former student. The Association contends this action, taken after the District Attorney's Office has closed the case, is evidence of the District's discriminatory conduct. The Association further contends the District failed to follow proper procedures regarding complaints by parents.

As stated in my May 21, 1997, the District's failure to strictly comply with investigatory procedures, alone, is insufficient to demonstrate the requisite nexus. While the Association contends the District's adverse action was taken in close temporal proximity to Mr. Hopkins protected activity, facts presented by the Association demonstrate the District's action was taken more than six months after any protected activity on Mr. Hopkins part. Moreover, the Association fails to demonstrate the District strictly followed the complaint procedures in all child abuse cases or routinely dismissed allegations once the District Attorney's office closed the case. As such, the Association fails to present any additional facts demonstrating nexus, and the allegation is dismissed.

Sue Butler

In September, 1996, during a staff meeting, Ms. Butler stated that the school budget was under site control. Palomar Principal, Bonnie Nelson, responded to this comment by stating that whomever gave this information to Ms. Butler was a "liar." In October, 1996, Ms. Butler called a meeting with teachers to inform them that Nelson had changed the procedure for handling parent complaints. On October 14, 1996, at a mediation session, Ms. Butler disputed Ms. Nelson's statement that she would never use statements or conduct outside of the classroom in an evaluation.

On November 26, 1996, the District issued Ms. Butler a written warning concerning her alleged inappropriate action against a student. The Association contends this letter was issued because of Ms. Butler's protected activity.

As noted in my May 21, 1997, letter, facts presented by the Association demonstrate the District followed proper procedures in handling the parent's complaint. Although Ms. Butler believed she had handled the complaint, Ms. Nelson's actions in pursuing the matter upon receiving a call from the child's parents, does not demonstrate discriminatory motivation. The Association also alleges Ms. Nelson made a statement to the effect that she would get even with Ms. Butler. However, both the original and amended

charges fail to provide any facts regarding this statement, including when it was made, and to whom it was made. As the Association fails to provide these facts, direct animus cannot be inferred. Finally, while this adverse action took place in close temporal proximity to Ms. Butler's protected activities, timing alone is insufficient to demonstrate nexus. As such, this allegation is dismissed.

The amended charge also asserts that on May 1, 1997, the District took adverse action against Ms. Butler by reassigning her from a 3rd grade class to 4th grade position. The Association argues nexus is demonstrated by Ms. Nelson's statement that "she knew she had a problem of retribution if she only reassigned two teachers, so she was reassigning eight."

Assuming the reassignment is an adverse action, the allegation fails also fails to demonstrate the requisite nexus. While the reassignment took place within months of the filing of this unfair practice charge, mere timing alone is insufficient to demonstrate the requisite nexus. The amended charge does not allege Ms. Butler received disparate treatment or that the District failed to follow proper procedures. Instead, the Association relies on Ms. Nelson's statement that she did not want to give the appearance of impropriety or retribution in her reassignments, therefore she reassigned eight teachers. Ms. Nelson's actions in refusing to single out teachers for reassignment, does not demonstrate the District reassigned eight teachers, simply to punish Association activists. As such, this allegation fails to state a prima facie case.

Gina Boyd:

The amended charge fails to add any additional facts to this allegation, and therefore, the allegation of retaliation against Ms. Boyd is dismissed for the reasons stated in the May 21, 1997, letter.

Carol Owens:

The amended charge presents for the first time an allegation that the District reassigned Ms. Owens because of her protected activity. Ms. Owens is the Association's Bargaining Chair and a teacher representative at Palomar Elementary School. On October 1, 1996, Ms. Owens requested budget information, over Principal Nelson's objection. On May 1, 1997, Ms. Owens was reassigned from 1st grade to a combination 2nd/3rd grade class.

Assuming again the reassignment is an adverse action, the charge fails to demonstrate the requisite nexus. The Association

contends Ms. Nelson's statement, quoted above, and the timing of the District's action demonstrate the necessary connection. However, as noted above, Ms. Nelson's statement does not demonstrate Ms. Owens was reassigned because of her protected activities. Indeed, Ms. Nelson's statement demonstrates she did not want to give the appearance of impropriety in reassigning staff members. Additionally, the District took this action seven (7) months after Ms. Owens request for budget information. In this instance, seven months is not within close temporal proximity of the adverse action. As such, this allegation is dismissed.

I am therefore dismissing those allegations above which fail to state a prima facie case based on the facts and reasons contained herein and in my May 21, 1997, letter.

Unilateral Change:

On November 26, 1996, Assistant Superintendent Curtis informed Ms. Boyd that the District's fax machines were not available for Association use. Specifically, Mr. Curtis informed Ms. Boyd that the District would not distribute communications from the Association received on school facsimile machines, nor will they permit non-educational use by the teachers. The District's letter states it is the second such directive by the District.

The Association contends this action violates the five year past practice of allowing the Association to use the school's fax machines for Association communications. In support of this allegation, the Association provides a copy of a facsimile sent by Ms. Boyd to Association members on October 18, 1996.

Article 4 of the parties collective bargaining agreement (Agreement), which expires on June 30, 1997, provides numerous means through which the Association can communicate with its members. Article 4.1.2 provides the Association with access to the District's internal mail system. Article 4.1.4 provides the Association with the right to post notices at school sites, and Article 4.1.5 grants Association representatives the right to conduct Association business on school sites. Finally, Article 4.1.8 of the Agreement states:

> The Association shall have reasonable opportunity to prepare and present a position in the event of any proposed policy change or new policy.

The parties grievance machinery is contained in Article 7 of the Agreement. Article 7.1.2 allows the Association to file

grievances on its own behalf. Additionally, Article 7.3.8, provides for the binding arbitration of grievances.

Section 3541.5(a) of the Educational Employment Relations Act states, in pertinent part, that PERB shall not:

> Issue a complaint against conduct also prohibited by the provisions of the [collective bargaining] agreement 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 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 this case. First, the grievance machinery of the agreement/MOU covers the dispute raised by the unfair practice charge and culminates in binding arbitration. Second, the conduct complained of in this charge, that the District implemented a new facsimile policy, is arguably prohibited by Article 4.1.8 of the MOU.

Accordingly, this charge must be deferred to arbitration and will be dismissed. Such dismissal is without prejudice to the Charging Party's right, after arbitration, to seek a repugnancy review by PERB of the arbitrator's decision under the Dry Creek criteria. (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.)

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 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
Kristin L. Rosi
Regional Attorney

Attachment

cc: Mark R. Bresee

STATE OF CALIFORNIA PETE WILSON, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415)439-6940

May 21, 1997

Rosalind Wolf
California Teachers Association
11745 E. Telegraph Road
Santa Fe Springs, CA 90670

Re: **WARNING LETTER**
Chula Vista Elementary Education Association, CTA/NEA v. Chula Vista Elementary School District
Unfair Practice Charge No. LA-CE-3777

Dear Ms. Wolf:

The above-referenced unfair practice charge, filed March 24, 1997, alleges the Chula Vista Elementary School District (District) discriminated against several bargaining unit members, and unilaterally changed the "facsimile policy." The Chula Vista Elementary Education Association (Association) alleges the conduct violates Government Code section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA or Act).

Investigation of the charge revealed the following. The Association is the exclusive representative of the District's certificated bargaining unit. Scott Hopkins is a teacher at Loma Verde Elementary School, where he serves as the Association's site representative. Sue Butler is teacher at Palomar Elementary School, where she serves as the Association's site representative. Gina Boyd is the Association's President.

Scott Hopkins:

On August 28, 1996, the District informed Mr. Hopkins that an oral complaint had been lodged against him by a student. The District further informed Mr. Hopkins he would be placed on administrative leave with pay until the investigation was concluded. As the complaint against Mr. Hopkins alleged possible child abuse, the District contacted Child Protective Services as required by law.

On December 5, 1996, District Assistant Superintendent, Ray Curtis, ordered Mr. Hopkins to report to the District office for an investigatory interview. The District advised Mr. Hopkins to bring a representative with him. On February 27, 1997, Mr. Hopkins met again with District officials. During this meeting,

the District stated its findings and decisions regarding the complaint. Specifically, the District found no sexual intent on Mr. Hopkins part. However, the District also determined that it was in the best interest of the student to transfer Mr. Hopkins to another school site. These findings were confirmed by letter dated March 6, 1997.

The District's policy regarding the handling of student/parent complaints is stated in a series of Administrative Regulations, Board Policies and Article 36 of the parties collective bargaining agreement (Agreement). Board Policy 1321.1 states in pertinent part, the following with regard to "Complaints Concerning School Personnel:"

> It is the desire of the Governing Board to rectify any misunderstanding between the public and the District by direct discussions of an informal type among the interested parties. Only when such informal meetings fail to resolve the differences, shall more formal procedures be employed.
>
> When public complaints involve accusations of child abuse, the provisions of this policy and regulation shall be implemented only after the child abuse reporting requirements have been completed.

Administrative Regulation 1321.1 states in relevant part:

> First Level - If it is a matter specifically directed toward a staff member, the matter must be addressed, initially, to the concerned staff member who shall discuss it promptly with the complainant and make every effort to provide a reasoned explanation or take appropriate action within his/her authority, and District rules and regulations.

Finally, Article 36 of the parties Agreement states as follows:

> Citizens and parents or guardians of pupils enrolled in the District may present informal (oral) and/or formal (written) complaints regarding employees to the District. Parents or guardians shall be encouraged by the immediate supervisor or District administrator to present informal (oral)

> complaints first to the employee who is the subject of the complaint prior to presenting any formal (written) complaint to the District.

Article 36.1 states in relevant part:

> **Informal (Oral) Complaints.** No record of any informal (oral) complaint shall be placed in the personnel filed of the employee unless:
>
> 36.1.1 The employee's immediate supervisor, a District administrator or a designee conducts an investigation about the complaint. Such investigation shall include a conference with the employee and may include a District representative and the employee's representative. . . The immediate supervisor, District administrator, or designee, shall have the prerogative of meeting with the parties in the event the employee does not request a meeting.

Sue Butler:

On September 30, 1996, Sue Butler received a letter from Palomar Principal, Bonnie Nelson, indicating an oral complaint had been lodged against Ms. Butler by the parent of one of her students. The letter indicated the child's name and recited the specific facts surrounding the complaint. Specifically, the complaint alleged Ms. Butler forcibly removed a student from the classroom and shook her violently. Ms. Nelson requested the parents meet with Ms. Butler regarding the situation and asked Ms. Butler to clear up the situation.

On October 1, 1996, Ms. Butler informed Ms. Nelson that she had handled the situation on an informal level. Ms. Butler stated she had met with the child's mother and that the situation was resolved. On October 2, 1996, Ms. Nelson inquired about Ms. Butler's meeting with the child's mother, as the mother had stated the day before that she wanted a conference with Ms. Butler where both parents could be in attendance. On November 4, 1996, Ms. Butler spoke with the child's father over the telephone. Ms. Butler again stated she believed the issue to be resolved.

On November 20, 1996, Ms. Butler, and her Association representative, Carol Owen, met with Assistant Superintendent Curtis and Palomar Principal, Bonnie Nelson, to discuss the above

mentioned incident. During this meeting, Mr. Curtis recited the child's allegations against Ms. Butler and asked for Ms. Butler's response. Ms. Butler denied all of the allegations against her, although she apparently admitted putting her hands on the child's shoulders. Ms. Butler questioned the delay in resolving the matter and asked about Child Protective Services report on the incident. Mr. Curtis informed Ms. Butler that he was sorry about the delay, and that he had no information regarding the CPS report. At the conclusion of the meeting, Mr. Curtis informed all present that he would make a decision as to what action, if any, would be taken against Ms. Butler, within five days.

On November 25, 1996, Mr. Curtis issued Ms. Butler a warning letter, concluding Ms. Butler had placed her hands on a child in such as manner at to cause physical pain. Mr. Curtis further concluded that the incident constituted corporal punishment in violation of Education Code section 49001(a). On December 10, 1996, Ms. Butler responded to the warning letter. Ms. Butler's response alleges the District took such action against her because of her protected activities.

Gina Boyd:

Article 27 of the Agreement provides "Leave for the President of the Association." Article 27.1 states:

> The President of the Association shall, upon written request, be granted a leave of absence without pay for one school year. A one year renewal may be granted at the discretion of the Superintendent and approval of the Board of Education. All entitlements which apply to long-term leave shall apply to this leave.

Article 27.2 states the following with regard to the President's placement the following year:

> Upon expiration of the leave, the President of the Association shall, subject to a written request from said employee, be returned to his or her previous location and assignment providing the specific previous assignment is still in existence and if the written request is filed with the Assistant Superintendent, Human Resources by March 31, in the year the leave expires.

On August 28, 1996, the District removed the personal belongings of Association President, Gina Boyd, from her classroom, as Ms. Boyd had begun a leave of absence for that year. The Association contends this action differs from the District's past practice of leaving the absent teacher's belongings in the classroom, and thus constitutes discrimination against Ms. Boyd.

Unilateral Change:

On November 26, 1996, Assistant Superintendent Curtis informed Ms. Boyd that the District's fax machines were not available for Association use. Specifically, Mr. Curtis informed Ms. Boyd that the District would not distribute communications from the Association received on school facsimile machines, nor will they permit non-educational use by the teachers. The District's letter states it is the second such directive by the District.

The Association contends this action violates the past practice of allowing the Association to use the school's fax machines for Association communications. The Association does not provide any documentation supporting this assertion.

Article 4 of the Agreement provides numerous means through which the Association can communicate with its members. Article 4.1.2 provides the Association with access to the District's internal mail system. Article 4.1.4 provides the Association with the right to post notices at school sites, and Article 4.1.5 grants Association representatives the right to conduct Association business on school sites. The Agreement is, however, silent with regard to the use of fax machines.

On numerous occasions over the last two months, I have contacted you seeking additional information regarding member's protected activities. To date, I have not received any additional information.

Based on the above stated facts, the charge as presently written, fails to state a prima facie violation of the EERA, for the reasons stated below.

DISCUSSION

The Association alleges the District discriminated against Mr. Hopkins, Ms. Butler and Ms. Boyd, based on their protected activities. The charge further alleges the District unilaterally changed the policy regarding the use of the District's facsimile machine.

Scott Hopkins:

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 employees 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 instant allegation fails to demonstrate the District's actions in investigating the complaint, placing a written summary of the investigation, and transferring Mr. Hopkins, were based on Mr. Hopkins' protected activities.[1] The Association asserts the requisite nexus is demonstrated by the District's failure to strictly comply with section 1321.1 of the Administrative Regulations. While it appears the District did not strictly follow the policies set forth in the Agreement or the regulations, such indicia, alone, is insufficient to state a prima facie case. The Association does not demonstrate the District took this action in close proximity to any protected activity by Mr. Hopkins, nor does the Association allege the District strictly followed this procedure in all cases of alleged child abuse. The Association also fails to provide any other evidence of the requisite nexus, and thus fails to state a prima facie case.

Sue Butler:

The Association contends the District failed to follow proper procedures regarding the complaint against Ms. Butler. The Association contends such failure to follow procedures demonstrates the requisite nexus for a prima facie case of discrimination. The Association contention is, however, unsupported by the facts presented.

Facts presented by the Association demonstrate the District followed proper procedures in handling the complaint against Ms.

---

[1] On August 28, 1996, the District placed Mr. Hopkins on administrative leave. The Association contends this action constitutes an adverse action against Mr. Hopkins. However, this allegation falls outside PERB six month statute of limitations, and must therefore be dismissed.

Butler. Principal Nelson informed Ms. Butler of the charge against her, and provided specific details regarding the event, including the child's name and the date of the alleged incident. Principal Nelson encouraged Ms. Butler to hold a meeting with the child's parents and did not begin an investigation into the matter prior to informing Ms. Butler of the allegations. Thus, it seems the District's actions conformed to both the regulations and Article 36.1. Moreover, the Association does not demonstrate the District took adverse action against Ms. Butler in close temporal proximity to her protected activities or that the District conducted a cursory investigation into the matter. Additionally, the Association fails to provide any other evidence of the requisite nexus, and thus fails to state a prima facie case.

Gina Boyd:

Government Code section 3541.5(a)(1) prohibits the Board from issuing a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. On August 28, 1996, the District removed Ms. Boyd's personal belongings from the classroom she used the previous year. The Association filed this charge on March 24, 1997, more than six months after the alleged unfair practice occurred. As such, PERB lacks jurisdiction over this allegation.

Assuming, however, the charge was timely filed, the allegation still fails to demonstrate a prima facie case. 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. The Association does not demonstrate why removing Ms. Boyd's personal items from a classroom she is no longer using is an action adverse to her employment. Moreover, the Association does not demonstrate the requisite connection between the District's action, and Ms. Boyd's protected activity. As such, the allegation fails to demonstrate a prima facie case.

Unilateral Change:

The Association contends the District unilaterally changed the facsimile policy, when on November 26, 1996, the District instructed the Association to refrain from using the machine. In determining whether a party has violated EERA section 3543.5(c), 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.)

In the instant allegation, the Association asserts the District altered the facsimile use policy. Assuming the policy is within the scope of representation, the Association fails, however, to demonstrate a change in the policy. Although the Association asserts that the District changed the fax machine policy, the Association does not demonstrate it had use of the facsimile machine prior to this memorandum, nor does the Association demonstrate it used the fax machine prior to this memorandum without warning. As such, the allegation fails to state a prima facie case.

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 May 28. 1997. I shall dismiss your charge. If you have any questions, please call me at (415) 439-6940.

Sincerely,

Kristin L. Rosi
Regional Attorney