STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

BERKELEY FEDERATION OF TEACHERS #1078, Charging Party, v. BERKELEY UNIFIED SCHOOL DISTRICT, Respondent.	Case No. SF-CE-2295-E PERB Decision No. 1538 June 24, 2003

Appearances: Van Bourg, Weinberg, Roger & Rosenfeld by Stewart Weinberg, Attorney, for Berkeley Federation of Teachers #1078; Atkinson, Andelson, Loya, Ruud & Romo by Marleen L. Sacks, Attorney, for Berkeley Unified School District.

Before Baker, Whitehead and Neima, Members.

DECISION

BAKER, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Berkeley Federation of Teachers #1078 (Federation) of a Board agent's dismissal of its unfair practice charge. The charge alleged that the Berkeley Unified School District (District) violated the Educational Employment Relations Act (EERA)[1] by retaliating against Federation members because the Federation filed a grievance. Specifically, the Federation alleges that the District refused to grant waivers of certain provisions in the parties' collective bargaining agreement, because the Federation had filed a grievance over an unrelated issue.

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

After reviewing the entire record in this matter, including the original and amended charge, the warning and dismissal letters, the Federation's appeal, and the District's response, the Board reverses the Board agent's dismissal and remands the case for further processing consistent with the discussion below.

BACKGROUND

The District and Federation are parties to a collective bargaining agreement (CBA) which expired on June 30, 2002. Section 11.8 of the CBA specifies the length of the instructional day. The Federation alleges that it had been the practice at many schools for the District to grant waivers of Section 11.8, so that teachers could work more minutes than the CBA would otherwise allow for four days per week. In return, the teachers were allowed to use the minutes that they had "banked" to work a shortened workday for one day per week. At several schools, Wednesday was the shortened workday.

In December 2001, management at the Berkeley Arts-Magnet Elementary School notified teachers that staff meetings would be held on Wednesdays at 3:00 p.m. The Federation's position was that the CBA required staff meetings to begin by 2:20 p.m. Accordingly, the Federation filed a grievance. The record indicates that the grievance was eventually submitted to arbitration.

In June 2002, the Federation requested waivers of the CBA at seven schools so that teachers could "bank" minutes as described above. The District only granted three waivers. At each of the schools where a waiver was granted, the teachers had agreed to hold staff meetings at 3:00 p.m. The Federation alleges that Chris Lim (Lim), the District's associate superintendent, informed Barry Fike, the Federation's president, "that the District had taken its position of not signing off on waivers because the Union had filed a grievance involving the extended working day on Wednesdays." In addition, the Federation alleges that its

representatives at various schools were informed that "the District would not agree to further waivers because the Union had filed the grievance at the Art-Magnet School."

BOARD AGENT'S DECISION

The Federation alleges that the District retaliated against its members in violation of EERA section 3543.5(a).[2] The Board agent analyzed the Federation's charge using the familiar framework set forth in Novato Unified School District (1982) PERB Decision No. 210 (Novato). Under Novato, 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; Carlsbad Unified School District (1979) PERB Decision No. 89.) The third prong of Novato requires that the charging party prove a nexus between the protected activity and the adverse action.

With respect to nexus, the Board agent concluded that the Federation had failed to demonstrate that the District denied the waivers because of the Federation's grievance. Specifically, the Board agent held that Lim's statement was not direct evidence of animus because the District also denied waiver requests at schools where no grievance was filed.

---

[2] EERA section 3543.5(a) states, in pertinent part:

> It shall be unlawful for a public school employer to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

Further, the Board agent noted that the District was under no obligation to grant waivers under the CBA. As no nexus was established, the Board agent dismissed the charge.

DISCUSSION

Nexus

PERB has long recognized that direct evidence of discriminatory intent – the proverbial "smoking gun" – is rarely possible. (See Oakdale Union Elementary School District (1998) PERB Decision No. 1246.) Accordingly, the Board has held that circumstantial evidence of discriminatory intent may be sufficient to establish the required nexus. Circumstantial evidence of discriminatory intent may include such factors as the timing of the employer's adverse action, the employer's disparate treatment of the employee, and the employer's departure from established procedures and standards. However, in those cases where direct evidence of discriminatory intent is established, circumstantial evidence of intent is not required. (San Marcos Unified School District (2003) PERB Decision No. 1508 (San Marcos) at p. 45, fn. 26.)

In this matter, the Federation alleges that Lim stated, "that the District had taken its position of not signing off on waivers, because the Union had filed a grievance involving the extended working day on Wednesdays." This statement provides a direct link between the filing of the grievance (protected activity) and the alleged adverse action (denial of waivers). Thus, the Federation has shown the requisite "nexus" in order to establish a prima facie case.

The Federation's direct evidence of discriminatory intent is not affected by the District's contemporaneous denial of waivers at schools where no grievance was filed. Disparate treatment, or the lack thereof, is helpful as circumstantial evidence of intent. However, where direct evidence of intent exists, circumstantial evidence of intent, or the lack thereof, is not necessary to establish a prima facie case. (San Marcos at p. 45, fn. 26.)

The fact that the District was under no obligation to grant the Federation's waiver requests is also irrelevant to the issue of motive. EERA section 3543.5(a) prohibits an employer from taking actions, that may otherwise be entirely permissible, based on an unlawful motive. (EERA sec. 3543.5(a).) Thus, even though the District could have denied the waivers for a variety of reasons, or perhaps no reason at all, its denial becomes unlawful when its motive is to retaliate for the exercise of rights guaranteed by EERA.[3] Accordingly, the Board finds that the Federation has satisfied the "nexus" requirement of Novato.

Although the Board finds the requisite "nexus," there is not enough evidence in the record for the Board to order that a complaint be issued. Specifically, the record does not establish that the District's denial of waiver requests constituted an adverse action, which is also required by the third prong of Novato. Since the warning letter did not provide the Federation an opportunity to submit more facts on this issue, the Federation should be given an opportunity to do so. Accordingly, the Board remands this matter back to the Office of the General Counsel for further processing consistent with this decision.

ORDER

The Board REVERSES the Board agent's dismissal in Case No. SF-CE-2295-E and REMANDS the case to the General Counsel's office for further processing consistent with this Decision.

Members Whitehead and Neima joined in this Decision.

[3] The Board is not holding that the District's denial of waivers constitutes an adverse action. As discussed later in the Board's decision, whether the Federation has established adverse action should be addressed on remand.