**STATE OF CALIFORNIA**
**DECISION OF THE**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

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| UNITED TEACHERS OF LOS ANGELES,<br><br>Charging Party,<br><br>v.<br><br>LOS ANGELES UNIFIED SCHOOL DISTRICT,<br><br>Respondent. | Case No. LA-CE-4506-E<br><br>PERB Decision No. 1657<br><br>July 8, 2004 |

Appearance: Geffner & Bush by Kathleen M. Erskine, Attorney, for United Teachers of Los Angeles.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the United Teachers of Los Angeles (UTLA) of a Board agent's dismissal (attached) of its unfair practice charge. The charge alleged that the Los Angeles Unified School District (District) violated the Educational Employment Relations Act (EERA)[1] by discriminating against and interfering with the rights of a unit member because of his protected conduct. UTLA alleged that this conduct constituted a violation of EERA section 3543.5(a) and (b).

After a review of the entire record, including the unfair practice charge, the Board agent's warning and dismissal letters, and UTLA's appeal, the Board adopts the Board agent's warning and dismissal letters as its own decision and dismisses the charges.

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

## BACKGROUND

The District instituted a Ten Schools Program several years before the facts of this case arose. Under that program, teachers at Mann Middle School (Mann) were required to sign a "Commitment Form" in which they agreed to additional conditions related to their employment. These conditions include a dress code and four weeks of additional staff development programs. None of the other District schools required this agreement. The agreement was by a signed "Commitment Form."

Scott Miller (Miller) was a teacher at Mann. He was employed during the 2001-2002 school year as a temporary teacher. He signed the commitment form on April 19, 2002. He attended a meeting held by UTLA in which he was advised of the union position related to the commitment forms. At that meeting he was told that teachers who did not sign the form would be eligible to work at other District schools. Following the meeting he asked the principal to return his form.

In early August of 2002, Miller contacted the school inquiring when to report to work and was advised he no longer was employed at that school. He was told he would need an evaluation to be re-employed and that he should look for employment at other District schools.

On September 3, 2002, the UTLA representative was told by the principal of Mann that Miller would have a job at the school if he signed the "Commitment Letter." The UTLA representative was also told the next day, by a District personnel specialist, that the District was not going to allow a temporary teacher to change schools.

Miller interviewed at other schools within the District in September and October without procuring employment. One of the schools where he interviewed was Virgil Middle School (Virgil). He received various reasons for not being hired at any of them.

UTLA alleges that in refusing employment at Virgil, and in a pattern of denying jobs to Miller, the District has taken an illegal reprisal because of Miller's refusal to sign the commitment form.

## BOARD AGENT DISMISSAL

### Protected Activity

The charge was dismissed for failure to state a prima facie case of discrimination. The Board agent found Miller's revocation of his commitment form was not protected activity. He found no case law or statute to support that position. Miller did, however, engage in protected activity by enlisting the assistance of UTLA when seeking other jobs.

### Motive

The Board agent did not believe UTLA had made its case to prove motive, particularly how other schools denied Miller employment because of alleged protected activity.

### Right to Employment

The charge states that the teachers who did not sign the form would be "eligible for" employment at other schools in the District. It does not indicate that temporary teachers would have employment at other schools. Miller, as a temporary teacher, had no right to continued employment with the District.

## DISCUSSION

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 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (North Sacramento School District (1982) PERB Decision No. 264 (No. Sacramento)), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District (1979) PERB Decision No. 104); (3) the employer's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S); (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; (6) employer animosity towards union activists (Cupertino Union Elementary School District) (1986) PERB Decision No. 572); or (7) any other facts which might demonstrate the employer's unlawful motive. (Novato; No. Sacramento.)

Evidence of adverse action is also required to support a claim of discrimination or reprisal under the Novato standard. (Palo Verde Unified School District (1988) PERB Decision No. 689.) In determining whether such evidence is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (Ibid.) In a later decision, the Board further explained that:

> The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a

> reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment. [Newark Unified School District (1991) PERB Decision No. 864; emphasis added; fn. omitted.]

The theory of UTLA is that Miller's refusal to sign the form is protected because he was following the advice of the union representative. We do not agree that this is protected activity and emphasize there is no case law indicating that it is. Further, there is no evidence that the District and UTLA had an agreement permitting employees to refuse to sign the form. Based on the facts in the charge, the form appears to be a valid term and/or condition of employment. Miller's refusal to perform a valid condition of employment is likewise unprotected.

The Beaumont[2] case cited by the dissent here is inapposite. The situation of that case had a potential issue involving protected activity, however, there is no such activity here.

The Board in Beaumont said, in dicta, that the failure to follow union advice was not protected activity in that instance. That does not mean following union advice is always protected activity regardless of the advice or the conduct.

The union in Beaumont had alleged the school district proposal for non-retroactive wage increase, that was effective on ratification of the entire agreement, was unlawfully regressive merely because of the lost monetary benefit. The district had sent offers of employment directly to the individual bargaining unit members and the union told each member not to sign the contracts because they were improper offers bypassing the exclusive representative.

Members were advised by the union to sign a union form indicating an intention to return to work so they would comply with the education code notice requirements. Three

[2]Beaumont Unified School District (1984) PERB Decision No. 429 (Beaumont).

teachers did not return either form and they were not immediately rehired. They had not given the district notice of intent to return to work. The teachers who returned the union form were rehired and the three who returned no form were eventually rehired before the start of the next school year. The union argued that those three employees engaged in protected activity by following union advice and refusing to participate in direct dealing with the district. But those who did send in the union form did not have any action against them.

The dissent here notes the Board in Beaumont said those individuals who did not follow union advice, when they did not send in any form, did not participate in protected activity. However, the parties in that case were negotiating a collective bargaining agreement covering the dispute. Here, the form was not covered by the collective bargaining agreement or any other agreement between the District and UTLA. Instead, the form was a valid term and/or condition of employment. The dicta in Beaumont cited by the dissent simply does not apply under these facts.

The Board therefore upholds the Board agent dismissal and adopts the warning and dismissal letters as its own decision.

## ORDER

The unfair practice charge in Case No. LA-CE-4506 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Member Neima joined in this Decision.

Member Whitehead's dissent begins on page 7.

WHITEHEAD, Member, dissenting: I respectfully dissent. A recitation of the facts as I see them follows:

Scott Miller (Miller), a teacher at Mann Middle School (Mann), was employed during the 2001-2002 school year, was credentialed in social studies, math and possessed a science supplemental credential, and received a positive evaluation at the end of the school year.

The Los Angeles Unified School District (District) instituted a Ten Schools Program several years before and under that program, teachers at Mann were required to sign a "commitment form" in which they pledge to, inter alia, conform to a dress code and participate in an extra four weeks of staff development programs. Teachers at all other District schools were not required to sign this form. Miller signed the form on April 19, 2002. During this period, United Teachers of Los Angeles (UTLA) Representative Roger Scott (Scott) was conducting weekly meetings at Mann to advise teachers of their rights with regard to the form and of the District's representation that the teachers would be eligible to work at other District schools if they chose not to sign the form. After one of these meetings, Miller asked the Mann Principal, Barbara Rickett (Rickett), to return his form. Other unit employees also did not sign the form.

On August 9, 2002, Miller contacted Mann to find out when he was to report to work and learned that he no longer had a position at Mann. On August 14, 2002, Matthew Greco, a personnel specialist at Mann told Miller that he needed an evaluation to be reemployed. The next day, Miller spoke with the Mann office manager, who advised him to look for employment at other District schools.

Miller attempted unsuccessfully to obtain employment at other middle schools. On August 29, 2002, Miller interviewed for a position at Pacoima Middle School (Pacoima) and was offered a job. Later, Miller was denied the job because of an alleged substandard rating.

Miller asked Rickett about this alleged substandard rating. She replied that she was not aware of such a rating and that Miller had indeed received a good year-end evaluation. Rickett sent a non-confidential reference to personnel on September 3, 2002 and to Miller. Although the copy provided with the charge is difficult to read because of poor copy quality, it appears to be a good reference. On September 3, 2002, Rickett told UTLA representative Scott that if Miller had signed the commitment form, he would still be working at Mann. The next day, Scott asked Phyllis Klein (Klein), a District personnel specialist, why Miller was denied employment at Pacoima, and Klein stated that the District would not allow a temporary teacher to change schools and that Miller should have signed the commitment form. On September 10, 2002, Scott again asked Klein why he was denied employment at Pacoima and she responded that it was because the school was "overteachered."

On September 12, 2002, Miller interviewed and was offered a job at Byrd Middle School (Byrd). The next morning the Byrd principal called Miller and rescinded the offer with a vague explanation involving a "situation with a choral teacher." Miller however teaches math, social studies and science. On September 17, 2002, Miller interviewed at Burbank Middle School but on September 26, 2002 was denied a job there allegedly because the principal had to give the open positions to two "must place" teachers. On October 16, 2002, Jerry Durham (Durham), Virgil Middle School (Virgil) principal, called Miller to inquire whether he was available to teach. Miller advised Durham to contact Human Resources regarding his eligibility. Miller later learned that a District personnel specialist had informed Durham that he was not eligible. After discussions with UTLA representatives, Durham informed Miller on October 21, 2002 that he was eligible for reemployment and she would be interviewing for the position. Before his interview, a secretary called Miller and informed him that another teacher was hired for the position.

UTLA explains that Miller's activity is protected because he revoked his signature on the commitment form as a result of advice received from UTLA representatives at one of several meetings held for the purpose of representation on terms and conditions of employment. At these meetings, UTLA representatives and unit members explained the form as representing an additional term and condition of employment and employees agreed that they should not sign the form. UTLA also informed teachers that the District would assist teachers who did not sign the form in relocating to other schools. The District was aware of these meetings because they took place at Mann. By attending these meetings, Miller and other teachers were participating in union activities for purposes of representation. By acting in response to UTLA's advice, those teachers who refused to sign or revoked their signature were engaging in protected activity. UTLA insists that the parties agreed to allow employees to not sign the form. Miller's taking advantage of that agreement is also protected conduct. (Compare North Sacramento School District (1982) PERB Decision No. 264 (No. Sacramento) and City of Milpitas (2004) PERB Decision No. 1641-M.) Further, Miller was relying upon the District's representation that it would not retaliate against any teacher who declined to sign the form. However, the District did retaliate by terminating his employment at Mann and denying him opportunities for employment at other District schools.

In light of these facts, UTLA asserts that the District engaged in a pattern of denying Miller employment or rescinding job offers on the basis of his failure to sign the commitment form and thus unlawfully imposed reprisals on him for protected activity in violation of Educational Employment Relations Act (EERA) section 3543.5(a) and (b).

## BOARD AGENT DISMISSAL

The Board agent found that UTLA failed to state a prima facie case of discrimination. Reviewing the facts under the Novato test,[1] the Board agent found that Miller's revocation of the commitment form was not protected activity and that he was aware of no case law or statutory provision to support such a right. He explained that UTLA does not show how Mann was unable to lawfully separate teachers who did not sign the form. The Board agent also found that UTLA has not shown sufficient indicia of motive, i.e., how other schools denied Miller employment because of his alleged protected activity at Mann, particularly because Miller, as a temporary teacher, has no right to continued employment with the District. The dismissal letter refers to a faxed letter received from UTLA by the Board on September 30, 2002.[2]

## DISCUSSION

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.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (No. Sacramento), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the

[1]Novato Unified School District (1982) PERB Decision No. 210 (Novato).

[2]There is no evidence that this September 30, 2002 letter was served on either the Board or the District. The letter is also not in the record, and therefore, cannot be reviewed.

protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District (1979) PERB Decision No. 104.); (3) the employer's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S); (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; (6) employer animosity towards union activists (Cupertino Union Elementary School District) (1986) PERB Decision No. 572); or (7) any other facts which might demonstrate the employer's unlawful motive. (Novato; No. Sacramento.)

Evidence of adverse action is also required to support a claim of discrimination or reprisal under the Novato standard. (Palo Verde Unified School District (1988) PERB Decision No. 689.) In determining whether such evidence is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (Ibid.) In a later decision, the Board further explained that:

> The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment. [Newark Unified School District (1991) PERB Decision No. 864; emphasis added; fn. omitted.]

In its appeal, UTLA alleges that Miller's conduct, i.e., revoking his signature on the commitment form in direct response to advice he received from UTLA representatives at meetings held at Mann, was protected. I agree with UTLA.

This case may be contrasted with the Board's decision in Beaumont Unified School District (1984) PERB Decision No. 429 (Beaumont). In Beaumont, the Board held that employees' conduct involving a failure to follow the union's advice is not protected. The district had mailed unit members an offer of employment for the next school year and a request to sign and return the form to verify acceptance of the employment offer in order to comply with provisions of the Education Code. The offers identified a salary which allegedly incorporated a percentage increase. A few days later, the union sent each member a notice asking them not to sign the district's form because the salary offer improperly bypassed the union. Instead, in the union notice, in order to comply with Education Code requirements, the union asked employees to sign and return to the district the union's alternative form showing intent to work at the school the following year. Three employees chose not to sign either form and were deemed by the district to have declined employment for the following year. Under these circumstances, the Board agreed with the district.

Conversely, in the instant case, UTLA representatives were conducting weekly meetings at Mann advising teachers, including Miller, about their rights with regard to the commitment form. UTLA advised teachers at these meetings that the District had represented that it would assist teachers, who had chosen not to sign the form, in relocating to other District schools. Mann was the only school in the District in which teachers were required to sign the commitment form; however, UTLA states that UTLA and the District agreed that the Mann teachers could refuse to sign the form. Miller had previously signed the form but had asked Rickett to return the form in order to revoke his signature. In so doing, Miller was acting in direct response to advice he received from UTLA and consequently Miller's revocation of his signature on the commitment form must be considered protected conduct.

It was UTLA's understanding of the District's representation that teachers had a choice to sign the form or the District would assist the teacher in relocating to other District schools.[3] UTLA thus alleges that signing the form was a voluntary act on the part of Mann teachers.[4] Under Board precedent, refusal to perform a purely voluntary duty is protected conduct. (Modesto City Schools (1983) PERB Decision No. 291, p. 15.)

It should be noted that at least some items included on the commitment form, such as four extra weeks of paid staff development, are matters within the scope of representation under EERA. (See Contra Costa Community College District (1990) PERB Decision No. 804 (Contra Costa), pp. 7-8, citing Poway Unified School District (1988) PERB Decision No. 680 (Poway).)[5]

It is clear that the District's conduct comprised an adverse action against Miller. Although Miller had received a positive performance evaluation while at Mann, he lost his

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[3]Compare No. Sacramento. In that case, an employee asserted his right to file a grievance pursuant to a negotiated grievance procedure. The Board stated that:

> An employee's attempt to assert rights established by the terms of a negotiated agreement clearly constitutes 'participation' in the activities . . . protected by section 3543 of the Act. Were this not the case, an employer could freely retaliate against employees because of their assertion of contractual rights, thereby effectively undermining the collective negotiation process. (At p. 6.)

Although it is not alleged that the agreement between UTLA and the District is part of the parties' collective bargaining agreement, the principle still holds. The claim of such an arrangement should be allowed to proceed to hearing.

[4]There is no evidence that the District's representation to assist teachers refusing to sign the commitment form in relocating to other District schools distinguished between temporary and permanent teachers.

[5]In Contra Costa, the Board indicated that the negotiability of staff development must be determined on a case-by-case basis by evaluating the relationship to enumerated terms and conditions of employment. In this case, unlike Poway, the commitment form is alleged to make four additional weeks of staff development mandatory and therefore affects hours of employment, an enumerated item.)

employment with the District after rescinding his signed commitment form. This is evidenced by offers and later denials of job opportunities at other District schools over a period of three months. The denial of employment is a form of adverse action. (See, e.g., San Diego Community College District (1983) PERB Decision No. 368.)

In its appeal, UTLA points to a pattern of conduct by the District in denying Miller employment that shows unlawful motive. I agree. UTLA identifies conflicting, shifting and vague justifications from the various District officials both to Miller and to Scott, the UTLA representative. These include comments maintaining that if Miller had signed the commitment form, he would still be working at Mann, and that as a temporary teacher, he is not entitled to employment elsewhere. Within days, the explanations for denying Miller employment at other schools changed to the school being "overteachered," a vague situation with a choral teacher, having to hire "must place teachers," and his lack of "eligibility" although credentialed in three subject matters. Moreover, that Miller received a positive year-end evaluation before signing the form, and was then told by staff at Pacoima that his rating was substandard and by staff at Virgil that he was ineligible for employment further evidences inconsistent explanations and thus unlawful motive. (See Los Angeles Unified School District (2001) PERB Decision No. 1469, admin. law judge's proposed dec. at p. 76; Livingston Union School District (1992) PERB Decision No. 965, admin. law judge's proposed dec. at pp. 30-33 (Livingston).)

The Board agent raises the issue that Miller, as a temporary teacher, was not entitled to employment at other District schools. However, Miller's status does not shield the District from its unlawful conduct. The Board has previously held that the status of a probationary teacher under Education Code section 44929.21(b) does not insulate an employer from Board scrutiny of its unlawful conduct. (McFarland Unified School Dist. v. Public Employment Relations Bd. (1991) 228 Cal.App.3d 166, 169 [11 Cal.Rptr.2d 405]; see also, Livingston, at p.

3 and admin. law judge's proposed dec., at pp. 34-37.) The same principle should apply to temporary teachers.

In light of the above, I disagree with the majority and conclude that UTLA has provided sufficient evidence of retaliation to state a prima facie case.

Finally, I agree with the majority that the facts presented in the charge do not demonstrate a prima facie case of unilateral change. However, UTLA did not raise this allegation in the charge. Therefore, I believe the majority's discussion of this issue is unnecessary.

STATE OF CALIFORNIA GRAY DAVIS, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8386
Fax: (916) 327-6377

September 30, 2003

Kathleen M. Erskine, Attorney
Jesus E. Quinonez, Attorney
Geffner & Bush
3500 West Olive Avenue, Suite 1100
Burbank, CA 915054628

Re: United Teachers of Los Angeles v. Los Angeles Unified School District
Unfair Practice Charge No. LA-CE-4506-E
**DISMISSAL LETTER**

Dear Ms. Erskine and Mr. Quinonez:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on April 16, 2003. The United Teachers of Los Angeles alleges that the Los Angeles Unified School District violated the Educational Employment Relations Act (EERA)[1] by illegally discriminating against teacher Scott Miller.

I indicated to you in my attached letter dated September 24, 2003, 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 October 1, 2003, the charge would be dismissed.

I have not received either an amended charge or a request for withdrawal. However, I received, by facsimile, a letter from you on September 30, 2003. In that letter, you request that I reconsider the assessment of your charge made in my letter of September 24.

You contend that Mr. Miller was the subject of "a pattern of discriminatory treatment that began when Mr. Miller revoked his signed 'Commitment Form'." However, as described in my letter of September 24, I am aware of no case law or statutory provision which makes the refusal to sign such a form (or the decision to revoke it) protected activity under EERA.

You also state that "Mr. Miller interviewed for and was denied the job" at Virgil Middle School. I note that your charge states (paragraph 16), "Prior to Mr. Miller's interview, the school secretary at Virgil Middle School informed Mr. Miller that the school had hired another

[1] EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

teacher for the position." In any event, in my letter of September 24, I discussed the fact that as a temporary teacher, Mr. Miller had no continuing employment rights with the District. I concluded that your charge contained insufficient evidence of improper motive for denying him employment. I then stated, "For example, Charging Party has not demonstrated that filling the job at Virgil was not proper under past practice or obligations to those teachers that do have continuing employment rights." Your letter does not supply additional facts which establish that the failure to hire Mr. Miller at Virgil Middle School was improperly motivated.

I am dismissing the charge based on the facts and reasons contained herein and in my September 24 letter.

Right to Appeal

Pursuant to PERB Regulations,[2] 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. (Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Regulations 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

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. (Regulation 32635(b).)

[2] PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

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 Regulation 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. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

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. (Regulation 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
General Counsel

By _____
Bernard McMonigle
Regional Attorney

Attachment

cc: Kathleen M. Erskine, Attorney
Jesus E. Quinonez, Attorney

STATE OF CALIFORNIA GRAY DAVIS, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

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September 24, 2003

Kathleen M. Erskine, Attorney
Jesus E. Quinonez, Attorney
Geffner & Bush
3500 West Olive Avenue, Suite 1100
Burbank, CA 915054628

Re: United Teachers of Los Angeles v. Los Angeles Unified School District
Unfair Practice Charge No. LA-CE-4506-E
**WARNING LETTER**

Dear Ms. Erskine and Mr. Quinonez:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on April 16, 2003. The United Teachers of Los Angeles alleges that the Los Angeles Unified School District violated the Educational Employment Relations Act (EERA)[1] by illegally discriminating against teacher Scott Miller.

Scott Miller was a teacher at Mann Middle School during the 2001-2002 school year. Under the Ten Schools program, teachers at Mann were asked to sign a "Commitment Letter" in which they pledged to conform to a code of conduct which includes a professional dress code and certain staff development programs. Mr. Miller signed the form on April 19, 2002.

Soon thereafter, UTLA met with teachers at Mann regarding their rights not to sign the form and the District's representation that they would be eligible to work at other schools if they did not sign the form. Mr. Miller requested that the Mann principal, Barbara Rickett, return his form. She did so. On August 9, Mr. Miller was informed that he no longer had a position at Mann.

On September 3, UTLA representative Roger Scott was told by Principal Rickett that Mr. Miller would have a job at Mann if he signed the "Commitment Letter". The next day Mr. Scott was told by a District Personnel Specialist that the District was not going to allow a temporary teacher to change schools.

In September and October 2002, Mr. Miller applied for teaching positions at several other schools. He was not hired and was given a variety of reasons. Pacoima Middle School stated it was "overteachered", Byrd had a "situation with a choral teacher", Burbank had "must

[1] EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

place" teachers, Virgil advised that it had been told by a District personnel specialist that Mr. Miller was not eligible to be reemployed. Later the Virgil principal informed Mr. Miller that he was eligible and there would be job interviews. However, prior to an interview, Mr. Miller was informed that the job he hoped for had been filled.

UTLA alleges that in refusing employment at Virgil Middle School and in a pattern of denying jobs to Mr. Miller, the District has taken an illegal reprisal because of Mr. Miller's refusal to sign a "Commitment Form".

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 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (North Sacramento School District (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District (1979) PERB Decision No. 104.); (3) the employer's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S; (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; (6) employer animosity towards union activists (Cupertino Union Elementary School District) (1986) PERB Decision No. 572.); or (7) any other facts which might demonstrate the employer's unlawful motive. (Novato; North Sacramento School District, supra, PERB Decision No. 264.)

Evidence of adverse action is also required to support a claim of discrimination or reprisal under the Novato standard. (Palo Verde Unified School District (1988) PERB Decision No. 689.) In determining whether such evidence is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (Ibid.) In a later decision, the Board further explained that:

> The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's

employment. [Newark Unified School District (1991) PERB Decision No. 864; emphasis added; footnote omitted.]

The facts provided by Charging Party do not establish a prima facie case of discrimination. Charging Party contends that Mr. Miller was discriminated against because of his failure to sign the "Commitment Form". However, I aware of no case law or statutory provision which protects Mr. Miller's right to refuse to sign the form. Charging Party does not appear to object to the fact that Mr. Miller was separated from his original school (Mann) because he would not sign the form. Charging Party provides no facts or argument that Mann school could not separate teachers who did not make the required commitment to the program.

Rather, Charging Party contends that the other middle schools discriminated against Mr. Miller because of his refusal to sign the form at Mann. As stated, I am aware of no case law or statutory authority which make such refusal protected activity. However, Mr. Miller did engage in protected activity by enlisting the assistance of UTLA when seeking other jobs.

Charging Party has not demonstrated that the schools where Mr. Miller made application after leaving Mann denied him employment because of his protected activity. As a temporary teacher at Mann, Mr. Miller had no continuing employment rights with the District. Charging Party has supplied insufficient indicia of motive to establish that the other schools were improperly motivated when denying him employment[2].

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 that 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 have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before October 1, 2003, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

B L McMonigle

Bernard McMonigle
Regional Attorney

BMC

[2] For example, Charging Party has not demonstrated that filling the job at Virgil was not proper under past practice or obligations to those teachers that do have continuing employment rights.