STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

LAUREL FREEMAN, Charging Party, v. MADERA UNIFIED SCHOOL DISTRICT, Respondent.	Case No. SA-CE-2236-E PERB Decision No. 1718 November 30, 2004

Appearances: Bennett & Sharpe by Barry J. Bennett, Attorney, for Laurel Freeman; Atkinson, Andelson, Loya, Ruud & Romo by Todd A. Goluba, Attorney, for Madera Unified School District.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on appeal filed by Laurel Freeman (Freeman) of a Board agent's dismissal (attached) of her unfair practice charge. The charge alleges that the Madera Unified School District (District) treated her disparately in violation of Educational Employment Relations Act (EERA)[1] section 3543.5(a) by involuntarily transferring her from her school along with two other teachers.

The Board has reviewed the entire record in this case, including the original and amended unfair practice charge, the warning and dismissal letters, Freeman's appeal and the District's response. The Board finds the warning and dismissal letters to be free from prejudicial error and adopts them as the decision of the Board itself, subject to the discussion below.

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

DISCUSSION

Freeman argues on appeal that she was treated in a disparate manner by the District. She states that she should not have been transferred along with the other two teachers from the elementary school where they all taught. It is the District's position that they were transferred because the three of them had interpersonal conflicts that had gone on for years and began to impact the instructional aspects of the school.

Since 1997 the teachers had not gotten along. In May 2003, Freeman accused the other two of being mean to her students in retaliation towards her. In September 2003, the principal held a meeting of the faculty and distributed memos for them to sign. The memo was titled "Commitment to Work Together or Transfer."

In October of that year she indicated that they were involved in a verbal attack of her at a faculty meeting. In the next weeks Freeman refused to enter the principal's office because the other two were present and did not attend a meeting on November 4, 2003, because they would be there. She received a "Conference Memo" for missing the November 4 meeting and she filed a grievance in December 2003. The grievance alleged that she was verbally attacked in a faculty meeting when someone said "Mrs. Freeman does not teach AR"[2] and that the District failed to defend her from the verbal attack. Freeman also alleged that her Weingarten[3] rights were violated when she was disciplined but that was later withdrawn.

In her charge, Freeman alleged that she was transferred along with the other two teachers in 2004 because of filing the grievance. The union refused to take the grievance to arbitration and she filed a separate action against it. On appeal, she contends that she was

[2]AR stands for Accelerated Readers.

[3]NLRB v. Weingarten, Inc. (1975) 420 U.S. 251 [88 LRRM 2689].

treated in a disparate manner by the District in that she did nothing to cause the trouble and therefore she should not have been transferred like the other two teachers.

Freeman bears the burden of establishing the elements in the Novato Unified School District (1982) PERB Decision No. 210 (Novato) test. 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 (North Sacramento School District (1982) PERB Decision No. 264 (North 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; North 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.]

Although the transfer of the teachers was a few months after the grievance was filed, the problem existed long before that occurred. A few months before the grievance was filed all the teachers were put on notice that interpersonal conflicts that spilled over into the instructional program would not be tolerated and those who continued on that path would be transferred.

The allegation that by treating Freeman the same as the other two teachers is disparate ignores the fact that all of them signed the letter agreeing to work together or be transferred. Freeman had refused to attend meetings involving the other two. She also has failed to show that the other two teachers were "disciplinary problems" when she was the only one of the three who had received a Conference Memo. Most significantly, she failed to set forth anything showing she had been treated differently than other teachers similarly situated (those with conflicts and/or interpersonal problems with other teachers even if without fault).

Because Freeman has not met her burden, the charges must be dismissed.

ORDER

The unfair practice charge in Case. No. SA-CE-2236-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Member Neima joined in this Decision.

Member Whitehead's concurrence begins on page 6.

WHITEHEAD, Member, concurring: I agree with the decision that the charge against the Madera Unified School District (District) should be dismissed. However, I want it noted that the unfair practice charge alleges that the District violated Laurel Freeman's (Freeman) Weingarten[1] rights. Specifically, in the amended unfair practice charge, Freeman alleges, in pertinent part:

> 26. On November 7, 2003, I was sitting on a bench outside my office, when Beveridge came up to me and, in a loud voice, stated 'Mrs. Freeman, I need to see you in my office. I need to speak with you in private.' Because of his tone, I asked Beveridge if I needed representation, but he stated that that would not be necessary.
>
> 27. In Beveridge's office, he handed me a memorandum (See Exhibit 'C', attached hereto and incorporated by reference as if fully set forth herein), and stated that he was 'writing me up' for not attending the November 4th meeting. I asked Beveridge if the teachers who had walked out of the meeting on October 28th had gotten letters too, and Beveridge stated that he had handled the matter 'his way,' and that it was 'none of my business.' This memo took the form of a Conference Summary Memorandum . . . .
>
> 28. On November 25, 2003, I filed a grievance with the District . . . .

According to the charge, the Level I, II and III grievances all alleged Weingarten violations. (See Exhibits D, D1, G, and J attached to the unfair practice charge.) Freeman never withdrew this allegation from her grievance. When reviewing a charge to determine whether the charging party has stated a prima facie violation of the Educational Employment Relations Act, the Public Employment Relations Board (PERB or Board) will deem the facts stated by the charging party as true. (San Juan Unified School District (1977) EERB Decision

[1]Weingarten refers to NLRB v. Weingarten, Inc. (1975) 420 U.S. 251 [88 LRRM 2689] (Weingarten), which holds that an employee required to attend an investigatory interview with the employer is entitled to union representation where the employee has a reasonable basis to believe discipline may result from the meeting.

No. 12[2] (San Juan); Golden Plains Unified School District (2002) PERB Decision No. 1489 (Golden Plains.) At this stage of the Board's proceedings, disputed facts must be resolved in the charging party's favor. (San Juan; Golden Plains.) Therefore, whether other parties disagreed with this allegation becomes irrelevant for determining the sufficiency of the charge. The amended charge further alleges that around March 1, 2004, Freeman notified the Madera Unified Teachers Association (Association) that she wanted to proceed with her grievance to arbitration. But, on March 18, Thomas Greci, the Association representative, told her that the Association and the District met and agreed to transfer her to another school, without Freeman's knowledge or consent. There is nothing in the charge or amended charge that shows that the Weingarten issue was withdrawn from the grievance.

Although the warning letter identified the facts supporting the Weingarten allegation, neither the warning letter nor the dismissal addressed the issue. However, Freeman did not raise this issue on appeal. As a result, while the issue is an element of Freeman's charge, it will not be addressed further.

[2]Prior to January 1978, PERB was known as the Educational Employment Relations Board or EERB.

STATE OF CALIFORNIA — ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
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July 30, 2004

Barry J. Bennett, Esquire
Bennett & Sharpe
925 "N" Street, Suite 150
Fresno, CA 93721-2221

Re: Laurel Freeman v. Madera Unified School District
Unfair Practice Charge No. SA-CE-2236-E
DISMISSAL LETTER

Dear Mr. Bennett:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on April 16, 2004. Your client, Laurel Freeman alleges that the Madera Unified School District violated the Educational Employment Relations Act (EERA)[1] by retaliating against her for pursuing a grievance.

I indicated to you in my attached letter dated May 20, 2004, 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 May 26, 2004, the charge would be dismissed. You received an extension of time and I received your amended charge on June 29, 2004.

In the amended charge you rely on essentially the same facts which were in your initial charge and continue to contend that the involuntary transfer of Ms. Freeman is in retaliation for filing and pursuing a grievance.

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.)

[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.

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.)

As described in my prior letter, the facts demonstrate that the employer involuntarily transferred three teachers from Howard school after a series of confrontations and interpersonal conflicts between Ms. Freeman and the other two teachers. My letter of May 20 stated that you have not set forth a prima facie case of discrimination against Ms. Freeman because you have not demonstrated a nexus between the filing of the grievance and the involuntary transfer of Ms. Freeman.

In your amended charge you contend that Ms. Freeman has been disparately treated because she is being "treated the same" as the other two teachers whom you characterize as "disciplinary problems." However, it has not been shown that Ms. Freeman has been treated differently than other teachers similarly situated (those with conflicts, interpersonal problems with other teachers even if faultless.) Being treated the same as others, even if characterized by the charging party as "nothing but trouble throughout for the District throughout their careers" does not demonstrate improper motive.

Nor is it clear how the District has departed from established procedures "since the FRISK model was used against me as pretext". I note from your charge, that the procedure used by the District was to work with and agree with the exclusive representative union that the transfers were a proper solution.

You also contend that the employer has been "inconsistent and contradictory" in its dealing with Ms. Freeman. However, as stated in my prior letter, the facts demonstrate that the teachers involved were given warnings and reasons prior to the action being taken.

In sum, you have not provided sufficient facts to demonstrate that the District was improperly motivated when it involuntarily transferred Ms. Freeman and the other two teachers.

Therefore, I am dismissing the charge based on the facts and reasons contained herein and in my May 20 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. (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).)

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

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

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: Todd Goluba

STATE OF CALIFORNIA OLD SCHWARZENEGGER, Governor
PUBLIC EMPLOYMENT RELATIONS BOARD

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May 19, 2004

Barry J. Bennett, Esquire
Bennett & Sharpe
925 "N" Street, Suite 150
Fresno, CA 93721-2221

Re: Laurel Freeman v. Madera Unified School District
Unfair Practice Charge No. SA-CE-2236-E
WARNING LETTER

Dear Mr. Bennett:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on April 16, 2004. Your client, Laurel Freeman alleges that the Madera Unified School District violated the Educational Employment Relations Act (EERA)[1] by retaliating against her for pursuing a grievance.

The charge state that Ms. Freeman has taught in the district since 1972. Prior to teaching at Howard School she taught at Madison and Alpha schools where she served 12 years as a MUTA representative. She transferred to Howard School in 1996. At that time, she was told by the principal that other teachers might isolate her because of her district seniority.

Freeman states that she initially became a part of the leadership group at Howard in 1997. At a meeting of that group, the principal asked what could be done to get the school moving forward more assertively. Freeman addressed the "duty day" and expressed her surprise that teachers did not have to sign in, and could come and go as they pleased. Other teachers were upset by the remark and, over the next several years, she found herself excluded from some teacher activities.

In May 2003, an incident occurred in which the animosity against her was directed at her students. According to the charge, teachers Debee Wachtel and Theresa Santoro were rude to Freeman's students. This incident lead to a meeting between those two teachers and Principal Beveridge. Other staff members and parents attended. Freeman was asked to attend but declined, stating "No, not with those two in there." A short time later Beveridge went to Freeman's room, apologized to her and told her to avoid Wachtel and Santoro. Beveridge expressed appreciation for Freeman's efforts at Howard School.

[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.

On September 2, 2003, Freeman was told by MUTA steward Tom Greci that District Director of Certificated Human Resources Carles Beckett and he had discussed the issues involving Freeman, Wachtel and Santoro. Beckett told Greci that the District would move all three teachers from Howard School.

On September 9, Principal Beveridge issued a memorandum to all teachers. He stated that the interpersonal conflicts among some teachers must stop and that he no longer wished to mediate or attempt to resolve the disputes which had "plagued" the school. He also stated that teachers must work together professionally or their voluntary transfer would be arranged. In its response to this unfair practice charge, WUTA states that Freeman, Wachtel and Santoro were understood by other staff to be the reason for the memo.

Freeman states that, sometime in September, Beveridge told her that Beckett asked if he had anything "on her" in his files. Beveridge said that he did not.

At two meetings in October 2003, a yearbook committee meeting and a staff development meeting, there were disputes or verbal confrontations involving Freeman, Wachtel and Santoro. Because of the confrontation at the October staff development meeting, Freeman did not attend the November 4 staff development meeting. Freeman told this to Beveridge when he went to her room and told her that the meeting was going to start. Beveridge did not order her to attend.

On November 7, 2004, Beveridge asked Freeman to come to his office. Freeman asked whether she needed union representation. Beveridge stated that would not be necessary. At his office, Beveridge gave Freeman a Conference Summary Memo which states that they discussed her failure to attend the November 4 staff development meeting. The memo directed that Freeman attend future meetings.

On November 25, 2003, Freeman filed a grievance alleging that Beveridge had violated the collective bargaining agreement by failing to prevent a "verbal attack" against her on October 28 and by violating her right to union representation when he met with her on November 7. The grievance was denied by the employer and pursued by Freeman through the third step (the employer's governing board).

On March 1, 2004, Freeman informed the union that she wished to pursue the grievance to arbitration. Union President Greci informed her that the union would consider the request and determine whether the matter would proceed to arbitration. Subsequently, the WUTA executive board denied the request.

On March 18, Greci told Freeman that he had been called to a meeting with the District; Freeman would be transferred from Howard School as would Santoro and Wachtel.[2]

[2] Your charge states "the decision had been made between CTA and the District to transfer me." However, without additional facts, it is not clear whether you allege the union participated in the personnel decision or was merely informed of the personnel decision.

In March, Freeman received a letter from Carles Beckett informing her that she would be involuntarily transferred from Howard School for the 2004-2005 school year.

Your charge alleges that the involuntary transfer is in retaliation for filing and pursuing the grievance against Beveridge.

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.]

Here, you have failed to provide facts demonstrating nexus between the involuntary transfer and the protected activity. Freeman is not being treated in a disparate manner, other employees are also being involuntarily transferred. The employer has not offered an inconsistent justification; the teachers involved were given warnings and reasons long before action was taken. Nor have you provided other facts which demonstrate that the employer was unlawfully motivated to take the action.

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 May 26, 2004, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Bernard McMonigle
Regional Attorney

BMC