STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JANICE M. ABNER, Charging Party, v. COMPTON UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-4868-E PERB Decision No. 1805 January 5, 2006

Appearances: Janice M. Abner, on her own behalf; Littler Mendelson by Michael A. Gregg, Attorney, for Compton Unified School District.

Before Duncan, Chairman; Whitehead and Neuwald, Members.

DECISION

NEUWALD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Janice M. Abner (Abner) of a Board agent's dismissal (attached) of her unfair practice charge. The charge alleged the Compton Unified School District (District) retaliated against her for engaging in protected activities.

The Board has reviewed the entire record, including the unfair practice charge, the amended unfair practice charge, the second amended unfair practice charge, the District's position statement, the Board agent's warning and dismissal letters, Abner's appeal, and the District's response. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself.

On appeal, Abner asks the Board to take judicial notice of a Superior Court order submitted after the appeal filings deadline. Consideration of new supporting evidence on appeal, however, is controlled by PERB Regulation 32635[1] which provides, in pertinent part:

> (b) Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence.

Interpreting this regulation, the Board has been reluctant to find that good cause existed to allow a party to raise new allegations or new evidence for the first time on appeal. The reason for this reluctance is stated in South San Francisco Unified School District (1990) PERB Decision No. 830:

> The purpose of PERB Regulation 32635(b) is to require the charging party to present its allegations and supporting evidence to the Board agent in the first instance, so that the Board agent can fully investigate the charge prior to deciding whether to issue a complaint or dismiss the case.

When a party has the opportunity to cure defects in a prima facie case at earlier stages and does not do so, the Board is reluctant to allow a party to raise such facts or evidence later. (Oakland Education Association (Freeman) (1994) PERB Decision No. 1057.)

On November 18, 2005, Abner submitted an order dated November 3, 2005, by the clerk of the Superior Court. Because it was not plausible to receive the order prior to the Board agent's dismissal or the appeals filing deadline, Abner demonstrates good cause to submit the document and have it considered by the Board.

Even considering the new evidence presented by Abner, she fails to allege a prima facie case of retaliation.

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[1]PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq.

ORDER

The unfair practice charge in Case No. LA-CE-4868-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Whitehead joined in this Decision.

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8384
Fax: (916) 327-6377

September 21, 2005

Janice Abner
888 Victor Avenue, #16
Inglewood, CA 90302

Re: Janice M. Abner v. Compton Unified School District
Unfair Practice Charge No. LA-CE-4868-E, Second Amended Charge
DISMISSAL LETTER

Dear Ms. Abner:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 24, 2005. You allege that the Compton Unified School District violated the Educational Employment Relations Act (EERA)[1] by retaliating against you for your participation in protected activities.

I indicated to you in my attached letter dated July 5, 2005, 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 July 15, 2005, the charge would be dismissed. On July 14, 2005, you filed a First Amended Charge. On August 16, 2005, the Respondent filed a position statement. On August 23, 2005, the Respondent filed a Proof of Service demonstrating that he had served the position statement. On September 2, 2005, you filed a Second Amended Charge. My investigation revealed the following information.

The District employs Janice Abner as a Special Education Resource Specialist Teacher. On May 25, 2004, Abner filed a letter-grievance regarding the District's removal of an aide from her classroom. On July 29, 2004 Abner filed a Step-III grievance regarding her April 6, 2004 performance evaluation. On February 5, 2005, Abner wrote to the Deputy Superintendent complaining that the students at King Elementary school were being illegally taught by Instructional Assistants who do not have degrees and credentials. On March 14, 2005, Abner submitted a complaint pursuant to the District's Uniform Complaint policy alleging that the District created a hostile work environment.

On April 26, 2005, the District issued a reprimand to Abner regarding her conduct during a meeting with Principal Alane Calhoun. During that meeting Abner yelled, verbally attacked Calhoun and other employees, and indicated she was going to dissent about the placement of

[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.

[the] student [name omitted] during an upcoming IEP meeting even though the IEP Team had not yet made a recommendation regarding [the student's] placement.

The Warning Letter indicated, in pertinent part:

> Although Abner engaged in protected activities by filing grievances and complaints, the charge fails to demonstrate the District was motivated by those activities when it issued her a reprimand, placed her on administrative leave and requested her to submit to a medical examination. The adverse actions are remote in time from the grievances Abner filed. Although the adverse actions are closer in time to the complaints Abner filed, the District recounted a specific incident justifying the reprimand without any contradictory justification for its action. The facts indicate that the investigation and request for medical examination stemmed from that incident. The charge does not provide facts establishing the requisite nexus between Abner's protected activities and these adverse actions.

In the First Amended Charge Abner alleges that during the April 26, 2004 meeting she did not say that she intended to sue the principal. Abner explains that she said the District could be sued if they improperly placed [the student]. Abner alleges that the District issued the reprimand to detract from the fact that she was excluded from the IEP meeting in violation of the Education Code. Abner also alleges she was not given a chance to respond to the reprimand, but acknowledges that Calhoun told her she had ten days to provide a response. Abner also alleges that she has been placed on leave without being provided any specific charges.

In the Second Amended Charge Abner alleges: (1) the charge is timely filed; (2) arbitration is inappropriate because there is not an underlying grievance;[2] (3) the elements of a retaliation violation have been met; and (4) there is a nexus between her protected activity and the District's adverse action. More specifically, Abner alleges the following facts demonstrate the requisite nexus: (a) the District's failure to investigate her March 2005 complaint demonstrates disparate treatment; (b) the District's failure to investigate her March 2005 complaint demonstrates a departure from procedures; (c) she has not served as a counselor since 2001 and therefore the District cannot subject her to a medical exam; and (d) she received commendations from supervisors which disprove allegations that she is unable to work with students.

[2] This allegation appears to be in response to the Respondent's position statement which suggests the charge should be deferred to binding arbitration. Although the parties' agreement ends in binding arbitration, Article 6.8.4 only indicates that reprisals will not be taken against participants in the grievance procedure. The parties did not provide information indicating the CBA included a broader non-discrimination clause which would cover reprisal for Abner's filing of complaints.

The above-stated information fails to state a prim facie violation for the reasons that follow.

PERB's jurisdiction is limited to the determination of unfair labor practice claims arising under EERA and a few other public sector labor statutes. (Sweetwater Union High School District (2001) PERB Decision No. 1417-S.) PERB's jurisdiction does not include enforcement of the Education Code or laws governing special education. As such, this letter does not address whether the District violated the Education Code and does not address whether the Charging Party has rights or remedies under other state or federal laws.

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.)

Abner demonstrated that she engaged in protected activity and that the District took adverse action against her by issuing her a reprimand, placing her on administrative leave and requesting her to submit to a medical examination. However, as the warning letter noted, the charge did not demonstrate the District took adverse action against her because of the exercise of those rights. As explained more fully below, the First and Second Amended charges do not correct this deficiency.

The adverse actions did not occur close in time to Abner's 2004 grievances, and occurred more than a month after Abner's March 14, 2005 complaint. Principal Alane Calhoun issued Abner a Letter of Reprimand based on Abner's conduct during a meeting with Calhoun. As Calhoun observed Abner first hand, it does not appear that Calhoun needed to conduct further investigation of the matter before issuing the reprimand. As such, the charge does not demonstrate the District conducted a cursory investigation into the April 26, 2005 incident.

Article 12.18 of the parties' collective bargaining agreement states:

> If the District believes that an unit member cannot safely or adequately perform the duties of his/her position, or if a unit member is using any leave based on an illness or an injury, the District may require that the unit member be examined by a District-selected physician at District expense. This section shall be applicable to members of all Association bargaining units.

Based on the above-quoted language, it appears that the District had the right to require Abner to submit to a medical examination when it determined that it had concerns about whether Abner could safely perform her duties. Abner's charge does not present facts demonstrating the District's rights are limited because she has not served as a counselor since 2001. As such, the charge fails to state a prima facie violation and must be dismissed.

Right to Appeal

Pursuant to PERB Regulations,[3] 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).)

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

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 _____
Tammy Samsel
Regional Attorney

Attachment

cc: Michael Gregg

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 5, 2005

Janice M. Abner
888 Victor Avenue, #16
Inglewood, CA 90302

Re: Janice M. Abner v. Compton Unified School District
Unfair Practice Charge No. LA-CE-4868-E
WARNING LETTER

Dear Ms. Abner:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 24, 2005. You allege that the Compton Unified School District violated the Educational Employment Relations Act (EERA)[1] by retaliating against you for your participation in protected activities. My investigation revealed the following information.

The District employs Janice Abner as a Special Education Resource Specialist Teacher. On May 25, 2004, Abner filed a letter-grievance regarding the District's removal of an aide from her classroom. On July 29, 2004 Abner filed a Step-III grievance regarding her April 6, 2004 performance evaluation.

On February 5, 2005, Abner wrote to the Deputy Superintendent complaining that the students at King Elementary school were being illegally taught by Instructional Assistants who do not have degrees and credentials.

On March 14, 2005, Abner submitted a complaint pursuant to the District's Uniform Complaint policy alleging that the District created a hostile work environment. On March 23, 2005, Abner wrote to Area Superintendent Nicholas Rotuna asking whether that complaint had been resolved yet.

On April 26, 2005, the District issued a reprimand to Abner which stated, in part:

> At approximately 9:10 a.m., I called you into my office to discuss the IEP meeting Friday for [a student]. Due to previous IEP meetings where your behavior was unprofessional, I felt the need to connect with you to discuss my expectations in regards to your being professional and representing the district and school in a

[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.

> positive manner. You began to yell, threatened to sue me, and verbally attack several district employees, namely: Joe Mahabir, Dr. Ed Scott, Rafael Cardanas, and myself, Dr. Alane Calhoun. You went on further to state that when we conduct the IEP, you were going to dissent. I informed you that the IEP team had not made any decisions in regards to [the student's] placement because that decision is reserved for the IEP meeting time when all parties including the parents are present. You informed me that you were dissenting anyway. You stated, "I will dissent because I can...the world is made up of dissenters." You could not explain to me what the dissent was based on. Afterall, no decision had been made. I explained to you that any IEP team member has a right to dissent including yourself, but I question your motives when you to decide to dissent prior to an IEP meeting where all parties are at the table to discuss the matter and come to decision. You aggressively asserted, "I am going to dissent anyway." It was clear to me that your agenda was to create conflict.

On April 28, 2005, the District notified Abner that she was being placed on administrative leave with pay. The letter indicated that allegations of inappropriate behavior had been made against her and that the District was going to conduct an investigation.

On June 3, 2005, the District requested that Abner submit to a medical examination. The letter indicated that the District had serious concerns about her ability to safely perform her responsibilities including interacting with District students and participating in IEP meetings.

The above-stated information fails to state a prima facie violation for the reasons that follow.

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.)

Although Abner engaged in protected activities by filing grievances and complaints, the charge fails to demonstrate the District was motivated by those activities when it issued her a reprimand, placed her on administrative leave and requested her to submit to a medical examination. The adverse actions are remote in time from the grievances Abner filed. Although the adverse actions are closer in time to the complaints Abner filed, the District recounted a specific incident justifying the reprimand without any contradictory justification for its action. The facts indicate that the investigation and request for medical examination stemmed from that incident. The charge does not provide facts establishing the requisite nexus between Abner's protected activities and these adverse actions. As such, the charge must be dismissed.

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 July 15, 2005, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Tammy Samsel
Regional Attorney

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