STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JOHNNY COLLINS, Charging Party, v. SAN MATEO COUNTY COMMUNITY COLLEGE DISTRICT, Respondent.	Case No. SF-CE-2701-E PERB Decision No. 1980 October 17, 2008

Appearance: Johnny Collins, on his own behalf.

Before Neuwald, Chair; McKeag and Dowdin Calvillo, Members.

DECISION

DOWDIN CALVILLO, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Johnny Collins (Collins) of a Board agent's dismissal of his unfair practice charge. The charge alleged that the San Mateo County Community College District (District) violated the Educational Employment Relations Act (EERA) [1] by retaliating against him for engaging in protected activity. The Board agent dismissed the charge for failure to state a prima facie case of retaliation.

The Board has reviewed the entire record in this case, including but not limited to, the original and amended unfair practice charge, the District's position statement, the Board agent's warning and dismissal letters, and Collins' appeal. Based on this review, the Board affirms the dismissal of the charge for the reasons discussed below.

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

BACKGROUND

The District hired Collins as a security officer at the College of San Mateo in 2000. In or about October 2006, "coworkers and supervisors began over scrutinizing [Collins'] work including monitoring [Collins'] movements and whereabouts." Collins complained to the District about the scrutiny in the Spring of 2007.

On May 9, 2007, Chief of Security John Wells (Wells) and two other security officers received a call that a student was being disruptive in a building on campus. On their way to the building, the officers passed Collins, who was having a conversation with a woman. Wells told the other officers, "Leave him here. He's having a conversation." Collins asked one of the officers if he would write Collins a letter "describing how Chief Wells left [him] out of the operation." The officer never wrote the letter and instead told Wells about Collins' request.

On August 8, 2007, as Collins was in the security office preparing to leave for the day, Wells said to Collins, "I don't know what's going on with you." Wells told Collins that he was to meet with the Vice Chancellor of Human Resources, Harry Joel (Joel), the next morning. When Collins asked why he was meeting with Joel, Wells responded that he had concerns about Collins' behavior.

On August 9, 2007, Collins met with Joel. Joel told him Wells said he was a good worker but had concerns about his well-being. Collins thanked Joel and Wells for their concerns and began his shift for the day.

On August 21, 2007, Jim Clifford, Chair of the Social Science Department, and Neil McCallum (McCallum), the Dean of Social Science, approached Wells about Collins teaching a Psychology 100 class between the hours of 1:45 p.m. and 3:00 p.m. on Tuesdays and Thursdays. (Collins' shift as a security officer was from 6:30 a.m. to 2:30 p.m. on those same

days.) Wells said the security department would accommodate Collins' schedule so he could teach the class.

On September 10, 2007, Wells e-mailed McCallum asking if Collins taught any of the three Psychology 100 sections during August 2007 and, if so, whether Collins was paid for those classes. McCallum responded that Collins had been teaching the course since the beginning of the semester and was on the adjunct payroll. He also confirmed that Wells had agreed to accommodate Collins' schedule for the class.

On September 17, 2007, Collins met with Wells and Virgil Stanford (Stanford), dean of the business division. Stanford told them that due to a change in District policy "no employee can be working two shifts at the same time."

On September 18, 2007, another security officer called Collins to a meeting with Wells. When Collins arrived, the officer told him he did not know what the meeting was about. Wells then entered the room, "slammed his note pad on the table and stated Johnny if you continue this behavior this will lead up to Destruction." Collins interpreted this as a threat of violence.

On September 24, 2007, Collins met with Wells to discuss ways in which Collins could improve his job performance. Union Representative Chuck LaMere (LaMere)[2] was present at Collins' request. After Wells expressed his concerns about Collins' performance, LaMere confirmed with Wells that Collins would not be subject to discipline if he complied with Wells' instructions on how to improve his performance. Wells stated that Collins would not be disciplined based on anything discussed at the meeting.

On October 9, 2007, Wells placed a performance evaluation in Collins' mailbox with a note to meet with him on Monday to discuss. The evaluation contained no "suggestions on how to utilize strengths and how to overcome weaknesses." Evaluations were typically given

[2]The charge did not state which union LaMere represented.

on an employee's anniversary date of hire; Collins' anniversary date was April 1, not October 9. Collins called California School Employees Association (CSEA) President Ulysses Guadamuz (Guadamuz), who said the evaluation was not valid and to ask for union representation "if the discussion gets out of hand."

On October 16, 2007, McCallum received a call from Stanford's administrative assistant stating that Collins would not be teaching that day. When Collins learned that he was not scheduled to teach that day, he phoned Stanford to find out why. Stanford said "there was a fire on campus that day inside a classroom on campus and he was concern[ed] because I was not on duty."

On February 5, 2008, Collins again complained to the District about the scrutiny of his work and whereabouts. The next day, February 6, 2008, Wells placed Collins on immediate paid administrative leave. When Collins asked why he was being placed on leave, Wells "referred back to the August 2007 events and stated, 'I sent you to Harry Joel, and with my forty years of experience, there is something wrong with you.'" When Collins said that he would go speak with Joel, Wells told Collins that if Collins did so he would call the San Mateo Police Department and have him removed from campus. Collins interpreted this statement as a threat. Later that day, Joel notified several District administrators via e-mail that Collins had been placed on administrative leave "[b]ecause of a perceived psychological imbalance and odd behaviors." The e-mail indicated that Collins would be sent to a fitness for duty evaluation.

On February 7, 2008, Collins met with John Bradshaw (Bradshaw), the psychologist ethics coordinator for the San Mateo County Psychological Association. Bradshaw told Collins that his supervisor sent him there to determine if he was fit for duty. Bradshaw gave

Collins written tests and interviews. Collins was later cleared to return to work on February 23.

Also on February 7, 2008, Kevin Henson (Henson), dean of Social Science Creative Arts, informed students in Collins' Psychology 100 class that class was cancelled for that day. Henson did not notify Collins of the cancellation.

On February 11, 2008, Henson e-mailed Collins to get a syllabus or lesson plan for his class because another teacher was going to cover his classes for the week. On February 21, American Federation of Teachers (AFT) Grievance Officer John Kirk (Kirk) e-mailed Henson regarding the courses assigned to Collins. Henson responded that Collins' Psychology 100 class was cancelled for the semester on February 12 due to insufficient enrollment.

On March 20, 2008, the District's payroll department informed Collins that he had been overpaid as a result of his class being cancelled. The overpayment was $634.83 and would be deducted from Collins' paycheck in two installments.

On March 31, 2008, Kirk e-mailed Joel and asked if Collins was on administrative leave from both his security officer and faculty positions. Joel responded that Collins was on leave from his security officer position only. Joel also stated Collins would have been placed on leave from his teaching assignment had his class not been cancelled.

On April 7, 2008, Collins e-mailed Guadamuz seeking guidance because he felt he was being treated unfairly by the District. He wrote that he needed "a response ASAP due to what is at stake here."

Unfair Practice Charge and Dismissal

On April 28, 2008, Collins filed his unfair practice charge. The charge alleged that the District violated EERA by retaliating against him for engaging in protected activity.[3] The original charge alleged only the facts related to the placement of Collins on administrative leave on February 6, 2008 and his fitness for duty evaluation the following day. On June 5, 2008, Collins amended the charge to include the factual allegations from the other dates as set forth above.

The Board agent dismissed the charge on June 18, 2008. The Board agent found the charge failed to allege any protected activity by Collins within the six months prior to the filing of the charge. The Board agent noted that Collins' use of a union representative at the September 24, 2007 meeting with Wells could be considered protected activity but occurred seven months before the charge was filed. The Board agent then found that, even if Collins engaged in protected activity, the charge failed to allege facts showing a causal nexus between the protected activity and the alleged retaliation.

Collins' Appeal

Collins timely filed an appeal from the dismissal on July 10, 2008. The appeal states that Collins appeals the Board agent's decision to dismiss his "complaint of Discrimination/ Retaliation." Attached to the appeal is a letter alleging additional facts, all of which concern conduct between March 10 and June 24, 2008. The letter also raises a new allegation that the District and CSEA "had knowledge of the exercise of those rights and refused to share them with me."

[3]The charge also alleged that the District discriminated against Collins based on his race in violation of Title VII of the Civil Rights Act of 1964. The Board agent dismissed this allegation on the ground that PERB has no jurisdiction over claims of race discrimination. Collins did not challenge the dismissal of this allegation on appeal and therefore we do not address it further.

DISCUSSION

1. New Allegation and Supporting Evidence on Appeal

Collins' appeal contains a new allegation, that the District and CSEA failed to inform Collins of his rights, as well as further supporting evidence not presented to the Board agent. "Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." (PERB Reg. 32635(b).)[4] The Board has found good cause when "the information provided could not have been obtained through reasonable diligence prior to the Board agent's dismissal of the charge." (Sacramento City Teachers Association (Ferreira) (2002) PERB Decision No. 1503.)

The dates for most of the new supporting evidence indicate that Collins knew of this information before his charge was dismissed. For this reason, there is no good cause to consider these newly alleged facts on appeal. Nor does the Board have good cause to consider the alleged facts that occurred after the dismissal on June 18, 2008, because allegations based on those facts may only be brought in a new unfair practice charge. (City of Long Beach (2008) PERB Decision No. 1977-M; Sacramento City Unified School District (1992) PERB Decision No. 952.) Finally, there is no good cause to consider the new allegation of failure to inform Collins of his rights because it is based on facts that occurred before dismissal of the charge and thus could have been included in an amended charge. (See American Federation of Teachers, Local 1521 (Paige) (2005) PERB Decision No. 1769 [no good cause when charging party could have presented new allegation in charge or amended charge].)

2. Retaliation

To establish a prima facie case of retaliation in violation of EERA section 3543.5(a), Collins must show that: (1) he exercised rights under EERA; (2) the District had knowledge of

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

the exercise of those rights; and (3) the District imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained, or coerced Collins 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.)

Protected Activity

The charge alleges that Collins used union representation in two separate disputes with the District. First, Collins brought Union Representative LaMere into the September 24, 2007 meeting with Wells over Collins' performance issues. Second, AFT Grievance Officer Kirk engaged in e-mail communications with Henson and Joel about the cancellation of Collins' psychology class. Representation by a union in a work-related dispute is a protected activity. (Los Angeles Unified School District (1992) PERB Decision No. 957.) Thus, the charge sufficiently alleged that Collins engaged in activity protected by EERA.

As for the District's knowledge of Collins' protected activity, the charge establishes that Wells knew about Collins' union representation in the September 24, 2007 meeting but does not indicate that anyone else in the District knew about it. The charge also establishes that both Henson and Joel had knowledge of Collins' union representation regarding the cancellation of his psychology class. Thus, the District had knowledge of Collins' protected activity.[5]

Adverse Action

Evidence of adverse action is also required to support a claim of retaliation. (Palo Verde Unified School District (1988) PERB Decision No. 689 (Palo Verde).) In determining whether

[5]The charge also alleged that Collins contacted CSEA President Guadamuz for help on these issues but there is nothing in the charge to indicate the District was aware of this communication.

such evidence is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (Id.) 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.]

EERA section 3541.5(a)(1) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.) A charging party bears the burden of demonstrating that the charge is timely filed. (Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.) To be timely, a retaliation charge must allege an adverse action that occurred within six months prior to the filing of the charge.

Collins filed his charge on April 28, 2008. Thus, any adverse action by the District prior to October 28, 2007, cannot be used to establish a prima facie case. The charge alleged three adverse actions that occurred after October 28, 2007. Placing Collins on paid administrative leave on February 6, 2008, and sending him to a fitness for duty examination on February 7 constituted adverse action. (Carmichael Recreation and Park District (2008) PERB Decision No. 1953-M.) Further, canceling Collins' psychology class for the semester on February 12 was adverse because it caused him to lose pay. (See Palo Verde [test is whether employee suffers actual harm].) Thus, the charge sufficiently alleged that the District took adverse action against Collins.

Nexus

To establish a prima facie case of retaliation, Collins must demonstrate a "nexus" between his protected activity and the District's adverse actions. In other words, Collins must show that the District acted with discriminatory intent. Because direct evidence of discriminatory intent is rarely possible, the Board has held that "unlawful motive can be established by circumstantial evidence and inferred from the record as a whole." (Novato.)

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 School District)), 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 that might demonstrate the employer's unlawful motive. (Novato; North Sacramento School District.)

As discussed, there is no indication in the charge that anybody at the District other than Wells was aware of Collins' union representation in the September 24, 2007 meeting between Wells and Collins. The only adverse action in which Wells played a part was the placing of Collins on administrative leave on February 6, 2008. It is arguable whether the four and one-half month lapse between the meeting and the leave is sufficient to establish the timing factor. (See Los Angeles Unified School District (1998) PERB Decision No. 1300 [lapse of five months insufficient to establish timing factor]; Jurupa Community Services District (2007) PERB Decision No. 1920-M [two months sufficient to establish timing].)

Nonetheless, even if the timing supports an inference of retaliation, the charge failed to establish any of the other factors that would demonstrate a nexus between Collins' union representation and his administrative leave and fitness for duty examination. The charge alleged no facts showing that Collins was treated differently from other similarly situated employees or that the District in any way departed from established procedures. The charge did not allege facts showing that the District gave Collins inconsistent, contradictory, exaggerated, vague, or ambiguous reasons for placing him on administrative leave or sending him to a fitness for duty examination. Further, the charge did not contain any evidence that the District harbored animus toward the union that represented Collins in his meeting with Wells.

Nor did the charge establish a nexus between Collins' representation by AFT and the cancellation of his Psychology 100 class. The District canceled the class on February 12, 2008, but AFT did not act on behalf of Collins until February 21, when Kirk e-mailed Henson about the classes assigned to Collins. The timing factor cannot be established when the protected activity occurred after the adverse action. (Berkeley Unified School District (2004) PERB Decision No. 1702.) Moreover, the charge did not allege facts establishing that the District deviated from established procedures or treated Collins differently than other teachers

whose classes had been cancelled; that the District's reason for the cancellation, insufficient enrollment, was inconsistent, exaggerated or vague; or that the District harbored animus toward AFT. For these reasons, we find that the Board agent properly dismissed the retaliation charge.

ORDER

The unfair practice charge in Case No. SF-CE-2701-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Neuwald and Member McKeag joined in this Decision.