

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



UNITED EDUCATORS OF SAN FRANCISCO,

Charging Party,

v.

SAN FRANCISCO UNIFIED SCHOOL
DISTRICT,

Respondent.

Case No. SF-CE-2645-E

PERB Decision No. 2057

August 28, 2009

Appearances: Weinberg, Roger & Rosenfeld by Stewart Weinberg, Attorney, for United Educators of San Francisco; Fagen Friedman & Fulfrost, by Joshua A. Stevens, Attorney, for San Francisco Unified School District.

Before Dowdin Calvillo, Acting Chair; McKeag and Wesley, Members.

DECISION

DOWDIN CALVILLO, Acting Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by United Educators of San Francisco (UESF) of a Board agent's dismissal of its unfair practice charge. The charge alleged that the San Francisco Unified School District (District) violated the Educational Employment Relations Act (EERA)¹ by unilaterally changing the working conditions of teachers and by retaliating against a union representative for protesting those changes. The Board agent dismissed the charge for failure to state a prima facie case of an unlawful unilateral change by the District and failure to state a prima facie case of retaliation.

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

The Board has reviewed the dismissal and the record in light of UESF's appeal, the District's response to the appeal and the relevant law.² Based on this review, the Board affirms the dismissal of the charge for the reasons discussed below.

BACKGROUND

UESF's unfair practice charge stated in its entirety:

The Charging Party is party to a Collective Bargaining Agreement with the Respondent San Francisco Unified School District. Jeremiah Jeffries is a Union Building Representative at Sherman Elementary School. As part of his duties as a Building Representative for the Union, Mr. Jeffries alerted the Union to the fact that the Principal, Phyllis Matsuno, was making unilateral changes in working conditions. Ms. Matsuno unilaterally imposed a condition on teachers requiring that they provide her with weekly lesson plans, bi-weekly student progress reports, bi-weekly drafts for a classroom newspaper, reporting all absences orally and in writing, prepare lesson plans teaching or celebrating American Cultural mores in a specific way, and determined to hold accountable Grade Level Teams for the effectiveness of all its members. Attached herewith as Exhibit A is a copy of a letter sent by Union representative Eric Hall to Ms. Matsuno regarding what the Union believed to be unilaterally [sic] changes. Attached hereto as Exhibit B is a response by Ms. Matsuno. Mr. Jeffries was responsible for reporting the Principal's actions to Mr. Hall. He also contacted the faculty to explain to the faculty that [sic] these unilateral changes and that the Union would be protesting these changes. Principal Matsuo [sic] then sent an electronic letter to parents deriding Mr. Jeffries for his conduct as a Union Building [sic] Representative in having complained to the Union and having organized teachers around these changes.

The exhibits to the unfair practice charge consist of a letter dated September 6, 2007, from UESF to Principal Phyllis Matsuno (Matsuno) protesting "Principal's Expectations" and Matsuno's response dated September 21, 2007. Nothing in either letter indicates what the

² In its response, the District contends that abuse of discretion is the proper standard of review for this appeal. In *Beverly Hills Unified School District* (2008) PERB Decision No. 1969 (*Beverly Hills USD*), the Board reaffirmed that "the Board applies a de novo standard when reviewing a Board agent's dismissal of an unfair practice charge."

prior practices of the parties were concerning the “Principal’s Expectations,” nor did UESF submit any document reflecting the “Principal’s Expectations” themselves.

UESF also submitted a series of e-mail communications dated August 24 and 27, 2007, between Matsuno and a parent chair of the school site committee that was copied to other site committee members, including Jeremiah Jeffries (Jeffries) who also sat on this committee. The context of the emails is unclear, but they appear to contain statements by both the parent chair and Matsuno critical of Jeffries and referring to him as a “bully.” The email exchange included the following relevant statements:

[Parent:] I’m a little confused – is JJ teaching first grade? Who’s taking Kat’s class? Does this mean we’ll need to make program cuts? Too bad not everyone’s a team player as it hurts the kids, in the end. . . .

[Matsuno:] You really put it in perspective when you used the word “bully” last time. I’m writing a case study in which the District needs to make corrective action so this doesn’t happen to other principals over and over again. This takes more courage than I’ve ever had to muster before...including walking the Sunnydale housing projects, riding the bus to and from to insure safety of the kids at Alvarado, etc. I’m not sure the supt. will be responsive; he talks a good game but basically it came down from him.

[Parent:] . . . Thank you, thank you, THANK YOU for staying in the fight! Good for you for making a stink – I’m sure JJ was counting on this situation not getting daylighted the way it did. Bullies never do like daylight thrown on their actions because of course it exposes them for what they really are. I’m glad you’re meeting with the Supt. – I take it as a good sign that you’re meeting with him so quickly. And I’m glad to hear that staff is supporting you, too!

[Matsuno:] . . . I’m getting emails from teachers saying how sorry they are I have to deal with JJ. It’s backfiring on him because he’s crowing like a rooster. He saw Allen Lee (Prin. of John Yehall, who facilitated a grievance meeting here) and he was really friendly toward him offering a handshake. Allen said he stood there and just kept his arms crossed. I saw Myong at McD’s for breakfast and we talked and he said he heard about JJ

causing problems and I briefly told him. It's going around Central Office because I made such a stink. Jeanie Pon at first said she couldn't arrange a meeting with the supt. because he was too busy....then she arranged it....she knew we were going to talk about it at the Adm.Union which we did. It's Sept. 7 at 2:30 to 3. Thanks for your support. I'm sucking it up and putting up a friendly face.

The Board agent sent UESF a warning letter indicating that the allegations of the charge failed to state a prima facie case of unlawful unilateral change or discrimination or reprisal. UESF did not amend the charge after being afforded the opportunity to do so. As a result, the Board agent dismissed the charge for failure to state a prima facie case of unlawful unilateral change or discrimination/reprisal by the District.

On appeal, UESF asserts that the conditions imposed by Matsuno were all substantial unilateral changes in the terms and conditions of employment that changed the basis upon which teachers can be evaluated and imposed additional duties that impact the hours worked by employees. UESF further asserts that Matsuno retaliated against Jeffries by demeaning him in the eyes of his colleagues and parents for having complained to the union.³ UESF contends that, “[a]lthough it is not a formal form of discipline, being insulted because of one’s activities on behalf of an employee organization is obviously prohibited by the Educational Employment Relations Act.”

³ UESF also argues on appeal that the series of emails “was designed to intimidate Mr. Jeffries and interfere with his actions for and on behalf of an employee organization. It also had the effect of reducing the amount of information that Mr. Jeffries and others were prepared to share with [UESF] regarding working conditions and matters within the scope of representation at [the school where Jeffries was employed].” It is unclear whether this statement was intended to allege a new charge of interference with protected rights, or merely to support the charge of discrimination/retaliation. PERB Regulation 32635(b) provides: “Unless good cause is shown, a charging party may not present on appeal new allegations or new supporting evidence.” (PERB regs. are codified at Cal. Code of Regs., tit. 8, § 31001 et seq.) UESF has failed to demonstrate good cause to allow presentation of a new interference allegation on appeal; therefore, we do not consider whether a prima facie case of interference with protected rights has been established.

The District contends that it has not committed an unfair labor practice because: (1) it has not unilaterally changed the working conditions of teachers; (2) the issuance of expectations by a principal to classroom teachers is a managerial prerogative outside the scope of representation; (3) the principal issued her expectations to teachers as required by the collective bargaining agreement between the District and UESF; and (4) UESF has not provided any evidence to demonstrate that the email concerning Jeffries in any way interfered with, restrained, or coerced Jeffries or any other District employee in the exercise of rights guaranteed by EERA.

DISCUSSION

1. Unilateral Change

A public school employer's unilateral change in terms and conditions of employment constitutes a "per se" violation of EERA section 3543.5, subdivision (c)⁴ if: (1) the employer breached or altered the parties' written agreement or its own established past practice; (2) such action was taken without giving the other party notice or an opportunity to bargain over the change; (3) the change was not merely an isolated breach of the contract, but amounts to a change in policy (i.e., it has a generalized effect or continuing impact upon bargaining unit members' terms and conditions of employment); and (4) the change in policy concerns a matter within the scope of representation. (*Walnut Valley Unified School District* (1981) PERB Decision No. 160; *Grant Joint Union High School District* (1982) PERB Decision No. 196.)

UESF argues that the "Principal's Expectations" promulgated by Matsuno constituted unlawful unilateral changes over which the District was required to bargain. UESF has not, however, alleged any facts establishing any written agreement or past practices concerning written lesson plans, student progress reports, a classroom newspaper, reporting of absences,

⁴ EERA section 3543.5, subdivision (c) makes it unlawful for a public school employer to "[r]efuse or fail to meet and negotiate in good faith with an exclusive representative."

the teaching or celebrating of American cultural mores, or the manner in which grade level teams are held accountable. Therefore, UESF has failed to allege sufficient facts to show that the District has breached a written agreement or past practice. (*City of Commerce* (2008) PERB Decision No. 1937-M.) Accordingly, the charge fails to state a prima facie case of unlawful unilateral change.

Furthermore, the Board has held that the assignment of work is a nonnegotiable management prerogative if the newly assigned work is reasonably related to existing duties performed by employees. (*City & County of San Francisco* (2004) PERB Decision No. 1608-M.) If the changes are reasonably comprehended within the existing job duties, an assignment of such duties, even if never performed before, is not a violation. (*Rio Hondo Community College District* (1982) PERB Decision No. 279.) However, as noted, UESF has not alleged what the teachers' duties were before the change. Thus, the charge failed to establish that the newly assigned duties fell within the scope of representation because they were not reasonably comprehended within teachers' existing duties.

UESF further contends that the "Principal's Expectations" changed the basis upon which teachers would be evaluated and imposed additional duties affecting hours worked. The charge failed to allege any facts demonstrating that the change had an actual impact on teachers' evaluation criteria or workday. Accordingly, UESF has not established that the District was obligated to bargain over the effects of the change in duties. (*Beverly Hills USD, supra.*)

2. Retaliation

To demonstrate that an employer discriminated or retaliated against an employee in violation of EERA section 3543.5, subdivision (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; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*); *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416 (*Campbell*); *San Leandro Police Officers Assn. v. City of San Leandro* (1976) 55 Cal.App.3d 553 (*San Leandro*)).) In determining whether evidence of adverse action is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*Palo Verde Unified School District* (1988) PERB Decision No. 689 (*Palo Verde USD*)).) The Board has 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 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; *Campbell, supra*); (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; *San Leandro, supra*); (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;

San Leandro, supra); (4) the employer's cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (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 (*Baker Valley Unified School District* (2008) PERB Decision No. 1993; *County of San Joaquin (Health Care Service)* (2001) PERB Order No. IR-55-M); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive. (*North Sacramento School District, supra*; *Novato, supra*.)

UESF asserts that Jeffries was responsible for reporting Matsuno's actions (presumably, the issuance of the "Principal's Expectations") to UESF and that Jeffries informed the faculty that UESF would be protesting the changes. These actions constitute protected activity under EERA. (*Simi Valley Unified School District* (2004) PERB Decision No. 1714.) However, the charge failed to allege that Matsuno or any District representative knew that Jeffries had complained to UESF about the "Principal's Expectations," or that he contacted other teachers. Nor do the August 24 and 27, 2007, email communications show Matsuno had knowledge of Jeffries' protected activities. The description of Jeffries' conduct in the emails is so vague that it cannot be determined whether the emails refer to his complaint to UESF and contacting of other teachers or to some other conduct. Therefore, UESF has failed to show the District knew of Jeffries' protected activity.

Moreover, the charge does not allege that the statements contained in the email communications had any adverse impact on Jeffries' employment. UESF has provided no support for its assertion that "being insulted because of one's activities on behalf of an

employee organization is obviously prohibited” by EERA. In the absence of facts showing the impact of such statements on Jeffries’ employment, the bare allegation that the employer made disparaging remarks about an employee does not meet the standard set forth under *Novato* and *Palo Verde USD, supra*. (*Los Rios Community College District* (1994) PERB Decision No. 1048.)

UESF asserts that Matsuno sent the email in retaliation for Jeffries having engaged in protected activity by informing UESF about the issuance of the “Principal’s Expectations” and told the faculty that UESF would challenge them. UESF sent a letter to Matsuno protesting the “Principal’s Expectations” on September 6, 2007. However, the charge does not state when Jeffries complained to UESF about the changes or informed faculty that UESF would be protesting them. Thus, it is impossible for PERB to determine whether his protected activity occurred before or after the August 24 and 27, 2007, email communications. As a result, the timing factor of the nexus requirement is not met. (See *Berkeley Unified School District* (2004) PERB Decision No. 1702 [timing factor not satisfied when protected activity occurred after adverse action].) Moreover, the charge did not allege facts to establish any of the other nexus factors. Therefore, UESF has failed to establish a prima facie case of retaliation against Jeffries for having engaged in protected activity.

In sum, the charge failed to allege facts establishing that the issuance of the “Principal’s Expectations” breached or altered the parties’ written agreement or the District’s established past practices or that the changes fell within the scope of representation. The charge further failed to allege facts establishing that Jeffries was subjected to any adverse employment action as a result of having engaged in protected activity. For these reasons, the charge failed to state a prima facie case of unlawful unilateral change or retaliation.

ORDER

The unfair practice charge in Case No. SF-CE-2645-E is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Members McKeag and Wesley joined in this Decision.