

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



SACRAMENTO CITY TEACHERS
ASSOCIATION,

Charging Party,

v.

SACRAMENTO CITY UNIFIED SCHOOL
DISTRICT,

Respondent.

Case No. SA-CE-2507-E

PERB Decision No. 2129

September 3, 2010

Appearances: California Teachers Association by Joseph R. Colton, Staff Counsel, for Sacramento City Teachers Association; Lozano Smith by Jane Harrington, Attorney, for Sacramento City Unified School District.

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

DECISION

DOWDIN CALVILLO, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Sacramento City Teachers Association (Association) of a Board agent's dismissal of its unfair practice charge. The charge, as amended, alleged that the Sacramento City Unified School District (District) violated the Educational Employment Relations Act (EERA)¹ by removing David Reingold (Reingold) from the District's list of active substitute teachers because he filed several grievances. The Board agent dismissed the charge for failure to state a prima facie case of discrimination/retaliation.

The Board has reviewed the dismissal and the record in light of the Association's appeal, the District's response, and the relevant law. Based on this review, the Board reverses the dismissal of the unfair practice 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

At all relevant times, Reingold was employed by the District as a substitute teacher. Between April 27, 2007 and April 25, 2008, Reingold filed six grievances pursuant to the collective bargaining agreement (CBA) between the Association and the District, as follows:

April 27, 2007 - #27 (06/07): alleged a violation of the CBA's safety provision when a student hit Reingold in the face while he was trying to enforce the District's cell phone policy.

May 15, 2007 - #42 (06/07): alleged violation of CBA's evaluation provision because evaluator used un-validated materials.

May 16, 2007 - #43 (06/07) & #44 (06/07): alleged violation of CBA's compensation provision when Reingold was not paid for working through his preparation period.

March 7, 2008 - #19 (07/08): alleged Reingold was not paid for working through his preparation period.

April 25, 2008 - #34 (07/08): alleged Reingold was not paid for working through his preparation period.

All of these grievances were settled favorably to Reingold. On August 21, 2007, the District settled grievance #42 by agreeing to remove the challenged evaluation from Reingold's personnel file. On January 10, 2008, the District settled grievance #44 by an agreement that substitute teachers were entitled to preparation periods. Grievances #19, #27 and #43 were settled on October 8, 2008. The settlement agreement provided that the District

would hold an annual substitute teacher orientation, provide appropriate compensation to substitutes, and cease compelling substitutes to work through preparation periods.²

On October 17, 2008, Kristi Wynn (Wynn), controller/bookkeeper at Health Professions High School, completed a Substitute Teacher Evaluation Form for Reingold. Reingold had accepted an assignment that was to begin at 7:45 a.m. that day, the start of the school's "0" period. Reingold did not report for his assignment until 8:35 a.m. Wynn reported that Reingold said he had been told that "0" period was outside the regular work day and therefore he was not required to substitute for that period.³ He claimed that his work day should only be from 9:30 to 3:30, the regular schedule work day. Wynn wrote that her conversation with Reingold was "cordial."

Later that day, Susan Torngren (Torngren), the high school's office manager, wrote by hand underneath Wynn's typed report:

I spoke w/ Mr. Reingold @ the end of his assignment today & mentioned this mornings 'confusion.' I explained that I was responsible for the info on subfinder [the District's online substitute assignment system] & that the time to start was correct & we needed him @ that time. I also suggested that if he use the times on the assignment he can't go wrong. Mr. Reingold assured me he understood the time & it wouldn't happen again.

Neither Wynn nor Torngren checked the box on the form labeled "I request that this substitute NOT be assigned to this school again this school year for the following reasons:"

The blank lines following that statement were marked N/A and circled.

² The charge also alleged that the settlement included the District's promise to remove "a related evaluation" from Reingold's personnel file. Because the Association did not provide copies of the grievances or settlement agreements, we cannot determine whether this refers to the evaluation that was the subject of grievance #42 or a different evaluation.

³ The record does not reveal who said this to Reingold.

On November 13, 2008, the District sent Reingold a letter that stated, in relevant part:

I am writing to inform you that your name has been removed from our list of active certificated substitutes. [¶] Substitutes in the Sacramento City Unified School District work on an on-call, as-needed basis. There are no guarantees or rights to permanent, regular employment. Under Education Code section 44953, substitutes may be dismissed at any time at the discretion of the board.

The letter did not mention the October 17, 2008, tardiness incident or give any reason for the removal of Reingold's name from the active list. The letter was signed by Lupe Barba (Barba), Director II, Human Resource Services. The charge alleged that Barba is supervised by Associate Superintendent of Human Resources Carol Mignone Stephen (Mignone Stephen). The charge further alleged that Mignone Stephen was the "school district official involved in processing Reingold's grievances" and that "employees are not removed from the substitute list without the approval of Carol Mignone Stephen."

After receiving the November 13, 2008 letter, Reingold requested his personnel file from the District. The charge alleged, "The file does not contain any disciplinary or negative documents concerning Reinhold [sic]."

Dismissal, Appeal and Response

As noted, the Board agent dismissed the charge for failure to state a prima facie case of discrimination/retaliation. The Board agent found that Reingold engaged in protected activity by filing the six grievances and that removal of his name from the active substitute list was an adverse action. Based on additional facts alleged in the amended charge, the Board agent found that the District had knowledge of Reingold's grievances. However, the Board agent found no nexus between the grievances and the adverse action because: (1) over seven months elapsed between the filing of Reingold's last grievance and his removal from the active list;

and (2) the charge failed to allege any other indicia of unlawful motive. The Board agent also noted the October 17, 2008 evaluation regarding Reingold's late appearance for his assignment that day.

On appeal, the Association contends that the charge established the timing element of unlawful motivation because the District removed Reingold's name from the active list approximately five weeks after the successful resolution of three of his grievances. The Association also argues that a nexus was established based on: (1) the District's disparate treatment of Reingold; (2) the District's failure to offer justification at the time it removed him from the active list; and (3) the District's exaggerated reason for the removal.

The District responds that the charge failed to establish ongoing protected activity because it did not allege facts showing that Reingold participated in the settlement of his grievances. As for nexus, the District contends the charge was properly dismissed because: (1) the Association failed to allege facts showing Reingold was treated differently than other similarly situated employees; (2) the District is not required to give substitute teachers a justification for removal from the active list; and (3) the District's justification for removal was not exaggerated. The District also argues that it would have removed Reingold from the list based on the October 17, 2008 tardiness incident regardless of his protected activity.

DISCUSSION

To determine whether a charge alleges a prima facie case, the Board agent must assume that the essential facts alleged in the charge are true. (*San Juan Unified School District (1977) EERB⁴ Decision No. 12.*) It is not the function of the Board agent to judge the merits of the charging party's dispute. (*Lake Tahoe Unified School District (1993) PERB Decision No. 994;*

⁴ Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board or EERB.

Saddleback Community College District (1984) PERB Decision No. 433.) When the Board agent's investigation "results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Eastside Union School District* (1984) PERB Decision No. 466.)

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 adverse action because of the employee's exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210.)

1. Reingold's Protected Activity

"The filing and pursuit of grievances is an activity protected by the EERA." (*Ventura County Community College District* (1999) PERB Decision No. 1323.) We thus agree with the Board agent that Reingold engaged in protected activity by filing and pursuing to final resolution the six grievances listed above.

The District argues, however, that the settlement of three of Reingold's grievances in October 2008 did not constitute protected activity. According to the District, the charge failed to establish this conduct was protected because it did not allege that Reingold personally participated in the settlement. The District cites no PERB decision, nor have we found one, in which the Board held that a grievance ceases to be protected activity at any point before the end of the grievance process, regardless of the extent of the grievant employee's participation in the process. On the other hand, PERB has long held that use of union representation in a dispute over terms and conditions of employment is a protected activity. (*The Regents of the University of California* (1995) PERB Decision No. 1087-H; *Los Angeles Unified School*

District (1992) PERB Decision No. 957.) Accordingly, we find no merit in the District's argument.

2. The District's Knowledge of Reingold's Protected Activity

Although PERB commonly phrases the legal standard as whether the employer had knowledge of the employee's protected activity, the actual inquiry is whether the individual(s) who made the ultimate decision to take adverse action against the employee had such knowledge. (*City of Modesto* (2008) PERB Decision No. 1994-M.) The charge alleged that Associate Superintendent of Human Resources Mignone Stephen both processed Reingold's grievances and controlled the active substitute list. Assuming as we must that these material facts are true, we find the charge established the District's knowledge of Reingold's protected activity.

In its position statement in response to the amended charge, the District contended that Mignone Stephen "is not regularly involved in advising who is added to, or removed from, [the active substitute] list. These decisions are generally left to lower-level administrators and/or the Personnel Technician II in the substitute office." As noted, at this stage of the proceedings, PERB cannot resolve conflicting factual allegations. Instead, a material factual conflict such as this must be resolved based upon evidence presented at a formal hearing. (*Eastside Union School District, supra.*)

3. Adverse Action

In determining whether the employer's action is adverse to the employee, 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.) "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.)

The charge alleged that the District's removal of Reingold's name from the active substitute list was an adverse action. According to documents provided by the District, only teachers on the District's active substitute list may apply for and accept substitute assignments.⁵ Thus, by removing Reingold from the active substitute list, the District effectively terminated Reingold's employment with the District. We find this constitutes a classic adverse action. (See *Regents of the University of California (Einheber)* (1997) PERB Decision No. 949-H [discharge is adverse action].)

4. Nexus

“Unlawful motive is the specific nexus required in the establishment of a prima facie case. . . . Unlawful motive can be established by circumstantial evidence and inferred from the record as a whole.” (*Trustees of the California State University v. Public Employment Relations Bd.* (1992) 6 Cal.App.4th 1107, 1124.) To guide its examination of circumstantial evidence of unlawful motive, PERB has developed a set of “nexus” factors that may be used to establish a prima facie case. 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 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

⁵ In evaluating whether an unfair practice charge states a prima facie case, PERB is not required to ignore facts provided by the respondent and consider only the facts provided by the charging party. (*Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M.)

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 (*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 (*Oakland Unified School District* (2003) PERB Decision No. 1529) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); (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 Unified School District, supra*.)

a. Timing

Typically, the closeness in time (or lack thereof) between the employee's protected activity and the adverse action goes to the strength of the inference of unlawful motive to be drawn and is not determinative in itself. (*Moreland Elementary School District, supra*; *Regents of the University of California* (1998) PERB Decision No. 1263-H; *American Thread Co. v. National Labor Relations Bd.* (4th Cir. 1980) 631 F.2d 316, 322.)

PERB has found the timing element satisfied when adverse action was taken shortly after a favorable resolution of the employee's grievance. For example, in *Santa Clara Unified School District* (1985) PERB Decision No. 500, the Board found timing where the employer

involuntarily reassigned the employee “less than three weeks after he had prevailed on a grievance challenging his first reassignment.” Similarly, the Board in *Mountain Empire Unified School District* (1998) PERB Decision No. 1298, found timing when, approximately three months after it settled a lawsuit by the teachers union, the district involuntarily transferred a teacher who “had ‘a major impact’ on the lawsuit and its resolution.”

Here, the District removed Reingold’s name from the active substitute list five weeks after the Association and the District reached a settlement resolving grievances #19, #27 and #43 in Reingold’s favor. This proximity in time is sufficient to establish the timing element.

b. Disparate Treatment

In its amended charge, the Association alleged: “The charging party is not aware of the District previously removing a substitute from the list as a result of only one tardy incident.” The charge provided no factual allegations regarding the treatment of any other substitute teacher who had been late to an assignment. In the absence of such allegations, the charge failed to establish that the District treated Reingold differently than similarly situated employees. (*Madera County Office of Education* (1999) PERB Decision No. 1334; *Santa Clarita Community College District* (1996) PERB Decision No. 1178.)

c. No Justification/Shifting Justifications

The Association argues in its appeal that the District’s failure to give Reingold a reason for its action at the time he was removed from the active substitute list supports an inference of unlawful motive. The charge did not allege that the District was required by law or policy to give Reingold a specific reason for the action, nor did it allege a past practice by the District of giving a substitute teacher a reason for removal. Under these circumstances, we find that the District’s failure to give Reingold a reason for his removal from the active substitute list does not support an inference of unlawful motive.

The Association further contends that the District offered inconsistent or “shifting” justifications for its action by stating in the November 13, 2008 letter that Reingold was being removed from the list based on his “at will” employment status and later raising the October 17, 2008 tardiness incident as justification for the removal. The Board has found unlawful motivation when the employer offered a different justification for the adverse action in PERB proceedings than it gave to the employee at the time of the action. (*Newark Unified School District, supra*; see *Jurupa Community Services District, supra* [finding retaliation where reasons for discharge given at PERB hearing were different from those stated in discharge letter].) Here, the November 13, 2008, letter gave no specific justification for Reingold’s removal from the active substitute list. Thus the District’s later justification could not have “shifted” from its earlier one. Consequently, we cannot draw an inference of unlawful motive based on shifting justifications.

d. Exaggerated Reasons

The Association also argues that an inference of unlawful motive is established by the District’s exaggeration of the facts of the October 17, 2008 tardiness incident. The charge, as amended, alleged that Reingold accepted a substitute assignment at Health Professions High School for that date. Based on his prior experience with that campus, Reingold believed school did not officially start until after breakfast, which followed the school’s “0” period. When he spoke with Office Manager Tornngren at the end of the day, he said he thought the regular teacher input the wrong time into Subfinder, apologized for the mistake, and promised that in the future he would arrive early to find out if he was needed for “0” period. Reingold also spoke with Principal Matt Perry and apologized for his late arrival. Based on these conversations, Reingold believed the issue had been resolved.

The amended charge characterized the incident as a misunderstanding as to start time. This characterization is supported by the October 17, 2008 evaluation written by Wynn and Tornngren, each of whom spoke directly with Reingold on the day of the incident. This view is further supported by the fact that neither checked the box on the evaluation form to request that Reingold not be assigned to that campus again. The District did not counsel, reprimand or discipline Reingold for his tardiness on October 17, 2008, or at any time during the five weeks between the incident and his removal from the active substitute list.

Despite its apparent lack of concern over the incident at the time it occurred, the District asserted in its response to the charge that Reingold's tardiness on October 17, 2008, standing alone, was serious enough to justify his removal from the active substitute list. For example, the District's responsive position statement claimed that Reingold "purposely did not show up to work on time." Similarly, throughout its response to the appeal the District characterizes Reingold's tardiness as intentionally defiant behavior. The District's inflation of the seriousness of the incident suggests the justification is pretextual and that the District is "attempting to legitimize its decision after the fact." (*Novato Unified School District, supra*; *San Diego Community College District* (1983) PERB Decision No. 368.) We therefore find that the District's exaggeration of the seriousness of the October 17, 2008 incident supports an inference that Reingold's protected activity was a motivating factor in the District's decision to remove him from the active substitute list.⁶

⁶ It is not appropriate at this stage of the proceedings to determine the District's true motivation for removing Reingold from the active substitute list. If the Association establishes its prima facie case at hearing, the District will have the burden to prove it would have removed Reingold from the active list even if he had not engaged in protected activity. (*Novato Unified School District, supra*; *Martori Brothers Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721, 729-730; *Wright Line* (1980) 251 NLRB 1083.)

In sum, we find that the Association's charge, as amended, stated sufficient allegations to establish a prima facie case of retaliation. We also find that the Board agent's investigation revealed "conflicting allegations of fact" on material issues that may be resolved only through PERB's formal hearing process. For these reasons, we conclude that a complaint must issue in this case.

ORDER

The Board hereby REVERSES the dismissal of the unfair practice charge in Case No. SA-CE-2507-E and REMANDS this case to the Office of the General Counsel for issuance of a complaint consistent with this Decision.

Members McKeag and Wesley joined in this Decision.