STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

COLIN HERON, Charging Party, v. SANTA ANA UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-5286-E PERB Decision No. 2235 February 7, 2012

Appearance: Law Offices of Eric Bathen by Eric Bathen, Attorney, for Santa Ana Unified School District.

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

DECISION

DOWDIN CALVILLO, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Santa Ana Unified School District (District) to the proposed decision of a PERB administrative law judge (ALJ). The complaint alleged that the District violated section 3543.5(a) of the Educational Employment Relations Act (EERA)[1] by (1) issuing Colin Heron (Heron) an unsatisfactory performance report and (2) discharging Heron from employment as a substitute teacher in retaliation for his participation in protected activities. The ALJ dismissed the complaint with respect to the first alleged violation but found that the District violated EERA by terminating Heron's

[1] EERA is codified at Government Code section 3540 et seq. Section 3543.5(a) makes it unlawful for a public school employer to "impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter."

employment in retaliation for having engaged in protected activity. The District excepts to the latter determination.[2]

The Board has reviewed the proposed decision and the record in light of the District's exceptions[3] and the relevant law. Based on this review, the Board reverses the proposed decision with respect to the determination that the District violated EERA in terminating Heron's employment for the reasons discussed below.[4]

BACKGROUND

Heron was employed by the District as a substitute teacher since 1999. Substitute teachers are employed by the District on an at-will basis. Prior to the events at issue in this case, Heron had never received an unsatisfactory performance evaluation. Heron generally worked most days during the school year.

During the 2007-2008 school year, Heron participated in an organizing drive by the Communication Workers of America (CWA) aimed at organizing the District's substitute teachers. Although Heron testified that he openly participated in organizing activities, such as soliciting authorization cards, at several schools, the ALJ determined that the record failed to establish that any relevant decision maker had knowledge of these activities.

On October 6, 2008, Heron worked at Mendez Fundamental Middle School (Mendez) as a substitute for teacher Dee Barrett (Barrett). Mendez utilizes a "block period" schedule. Under this schedule, classes are held for a double period four days each week. Thus, two days

---

[2] Heron did not file exceptions to the ALJ's proposed decision dismissing the first allegation. Therefore, the ALJ's decision stands on that issue.

[3] Heron did not file a response to the District's exceptions.

[4] The District requested oral argument in this matter. Historically, the Board has denied requests for oral argument when an adequate record has been prepared, the parties had ample opportunity to present briefs and have availed themselves of that opportunity, and the issues before the Board are sufficiently clear to make oral argument unnecessary. (*City of Modesto* (2008) PERB Decision No. 1994-M.) Based on our review of the record, all of the above criteria are met in this case. Therefore, the District's request for oral argument is denied.

a week students attend their first, third, fifth and seventh period classes for two periods each, and on two other days they attend their second, fourth, sixth and eighth period classes for two periods each. On two of the block period days, teachers do not get a preparation period, but receive a double preparation period on the other two days, as well as a regular preparation period on the fifth day.[5] Due to the block schedule, Barrett did not have a preparation period on October 6, but was scheduled to receive one the following day.

The District's Substitute Handbook (Handbook) specifies the daily rate for substitute teaching. The Handbook further states: "Substitutes serving an extra period per day will be paid at $17.50 per period." The District has interpreted this provision to mean that, when a substitute teacher works on a day when the regular teacher would have had a preparation period but the substitute teacher is asked to cover another class, the substitute will receive extra period pay. If, however, the regular teacher would not have had a preparation period, the District does not pay the substitute for a preparation period on that day.[6]

Substitute teachers for the District have timecards that they carry from site to site. Normally, the substitute turns in the card at the school at the beginning of the assignment and picks up the card, signed by the school's principal or assistant principal, at the end of the day. The Handbook provides that the school will fill in the hours and indicate whether the substitute teacher is to be paid a full or half day's salary.

At the end of the school day on October 6, Heron went to the Mendez office to pick up his timecard from the office manager, Pam Padilla (Padilla). His timecard, filled out by Padilla

[5] In some cases, a teacher may choose to work through his or her assigned preparation period by taking on an additional assignment. In such cases, the teacher receives extra pay for such work.

[6] Another provision of the Handbook states: "Substitute teachers may be assigned to teach during the regular teacher's prep period. If this occurs, you will be compensated accordingly."

and initialed by the principal, showed an entry for one day's pay. Heron was not entitled to payment for an extra period because the regular teacher did not have a preparation period that day. Upon seeing that his timecard did not include extra pay for a preparation period, Heron requested that he be paid for an extra period, but Padilla told him he would not be paid for it because it was a block day and there was no preparation period. Heron then began writing on his timecard. Padilla told him he could not do that, but he continued to write on the card. In addition to an entry for the regular time he worked, he added a separate line entry for extra pay for a preparation period that day. Heron testified that he added the entry knowing that he would not get paid for the extra time. At the bottom of the card, Padilla wrote, "I did not fill in the time card for prep for Dee Barrett 10/6," and signed her name. The principal of Mendez, Cynthia Lanseider (Lanseider), was also present and signed her name next to Padilla's.

Following this incident, Padilla submitted a Substitute Teacher Performance Report (Report) stating:

> Mr. Colin Heron asked me to pay him an extra period because he didn't have a prep period. I explained to him that she (Dee Barrett) did not have a prep because we are on block schedule. (Tomorrow she would have one). He insisted – I also explained that the last time he was here, he subbed for a teacher that never has a prep, and so because she gets extra pay for that period, I also paid him.
>
> I refused to put it on his time card – so he wrote it himself. I told him I would not sign it. He said I didn't have to.
>
> We have gone through this before with him. I know the substitute union is trying to have this pass, that they are paid extra when they do not have a prep. Unless this is a new law, he should only be paid for the teacher's schedule.

Both Padilla and Lanseider signed the Report, which was submitted to Chad Hammitt (Hammitt), executive director, Human Resources. On October 7, 2008, Hammitt met with

Heron and gave him a Notice of Unsatisfactory Substitute Teacher Performance (Notice) removing him from working at Mendez. The Notice stated:

> Human Resources Division recently received a report related to your unsatisfactory performance as a Substitute Teacher for Santa Ana Unified School District.
>
> Attached is a copy of the Certificated Substitute Performance Report(s) that reflects area(s) of unsatisfactory overall performance. These areas indicated that the school is informing us of your below standard work, and as result, you will no longer be referred to that school as a Substitute Teacher.
>
> Should additional unsatisfactory performance report(s) be submitted to Certificated Personnel, you may be released from employment as a Substitute Teacher. Continuation of employment as a Substitute Teacher is contingent upon satisfactory performance as reported by school sites.
>
> If you wish to respond in writing to this report, please submit the response no later than 10 working days from date of this notice. The response will be placed in your Personnel Folder.

On October 10, 2008, Heron submitted the following written response to the Notice:

> At our recent meeting on 7th October, 2008 I was handed a copy of Substitute Teacher Performance Report submitted by the office manager at Mendez Middle School about my request to be paid for working an extra period that day. The teacher had no Prep. period that day. Page 3 of The Substitute Teachers Handbook states clearly that "Substitutes serving an extra period per day will be paid at $17.50 per period", A pitiful sum in my opinion.
>
> If this is not the correct interpretation then this ambiguity needs clarification from proper district personnel, not school personnel. To suggest, imply, allege and/or as stated that **"unsatisfactory overall performance"** and **"below standard work"** results from my request to be paid for "serving an extra period per day" is to impugn and assail my ability, character and performance in the classrooms and school sites within this district, over the years.
>
> I beg nothing, contracted teachers "get extra pay for that period". Our current impuissance as substitutes should not deny us what we have earned, i.e. being paid for "serving an extra period per day."

> I take umbrage at the terminology used, as quoted and underlined above, being placed in my personnel folder and request that such language be changed in the District report, the report removed from my file and Mendez privileges be restored.
>
> The office manager at Mendez stated that the "substitute union is trying to have this pass, that they are paid extra when they don't have a prep.". Is there a substitute union??

(Emphasis in original.)

At the time Hammitt issued the October 7 Notice, he had not seen the timecard, since it was not turned in until the end of the payroll period on October 9. Thus, in issuing the Notice, he relied on Padilla's October 6 report and conversations with Padilla and Lanseider concerning the October 6 incident. Hammitt testified that, at the time he issued the Notice, he believed that Heron had handled himself inappropriately in the Mendez office but, because he had not seen the actual time card, he "gave him the benefit of the doubt, that he wouldn't submit a fraudulent timecard, a timecard with inaccurate information on it at that time." Thus, he did not know what, if anything, Heron had written on the timecard.

Some time after October 10, Hammitt received a call from the payroll manager telling him there was an entry on Heron's timecard for which there was no principal's signature or indication of the account from which that entry should be paid. At that point, Hammitt reviewed the timecard and saw the entry for extra pay for October 6. Hammitt then spoke to the school's personnel technician to determine whether there had been an error. The personnel technician told him that there was no entry in the payroll system for Heron to be paid extra pay for October 6. After consulting with his supervisor, Assistant Superintendent for Human Resources Juan Lopez (Lopez), Hammitt concluded that Heron had committed fraud by writing on his timecard that he had worked a prep period on October 6 for which he was entitled to be paid when, in fact, he did not work any prep hours that day because the teacher did not have a

prep period. Together, Hammitt and Lopez decided to terminate Heron's employment with the District.

On October 14, 2008, Hammitt telephoned Heron and told him that the District had cancelled all of his assignments.[7] According to Heron, Hammitt did not give him a reason. The same day, Hammitt mailed Heron a memorandum terminating Heron's employment with the District effective the same day. No reasons were stated in the memorandum.

THE ALJ'S PROPOSED DECISION

The ALJ determined that Heron engaged in protected activities by participating in CWA's organizing campaign. However, the ALJ determined further that Heron failed to establish employer knowledge of these activities and, thus, that the District was motivated by his CWA participation. The ALJ also determined that Heron engaged in protected activity by requesting extra preparation period pay on October 6. The ALJ further found, however, that Heron's act of altering his timecard was not protected. The ALJ concluded that Heron failed to establish that the Notice removing him from working at Mendez would have issued if he had not altered his timecard but had only claimed the right to extra pay. Accordingly, the ALJ dismissed the allegation that the District retaliated against Heron by issuing the October Notice removing him from working at Mendez.

The ALJ also found that Heron engaged in protected activity by submitting his October 10 response to the Notice, in which he again asserted his right to extra pay. The ALJ determined that his discharge shortly thereafter was unlawfully motivated by his protected activity, in violation of EERA.

---

[7] The parties dispute whether Hammitt met with Heron a second time to discuss the incident. In light of our conclusion, *infra*, that the record failed to establish a past practice of providing reasons for terminating a substitute teacher, we need not resolve this factual dispute.

THE DISTRICT'S EXCEPTIONS

The District excepts to the ALJ's determination that the District's decision to terminate Heron's employment was motivated by Heron's protected activity in responding to the October 7 Notice.[8]

ISSUE

Did the District terminate Heron's substitute teacher employment in retaliation for having engaged in activity protected under EERA?

DISCUSSION

To establish a prima facie case that an employer retaliated against an employee in violation of EERA section 3543.5, subdivision (a), the charging party must show that: (1) the employee exercised rights guaranteed by EERA; (2) the employer had knowledge of the employee's exercise of those rights; (3) the employer took an adverse action against the employee; and (4) the employer took the action because of the employee's exercise of guaranteed rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).)

The statutes administered by PERB, including EERA, regulate specific conduct by public employers and employee organizations concerning employer-employee relations. (*Los Angeles Community College District* (1979) PERB Order No. Ad-64.) These statutes do not regulate every aspect of the public employer's conduct. (*Ibid.*) Thus, PERB may only remedy retaliation that was taken because an employee exercised rights guaranteed by one of the statutes PERB administers.

The District does not except to the ALJ's determination that Heron's conduct in submitting his response to the Notice asserting his right to extra pay constituted protected

[8] The District also excepts to the proposed remedy. Because we conclude that the complaint must be dismissed, we need not address these exceptions.

activity, that the District had knowledge of that activity, and that his termination from employment was an adverse action. Therefore, the only issues before the Board are whether the District's decision to terminate his employment was unlawfully motivated and, if so, whether the District established an affirmative defense.

Unlawful Motivation

"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 Cal. State Univ. 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 (*North Sacramento*)), 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.) PERB has considered the following factors as evidence of unlawful employer motivation: (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 (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) 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 (*Jurupa*); *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*, *supra*, PERB Decision No. 264; *Novato*, *supra*, PERB Decision No. 210.)

The District terminated Heron's employment on October 14, 2008, four days after he submitted his response to the Notice. Thus, the timing element is established.

The ALJ found that the following factors established a nexus, and therefore unlawful motivation on the part of the District: (1) failure to follow the District's own procedures; (2) inconsistent justifications for the decision to discharge; and (3) failure to provide reasons for the decision to discharge.

1. Failure to Follow Procedures

The ALJ's determination that the District failed to follow its own procedures was based upon language in the Notice that stated, "Should additional unsatisfactory performance report(s) be submitted . . . you may be released from employment as a Substitute Teacher." Construing this language to mean that Heron would be discharged *only* if he received another unsatisfactory report, the ALJ determined that the District did not follow its own announced procedure when it discharged Heron without issuing another unsatisfactory report. We disagree. Nothing in the Report indicated that Heron could not be terminated for conduct other than the receipt of a second unsatisfactory report. Moreover, there is no evidence in the record that indicates that the District had a policy of always issuing a second unsatisfactory performance report prior to terminating a substitute teacher, or that the District had a policy of only terminating substitute teachers based upon the receipt of one or more unsatisfactory performance reports. Hammitt testified that it was not until he reviewed the timecard and saw

that Heron had actually made an entry for work not performed that he concluded that Heron had not merely disputed the District's practice concerning preparation period pay, but that he had falsified his timecard by falsely claiming to have worked an extra period for which he was entitled to be paid. Hammitt testified that the District had previously discharged employees for falsification of timecards. Therefore, we conclude that the evidence failed to establish that District did not follow its own procedures.

2. Inconsistent Justifications

The ALJ also concluded that Hammitt "did not view Heron's behavior in any worse light when he issued the Dismissal memo" and that his "decision to discharge Heron because of his argument with Padilla is inconsistent with the decision to only remove Heron from assignments at Mendez for the same behavior." The Board has found unlawful motivation when an 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* (1991) PERB Decision No. 864; see also *Jurupa, supra,* PERB Decision No. 1920-M [finding retaliation where reasons for discharge given at PERB hearing were different from those stated in discharge letter].) However, where the employer's written notice removing a teacher from the active substitute list gave no specific justification for its action, PERB has held that the employer's later justification could not have "shifted" from its earlier one. (*Sacramento City Unified School District* (2010) PERB Decision No. 2129 (*Sacramento City Unified*).)

Similarly, given that the October 14 notice did not provide any reasons for the District's decision to terminate Heron's employment, we cannot draw an inference of unlawful motivation based upon alleged shifting justifications. Moreover, we disagree that the record establishes that the District provided inconsistent justifications to Heron. As indicated above, Hammitt did not make the decision to discharge Heron until after he viewed the actual

timecard, at which point he determined that Heron had not merely argued with Padilla but had engaged in fraudulent behavior by falsifying the timecard.[9] Thus, we reject the ALJ's conclusion that Hammitt "did not view Heron's behavior in any worse light when he issued the Dismissal memo." Instead, we conclude, based upon the record, that on October 7 Hammitt considered Heron's behavior to be sufficiently inappropriate to warrant his immediate removal from the Mendez site, but it was not until after he reviewed the timecard after October 10 that he viewed Heron's behavior as fraudulent so as to constitute grounds for dismissal. Accordingly, we conclude that Heron did not establish that the District gave inconsistent justifications for its actions.

3. Failure to Provide Reasons

An employer's failure to give an "at-will" employee a reason for dismissal does not indicate unlawful motive in the absence of evidence that the employer was required by law, policy or past practice to do so. (*Sacramento City Unified, supra,* PERB Decision No. 2129; *County of Riverside* (2011) PERB Decision No. 2184-M.) Thus, in *Sacramento City Unified*, the Board held that the failure to give a substitute teacher a reason for removing him from the active substitute list did not support an inference of unlawful motive, where the charge failed to allege that the employer was required by law or policy to do so or that it had a past practice of doing so. In this case, the evidence did not establish that the District was required by law or policy to give Heron a specific reason for its action, nor did it establish 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 include a reason on the notice of termination does not support an

[9] In reaching this decision, we reject the ALJ's credibility determination that Hammitt's testimony that he did not realize that employees are not allowed to write on their timecards was not believable. Our review of the record indicates that Hammitt testified that, other than entering their name and employee number, employees are not supposed to write on their timecards.

inference of unlawful motive. Thus, Heron has failed to establish a prima facie case of retaliation.

Affirmative Defense

Assuming for the sake of argument that Heron had established a prima facie case of retaliation, we nonetheless would conclude that the District established that it would have terminated his substitute teacher employment despite his protected activity of responding to the Notice and asserting that he was entitled to receive extra pay for working during a preparation period.

Once a prima facie case is established, the employer bears the burden of proving it would have taken the adverse action even if the employee had not engaged in protected activity. (*Novato*, *supra*, PERB Decision No. 210; *Martori Brothers Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721, 729-730 (*Martori Brothers Distributors*); *Wright Line* (1980) 251 NLRB 1083, 1089.) Thus, when it appears that the adverse action was motivated by both valid and invalid reasons, "the question becomes whether the [adverse action] would not have occurred 'but for' the protected activity." (*Martori Brothers Distributors*, *supra*, 29 Cal.3d at p. 729.) The "but for" test is "an affirmative defense which the employer must establish by a preponderance of the evidence." (*McPherson v. Public Employment Relations Bd.* (1987) 189 Cal.App.3d 293, 304.)

When conducting the "but for" analysis, the proper inquiry is whether the employer's true motivation for taking the adverse action was the employee's protected activity. (*Regents of the University of California* (1993) PERB Decision No. 1028-H.) In making this determination, "PERB weighs the employer's justifications for the adverse action against the evidence of the employer's retaliatory motive." (*Baker Valley Unified School District* (2008) PERB Decision No. 1993.) PERB's inquiry is not whether the employer had a lawful reason

for the action but whether it took the action for an unlawful reason. (*Ibid.*, citing *McFarland Unified School Dist. v. Public Employment Relations Bd.* (1991) 228 Cal.App.3d 166, 169.) Once PERB determines that the employer did not take action for an unlawful reason, its inquiry is at an end; PERB has no authority to determine whether adverse action not motivated by protected activity was just or proper. (*Regents of the University of California, supra*, PERB Decision No. 1028-H; *San Ysidro School District* (1980) PERB Decision No. 134.)

The record establishes that Hammitt and Lopez made the decision to terminate Heron's employment based upon the fact that he falsified his timecard. Hammitt testified that other employees had similarly been terminated for timecard falsification. Accordingly, we conclude that the District would have terminated Heron's employment even if he had not engaged in protected activity.

ORDER

The complaint and underlying unfair practice charge in Case No. LA-CE-5286-E are hereby DISMISSED.

Chair Martinez and Member McKeag joined in this Decision.