STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

LAKE ELSINORE TEACHERS ASSOCIATION, CTA, Charging Party, v. LAKE ELSINORE UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-5235-E PERB Decision No. 2241 February 27, 2012

Appearances: California Teachers Association by Michael Hersh, Staff Attorney, for Lake Elsinore Teachers Association, CTA; Atkinson, Andelson, Loya, Ruud & Romo by Mark W. Thompson, Attorney, for Lake Elsinore 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 Lake Elsinore Teachers Association, CTA (Association) to the proposed decision of a PERB Administrative Law Judge (ALJ) dismissing an unfair practice complaint. The complaint and underlying charge alleged that the Lake Elsinore Unified School District (District) retaliated against a probationary teacher and member of the Association's negotiating team by not re-electing him for employment after he engaged in protected activity, in violation of section 3543.5(a) of the Educational Employment Relations Act (EERA).[1]

The Board has reviewed the entire record in this case. Based upon that review, we affirm the ALJ's proposed decision for the reasons set forth below.

[1] EERA is codified at Government Code section 3540 et seq.

FACTUAL SUMMARY

Robert "Marty" Chavez (Chavez) was first employed by the District during the 2005-2006 school year.[2] He was rehired for the 2006-2007 school year as a probationary special education teacher at Lake Elsinore High School (School).

During the 2007-2008 school year, while still a probationary employee, Chavez participated as a member of the Association's negotiating team. His participation was well known to the District. Both Assistant Superintendent of Personnel Services Kip Meyer (Meyer) and the principal of the School, Jon Hurst (Hurst), testified that they believed Chavez had a positive influence on bargaining. Assistant Principal Amy Campbell (Campbell) also viewed Chavez's union involvement as a positive thing, in that they had a collaborative relationship in which he would bring potential workplace issues to her attention to give her a chance to address them.

Former District program specialist Nanette Sherman (Sherman)[3] testified by telephone that she attended a meeting with Executive Director of Special Education Dr. Kathleen Roberts (Roberts) and others, at which Chavez's Association activities were mentioned. According to Sherman, someone at that meeting said, "That it was a major concern because Marty would run straight to the Union with any information or concern he has." Sherman testified that she thought Roberts made this statement, but she was not sure. Sherman further testified:

> Well, I can't quote the exact words, but it was that his involvement, he was too involved, and I think the first time I ever became aware of Marty was I had just been hired and it was, like, two or three weeks before school would start, and he had a meeting with Dr. Roberts and a couple other people, I think, to go

[2] Chavez was hired on an intern credential while working on his special education credential, which he completed thereafter.

[3] Sherman had resigned from the District in lieu of involuntary demotion for non-performance reasons.

> over what he felt the collaborative model needed. And I remember that there was an odd sense that he was, like, stepping out of his realm because he wasn't the department chair. And that was before school had even started.

In response to a question as to whether she had "[heard] any talk concerning the fact that [Chavez] was a new employee in terms of his involvement in the Union," Sherman testified that she had heard "That it's unwise to get so involved [in the Association] when you're just starting out." Again, Sherman testified that she "thought" this statement was made by Roberts.

Roberts denied making any of these statements. Roberts testified that, after returning from a staff meeting at the school, Sherman "came back and said that the teachers at Elsinore High School are very tired of Mr. Chavez putting barriers in the way of us moving forward, and we, and the comment was, we wish that he would spend as much time concerned about his instruction as he is about attending Union activities."

The ALJ credited Roberts' testimony over that of Sherman, finding Sherman's telephonic testimony to be uncertain and unpersuasive.

During the 2006-2007 school year, following a review of the District's special education program by federal authorities, the District received at least twenty-one citations because it was not providing sufficient opportunities for special education students to access the core curriculum. In addition, the District had been placed in "program improvement" status due in part to inadequate yearly progress by students with disabilities. As a result of the federal review, the District was directed to improve its co-teaching program, under which special education teachers work collaboratively in the same classroom with the regular teacher on planning, instruction and assessment.

Assistant Principal Campbell was in charge of overseeing the School's special education department and was Chavez's direct supervisor. In this capacity, and in response to the negative federal review, Campbell sought to make the special education department more

collaborative and for each member of the department to work as a team. In or around May 2007, the Association and the District negotiated a memorandum of understanding entitled the "Co-Teaching Model MOU" (MOU). The MOU was a single-page document that set forth the agreement of the Association and the District that "the co-teaching model of service delivery for special education students may be implemented at all sites" and procedures for implementing the co-teaching model. Chavez participated in the negotiation of the MOU.

Although Chavez received satisfactory performance reports, the District perceived him as not being supportive of the co-teaching model. Campbell testified that, although Chavez performed his co-teaching assignments satisfactorily, he did not want to have those assignments and instead wanted to teach pull-out classes where he would instruct on his own, without another teacher, even though he was not qualified to teach pull-out classes. Campbell further testified that the chairs for the special education department reported that Chavez was not supportive of the co-teaching model, that he was directly "against what they were working for," and that he brought "negativity" and embarrassment to the department. Chavez communicated his displeasure during staff meetings and in e-mail correspondence to the District.[4] Campbell also received complaints from special education department staff that reflected "a tone of not liking the negativity that was brought to the department, the way it was dividing us with different agendas and not all going towards the same vision." Based upon these communications and her discussions with Chavez and other staff, Campbell formed the opinion that Chavez did not believe that the co-teaching model was best for the students.

Roberts also testified that she received reports from staff that Chavez challenged the co-teaching model. According to Roberts:

[4] The e-mails were not introduced into evidence.

> It was my observation when I arrived in the District that we had a lot of pull-out of students in self-contained classes with teachers that were not highly qualified. So therefore the co-teaching was one of the best practices that we encouraging all of our sites, including Elsinore High School, to implement . . . as quickly as possible.

Roberts further testified that, during a staff development meeting at the District office:

> We talked about best practices, talked about co-teaching, and Mr. Chavez's comment to, and it was a public comment with a lot of teachers present, was that he did not feel or agree that co-teaching should be implemented at this time, it was too soon, general education teachers were not prepared, and he felt strongly that that was important to note.

As assistant superintendent of personnel services, Meyer is responsible for making recommendations to the Board of Education concerning the non-reelection of employees. In making these recommendations, Meyer considers both the employee's performance in the classroom as well as the employee's conduct outside the classroom, such as judgment, attitude, collaborative skills, willingness to collaborate and to be a part of the team, and other factors necessary for success in the teaching profession. Thus, written performance evaluations, which cover only classroom performance, form only one piece of the information used by the District in making re-election decisions. In deciding whether to recommend Chavez for re-election, Meyer spoke to Hurst, Campbell and Roberts. According to Meyer, the common theme in their comments was that Chavez was deficient in the areas of teamwork, collaboration, and the ability to align himself with the District's mission, goals and objectives. All recommended that Chavez not be re-elected for the reasons described above.

On February 21, 2008, based upon the recommendations of Meyer, Campbell, Roberts, and Hurst, the District's Board of Education took action to non-reelect Chavez for employment with the District.

THE ALJ'S PROPOSED DECISION

The ALJ determined that Chavez engaged in protected activity by participating on the Association's negotiating team, that Chavez's participation was well known to the District, and that the District's decision on February 21, 2008 not to reemploy Chavez was an adverse action. The ALJ further determined that, although the protected conduct and the adverse action were close in time, the Association failed to establish that the decision not to reelect Chavez was motivated by anti-union animus.

THE ASSOCIATION'S EXCEPTIONS

The Association's primary argument set forth in its exceptions to the ALJ's proposed decision is that the District's decision was based not upon Chavez's supposed lack of support for the District's co-teaching model but because he engaged in the protected activity of trying to enforce the co-teaching MOU he had been instrumental in negotiating. Thus, the Association argues: (1) direct evidence establishes that Chavez was terminated because of his protected activities; (2) circumstantial evidence establishes sufficient nexus between Chavez's protected activity and his non-reelection; and (3) the District failed to establish it would have nonreelected Chavez even if he had not engaged in protected activities.

THE DISTRICT'S RESPONSE

The District argues: (1) the Association's statement of exceptions fails to comply with the requirements of PERB Regulation 32300;[5] (2) the bulk of the Association's exceptions are based upon an unalleged violation that may not be considered on appeal before the Board; and (3) the ALJ's proposed decision, including its credibility determinations, was correct and should be upheld.

[5] The District's response erroneously refers to "Regulation 3020," which does not exist. (PERB regs. are codified at Cal. Code Regs., tit. 8, sec. 31001 et seq.)

ISSUES

1. Does the Association's statement of exceptions comply with PERB Regulation 32300?

2. Are the Association's exceptions based upon an unalleged violation that may not be considered by the Board?

3. Did the Association establish that the District's decision to nonreelect Chavez was unlawfully motivated by retaliation for Chavez's protected activity?

DISCUSSION

Compliance with PERB Regulation 32300

PERB Regulation 32300 provides:

> (a) A party may file with the Board itself an original and five copies of a statement of exceptions to a Board agent's proposed decision issued pursuant to Section 32215, and supporting brief, within 20 days following the date of service of the decision or as provided in Section 32310. The statement of exceptions and briefs shall be filed with the Board itself in the headquarters office. Service and proof of service of the statement and brief pursuant to Section 32140 are required. The statement of exceptions or brief shall:
>
> (1) State the specific issues of procedure, fact, law or rationale to which each exception is taken;
>
> (2) Identify the page or part of the decision to which each exception is taken;
>
> (3) Designate by page citation or exhibit number the portions of the record, if any, relied upon for each exception;
>
> (4) State the grounds for each exception.
>
> (b) Reference shall be made in the statement of exceptions only to matters contained in the record of the case.
>
> (c) An exception not specifically urged shall be waived.

The District asserts: "Charging Party has ignored these provisions by filing a narrative brief, which is, in actuality, a re-hashing of his Post-Hearing Brief. As Charging Party has failed to comply with Section 3020 [sic], his Statement of Exceptions must be disregarded." We disagree. The Association's exceptions clearly identify the issues to which exception is taken, with appropriate page references to the ALJ's proposed decision and citations to the record. Accordingly, we conclude that it satisfies the requirements of Regulation 32300.

Unalleged Violation

The District asserts that the Association's contention on appeal that Chavez engaged in protected activity by trying to enforce the co-teaching MOU constitutes a new and previously unalleged violation that the Board may not consider on appeal. In support of this argument, the District notes that the complaint issued in this case refers only to Chavez's protected activity as a member of the Association's negotiating team, but does not refer to the co-teaching MOU, and that the Association never attempted to amend the Complaint. Thus, the District contends, the Association never put it on notice that it intended to allege protected activity related to the co-teaching MOU and therefore that it had no opportunity to litigate the matter.

The Board has the authority to review unalleged violations when the following criteria are met: (1) adequate notice and opportunity to defend has been provided the respondent; (2) the acts are intimately related to the subject matter of the complaint and are part of the same course of conduct; (3) the unalleged violation has been fully litigated; and (4) the parties have had the opportunity to examine and be cross-examined on the issue. (*County of Riverside* (2010) PERB Decision No. 2097-M; *Fresno County Superior Court* (2008) PERB Decision No. 1942-C (*Fresno Superior Court*); *Tahoe-Truckee Unified School District* (1988) PERB

Decision No. 668.) The unalleged violation also must have occurred within the applicable statute of limitations period. (*Fresno Superior Court.*)

Initially, we note that the facts surrounding the co-teaching MOU do not constitute an alleged *violation* of EERA but rather an additional instance of *protected activity* by Chavez. Thus, the issue is not whether the Board should consider such facts as evidence of an unalleged violation but rather whether the Board may consider whether the District retaliated against Chavez for having engaged in additional protected activity not specifically alleged in the complaint.

The District is correct that neither the charge filed by the Association nor the complaint issued by the PERB Office of the General Counsel alleged that Chavez engaged in any protected activity in connection with enforcement of the co-teaching MOU. Instead, the charge alleges facts only with respect to Chavez's participation on the Association's bargaining team prior to the beginning of the 2007-2008 school year and that "a number of issues put the Union bargaining team at loggerheads with the District administration between October and December 2007." None of the issues identified in the charge related to the co-teaching MOU. The complaint issued by the General Counsel alleged only that, throughout the 2007-2008 academic year, Chavez exercised rights guaranteed by EERA by participating on the Association's negotiating team.

During the hearing before the ALJ, Chavez testified about concerns he raised regarding implementation of the co-teaching MOU, the District's "Home Hospital" program (in which teachers go to the homes of students who are unable to attend school) and other matters. In its closing brief, the Association argued that the evidence established a nexus between Chavez's attempts to enforce the terms of the co-teaching MOU and the District's decision to terminate his employment. In the absence of notice that the Association was basing its case upon this

theory, however, the District was not afforded adequate notice and an opportunity to defend against the unalleged claim that it took adverse action against Chavez for having engaged in protected activity concerning the enforcement of the co-teaching MOU, as opposed to his activities as a member of the Association's bargaining team. Therefore, we conclude that the Association has failed to establish sufficient grounds for consideration of this unalleged basis for its retaliation claim under the standards set forth in *Fresno Superior Court* and the additional authorities cited above. (See *City of Clovis* (2009) PERB Decision No. 2074-M [employer was not provided adequate notice and opportunity to litigate issue of whether union's telephone call constituted "changed circumstances" so as to revive a duty to bargain, where claim was raised only in post-hearing brief]; *Baker Valley Unified School District* (2008) PERB Decision No. 1993 [evidence of union animus alleged for the first time in charging party's closing brief did not provide employer with adequate notice and opportunity to defend the allegations at hearing, and thus Board cannot make a finding regarding them].)

Retaliation

The Association bears the burden of proving the allegations of the complaint by a preponderance of the evidence. (*California State University (San Francisco)* (1986) PERB Decision No. 559-H; PERB Reg. 32178.) Preponderance of the evidence has been defined by the courts as "evidence that has more convincing force than that opposed to it." (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 324 (*Glage*).) Preponderance of the evidence is usually defined in terms of the probability of the truth, or such evidence which, when weighed against opposing evidence, has the greater probability of truth. (*California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133.) If the evidence is so evenly balanced that one is unable to say that the evidence on either side

preponderates, the finding on that issue must be against the party who has the burden of proving it. (*Glage* at p. 324.)

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.

It is undisputed that Chavez's participation on the Association's bargaining team constituted protected activity, that the District had knowledge of that activity, and that his non-reelection from employment was an adverse action. Therefore, the only issue before the Board is whether the District's decision to terminate his employment was unlawfully motivated.[6]

Unlawful Motivation

"Unlawful motive is the specific nexus required in the establishment of a prima facie case. Direct proof of motivation is rarely possible since motivation is a state of mind which may be known only to the actor. Unlawful motive can be established by circumstantial evidence and

[6] In its brief, the District states: "This case is simple because it is limited to the question of nexus."

inferred from the record as a whole." (*Trustees of Cal. State Univ. v. Public Employment Relations Bd.* (1992) 6 Cal.App.4th 1107, 1124 (*Trustees of CSU*).) 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; *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*; *Novato*.)

Direct Evidence of Unlawful Motivation

The Association asserts that this is one of those rare cases in which direct evidence of unlawful motivation exists. The Association contends that the District's reasons for non-reelecting Chavez—based upon his lack of support for the co-teaching model—were in fact based upon his protected activity of trying to get the District to comply with the co-teaching MOU and raising concerns about its implementation. As discussed above, we do not consider this unalleged violation. However, even if we were to do so, we would find that the Association failed to meet its burden of proving direct evidence of unlawful motivation. Although he was willing to perform his co-teaching duties satisfactorily, he made it clear to District administrators that he preferred to teach pull-out classes on his own instead. Chavez's lack of support for the District's vision and commitment to the co-teaching model created a tone of "negativity" within the special education department. Despite the fact that the District was under a federal mandate to implement co-teaching, Chavez resisted its implementation. Under these circumstances, we do not find the District's expressed reasons for non-reelecting him to constitute direct evidence of unlawful motivation.

The Association also contends that alleged statements made by Roberts—as testified to by Sherman—constituted direct evidence of anti-union animus and therefore unlawful motivation. As discussed above, the ALJ found Sherman's testimony to be uncertain and unpersuasive, and found Roberts' denials more credible. It is a well-established principle that the Board will give deference to ALJ credibility determinations absent evidence to support overturning such conclusions. (*Trustees of the California State University (San Marcos)* (2010) PERB Decision No. 2093-H; see also *Anaheim City School District* (1984) PERB Decision No. 364a ("[[T]he Board has determined that it will normally afford deference to

administrative law judges' findings of fact involving credibility determinations unless they are unsupported by the record as a whole."])

The ALJ found Sherman's telephonic testimony on the issue of animosity toward Chavez's Association activities to be unpersuasive when weighed against the live testimony of Roberts. The ALJ noted that Sherman's attribution of negative comments to Roberts was uncertain and that one of those comments – that Chavez "would run straight to the Union with any information or concern he has" – bore no obvious relation to Chavez's participation in bargaining or any other protected conduct. In contrast, the ALJ found Roberts' testimony to be clear, consistent and credible on all points. Having thoroughly reviewed the entire record in this matter, we conclude the ALJ properly weighed the evidence presented by the parties at hearing, and find that they are supported by the record as a whole. We therefore affirm the ALJ's determination that Roberts did not make the statements attributed to her by Sherman.

Circumstantial Evidence of Unlawful Motivation

The Association also asserts that the following "nexus" factors support an inference of unlawful motivation: (1) disparate treatment; (2) departure from established policies and procedures; and (3) vague and ambiguous reasons.[7]

1. Disparate Treatment

The Association contends that Chavez was subjected to disparate treatment because other teachers who were also non-reelected either because their teaching was deficient or because they were not performing job duties outside the classroom, whereas Chavez's performance evaluations showed that he met and exceeded the District's performance expectations. The Association has not established, however, that Chavez was treated

[7] The District does not dispute the ALJ's determination that the protected conduct and the adverse action were close in time. Therefore, we conclude that the timing element of nexus has been met in this case. (*North Sacramento.*)

differently from any similarly situated probationary teacher. There is no evidence in the record to suggest that other probationary teachers who were unsupportive of the District's co-teaching model were retained. In fact, the record establishes that three other teachers with satisfactory performance evaluations were also non-reelected. The fact that other teachers with performance deficiencies were also non-reelected does not establish that Chavez was treated differently. Accordingly, the Association has not established that Chavez was subjected to disparate treatment so as to raise an inference of unlawful motivation. (*Sacramento City Unified School District* (2010) PERB Decision No. 2129; *Madera County Office of Education* (1999) PERB Decision No. 1334; *Santa Clarita Community College District* (1996) PERB Decision No. 1178.)

2. Departure From Established Policies and Procedures

The Association appears to contend that the District varied from established policies and procedures by giving Chavez satisfactory performance evaluations and then not reelecting him, where other employees who were not reelected had unsatisfactory performance. As indicated above, however, the evidence in the record indicates that other employees with satisfactory performance evaluations were also not reelected. In addition, Meyer credibly testified that performance evaluations were not the only source of information used by the District in making re-election decisions. Therefore, the Association has failed to establish that the District departed from established policies and procedures in dealing with Chavez.

3. Vague and Ambiguous Reasons

The Association contends that the failure of the District to provide Chavez with the reasons for his non-reelection supports an inference of unlawful motivation. An employer's failure to give a probationary, "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. (*City of Santa Monica*) (2011) PERB Decision No. 2211-M; County *of Riverside* (2011) PERB Decision No. 2184-M (*County of Riverside*); *Sacramento City Unified School District* (2010) PERB Decision No. 2129; *City of Alhambra* (2011) PERB Decision No. 2161-M (*City of Alhambra*).) Thus, where the employer's practice was not to give a probationary employee a reason for releasing the employee on probation, the failure to do so did not support an inference of unlawful motive. (*County of Riverside.*) Similarly, in this case, the District's practice was not to provide reasons when notifying probationary employees of a non-reelection decision, and it was not required by law or policy to do so.[8] (See also *City of Alhambra* [release of probationary employee because he "no longer fit into the organization" does not indicate discriminatory intent, in the absence of evidence that employer was required by law or policy to provide a reason].) Accordingly, we do not find that the failure to provide Chavez with the reasons for terminating his probationary employment to be indicative of unlawful motive.

The issue before the Board is not whether the employer had just cause to discipline or terminate the employee, but rather whether the true motivation behind the employer's decision was the employee's exercise of protected activity under EERA. (*San Bernardino City Unified School District* (2004) PERB Decision No. 1602.) In this case, we conclude that the Association has failed to meet its burden of proving, by a preponderance of the evidence, that

[8] Education Code section 44929.21 allows a school district to non-reelect a probationary teacher without any showing of cause and without a statement of reasons, so long as the statutorily required notice is given. (*Bd. of Education v. Round Valley Teachers Assn.* (1996) 13 Cal.4th 269, 279; see also *McFarland Unified School Dist. v. Public Employment Relations Bd.* (1991) 228 Cal.App.3d 166, 169 [the final determination about rehiring probationary teachers lies within the discretion of the governing board and that tenure can be denied for any lawful reason regardless of the sufficiency of the cause].)

Chavez's protected activity as a member of the Association's negotiating team was the true motivation for the District's decision to terminate his probationary employment.[9]

ORDER

The complaint and underlying unfair practice charge in Case No. LA-CE-5235-E are hereby DISMISSED.

Chair Martinez and Member McKeag joined in this Decision.

[9] Because of the conclusions reached herein, it is unnecessary to address the Association's third argument that the District failed to establish it would have nonreelected Chavez even in the absence of his protected activities. (See *Trustees of CSU* at p. 1130 [the "but for" test is an affirmative defense that the employer must establish by a preponderance of the evidence].) The burden of proof shifts to the employer once the charging party succeeds in establishing its prima facie case. (*Novato.*) For the reasons explained above, the Association did not meet its burden of proving a prima facie violation and, therefore, the burden never shifted to the District.