STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MANUEL FAUSTINO YVELLEZ, Charging Party, v. CHULA VISTA ELEMENTARY SCHOOL DISTRICT, Respondent.	Case No. LA-CE-5732-E PERB Decision No. 2306 February 14, 2013

Appearances: Manuel Faustino Yvellez, on his own behalf; Fagen, Friedman & Fullfrost by Susan B. Winkelman, Attorney, for Chula Vista Elementary School District.

Before Martinez, Chair; Huguenin and Winslow, Members.

DECISION

MARTINEZ, Chair: This case is before the Public Employment Relations Board (Board) on appeal by Manuel Faustino Yvellez (Yvellez) from the partial dismissal (attached) of his unfair practice charge. The charge, as amended, alleges that the Chula Vista Elementary School District (District) violated the Educational Employment Relations Act (EERA)[1] by hiring the president of the Chula Vista Educators to fill the position of Director of Human Resources.[2] The charge, as amended, alleges that this conduct constitutes a violation of EERA

[1] EERA is codified at Government Code section 3540 et seq. Hereafter, these sections of the Government Code will be cited to as sections of EERA.

[2] The charge, as amended, also alleges that the District interfered with Yvellez's protected rights with respect to his use of the District's e-mail system. This aspect of the case was not dismissed, and therefore is not before the Board itself on appeal.

section 3543.5, subdivisions (a) and (d).[3] The Office of the General Counsel dismissed this aspect of the amended charge for failure to state a prima facie case. Yvellez filed a timely appeal.

The Board has reviewed the record in its entirety and given full consideration to the appeal. The gravamen of the allegations according to the appeal is that the District bribed a sitting union president by hiring her for the Director of Human Resources position with the intent to weaken the union; and, in so doing, caused harm to protected activities by creating a chilling effect of mistrust of union leadership; and also, effected the representative capacity of the union. Notwithstanding Yvellez's conclusory declarations and sincerely-held beliefs, the essential factual allegations in this case do not support a violation of EERA based on any viable theory of law.

Based on our review of this case, we find the partial warning and dismissal letters to be well-reasoned, adequately supported by the record and in accordance with the applicable law. We also find that none of Yvellez's assertions on appeal compels a change in the analysis performed by the Office of the General Counsel of the legal issues raised by the factual

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[3] EERA section 3543.5 provides:

> It is unlawful for a public school employer to do any of the following:
>
> (a) 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. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> [. . .]
>
> (d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

allegations in the amended charge. Accordingly, the Board affirms the partial dismissal of the amended charge and adopts the partial warning and dismissal letters as the decision of the Board itself.

ORDER

The partial dismissal of the unfair practice charge in Case No. LA-CE-5732-E is hereby AFFIRMED.

Members Huguenin and Winslow joined in this Decision.

STATE OF CALIFORNIA
EDMUND G. BROWN JR., Governor
PUBLIC EMPLOYMENT RELATIONS BOARD
Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
Telephone: (818) 551-2809
Fax: (818) 551-2820

November 27, 2012

Manuel Faustino Yvellez
2621 Meade Avenue
San Diego, CA 92116

Re: *Manuel Faustino Yvellez v. Chula Vista Elementary School District*
Unfair Practice Charge No. LA-CE-5732-E
PARTIAL DISMISSAL

Dear Mr. Yvellez:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on August 23, 2012. Manuel Faustino Yvellez (Charging Party) alleges that the Chula Vista Elementary School District (District or Respondent) violated section 3543.5 of the Educational Employment Relations Act (EERA or Act)[1] by interfering with Charging Party's exercise of rights protected under EERA and by hiring the President of the Chula Vista Educators' (CVE). This letter does not address allegations that the District's conduct with respect to Charging Party's use of the District e-mail system interfered with Charging Party's EERA rights.

Charging Party was informed in the attached Partial Warning Letter dated October 25, 2012, that certain allegations contained in the charge did not state a prima facie case. Charging Party was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, Charging Party should amend the charge. Charging Party was further advised that, unless Charging Party amended these allegations to state a prima facie case or withdrew them prior to November 5, 2012, the allegations would be dismissed. Charging Party requested, and the Board agent granted, an extension until November 16, 2012, for Charging Party to file an Amended Charge. On November 16, 2012, Charging Party filed an Amended Charge.

Discussion

In the Amended Charge, Charging Party alleges the District's hiring of former CVE President Peg Myers (Myers) constituted interference with the union's internal activities because it weakened the union and reduced members' trust in the union. Charging Party further alleges that the District's hiring of Myers had a chilling effect on Charging Party's and other members' right to engage in rights protected by EERA.

[1] EERA is codified at Government Code section 3540 et seq. The text of the EERA and PERB Regulations may be found at www.perb.ca.gov.

Charging Party compares the facts of the instant matter with the facts in *Carlsbad Unified School District* (1979) PERB Decision No. 89 and *City of Torrance* (2008) PERB Decision No. 1971-M.

In *Carlsbad Unified School District* (1979) PERB Decision No. 89, the Board found that the District chilled the exercise of employees' rights to organize in violation of section 3543.5(a) because the District involuntarily transferred union activists and the "natural and probable consequence" was that "other employees reasonably [] fear[ed] that similar action would be taken against them if they engaged in organizing." In *City of Torrance* (2008) PERB Decision No. 1971-M, the Board found that the City interfered with the exercise of rights when it reduced the union President's business release time and demanded that she reimburse the City for release time she took in excess of three days per week over a six-month period. In both of these cases, the Board found the employer's conduct amounted to interference because the employer's involuntary transfers of union activists and action for reimbursement against the union President could chill others from engaging in protected conduct and tended to interfere with the exercise of protected rights.

In the instant matter, the employer did not take any involuntary action against former CVE President Myers. Instead, Myers voluntarily resigned from her CVE position to become a District management employee. Thus, the allegations fail to demonstrate that the employer's hiring of Myers would the "natural and probable consequence of" instilling fear in others that if they exercised protected rights they would be subject to involuntary transfer or other chilling conduct by the District.

In addition, and as explained in the Partial Warning Letter, neither the employer nor the union may dictate the opposing parties' choice of representative. (*Yolo County Superintendent of Schools* (1990) PERB Decision No. 838, citing *San Ramon Valley Unified School District* (1982) PERB Decision No. 230.) This means CVE has no right to dictate that the District may not use Myers as the District's representative. Since the union has no right to dictate the choice of the employer's representative, individual employees certainly have no right to dispute the employer's choice of its own representative.

Charging Party asserts that, because he actually has suffered mistrust and the consequences of the District's hiring of Myers, he has established the District's conduct tended to harm Charging Party's rights under section 3543.5(a) as a matter of law. However, the test for whether statements constitute interference or coercion depends upon whether, under the existing circumstances, they reasonably tend to interfere or coerce in the exercise of guaranteed rights, not whether the employee subjectively perceives the statements in that manner. *(Clovis Unified School District* (1984) PERB Decision No. 389; see also *Los Rios College Federation of Teachers, CFT/AFTLocal 2279 (Deglow)* (1996) PERB Decision No. 1137 [the standard for analyzing interference is objective, rather than subjective].)

As also noted in the Partial Warning Letter, the Charge fails to provide information demonstrating the District is liable for Charging Party's loss of trust in the CVE. Unless Charging Party can demonstrate the District's conduct tends to interfere with the internal

activities of CVE ("the formation or administration of any employee organization..."), the allegations fail to demonstrate the District violated EERA by hiring former CVE President Myers. (Gov. Code, § 3543, subd. (d); *Santa Monica Community College District* (1979) PERB Decision No. 103; *Redwoods Community College District* (1987) PERB Decision No. 650 [to state a prima facie violation of EERA section 3543.5(d), the charging party must allege facts which demonstrate that the employer's conduct tends to interfere with the internal activities of an employee organization or tends to influence the choice between employee organizations].)

The original and amended charge fail to state a prima facie case regarding the District's hiring of Ms. Myers and the allegations are hereby dismissed based on the facts and reasons set forth herein and in the October 25, 2012 Partial Warning Letter.

Right to Appeal

Pursuant to PERB Regulations,[2] Charging Party may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (PERB Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received during a regular PERB business day. (PERB Regulations 32135(a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (PERB Regulation 32135(b), (c) and (d); see also PERB Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

If Charging Party files a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five (5) copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (PERB Regulation 32635(b).)

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

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See PERB Regulation 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (PERB Regulation 32135(c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (PERB Regulation 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

M. SUZANNE MURPHY
General Counsel

By _____
Mary Weiss
Senior Regional Attorney

Attachment

cc: Dean T. Adams, Attorney, Fagen Friedman & Fullfrost, LLP

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STATE OF CALIFORNIA
EDMUND G. BROWN JR., Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
Telephone: (818) 551-2809
Fax: (818) 551-2820

October 25, 2012

Manuel Yvellez
2621 Meade Avenue
San Diego, CA 92116

Re: *Manuel Faustino Yvellez v. Chula Vista Elementary School District*
Unfair Practice Charge No. LA-CE-5732-E
PARTIAL WARNING LETTER

Dear Mr. Yvellez:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on August 23, 2012. Manuel Faustino Yvellez (Charging Party) alleges that the Chula Vista Elementary School District (District or Respondent) violated section 3543.5 of the Educational Employment Relations Act (EERA or Act)[1] by interfering with Charging Party's exercise of rights protected under EERA and by hiring the President of the Chula Vista Educators' (CVE). This letter does not address allegations that the District's conduct with respect to Charging Party's use of the District e-mail system interfered with Charging Party's EERA rights.

Facts Alleged in the Charge

Charging Party is a school teacher and member of the CVE. On May 24, 2012, Charging Party received at his e-mail address, "myvellez@hotmail.com," an e-mail message from CVE President Peg Myers (Myers), "cvepresident@gmail.com," that notified members that she was "stepping down as your CVE President" and had "accepted the Director of Human Resources position at the District." The message further explained that CVE Vice President Jennefer Porch (Porch) would assume the office of CVE President and the CVE cell phone number and e-mail address, "cvepresident@gmail.com," would remain the same.

On May 25, 2012, Charging Party received at his e-mail address, "myvellez@hotmail.com," an e-mail message from new CVE President Porch, "cvepresident@gmail.com," explaining she had "assumed the presidency to complete Peg's current term."

On May 27, 2012, Charging Party sent an e-mail message from "myvellez@hotmail.com" to Porch at "cvepresident@gmail.com," setting forth his view that Myers had breached her fiduciary duty to CVE and its members by accepting employment with the District and by failing to reveal that she was considering the position. Charging Party also asked Porch to take

[1] EERA is codified at Government Code section 3540 et seq. The text of the EERA and PERB Regulations may be found at www.perb.ca.gov.

immediate steps such as calling a site representative meeting and seeking legal advice regarding the alleged breach. Charging Party also asked Porch to forward his e-mail message to all CVE members.

On May 29, 2012, Charging Party sent an e-mail message from his District e-mail account to:

> All Kindergarten Teachers Distribution Group; All Kindergarten-First Teachers Distribution Group; All 6th Grade Teachers Distribution Group; All 6th Grade Teachers Distribution Group [*sic*]; All 5th-6th Grade Teachers Distribution Group; All 1st Grade Teachers Distribution Group; All 1st-2nd Grade Teachers Distribution Group; All 2nd Grade Teachers Distribution Group; All 2nd-3rd Grade Teachers Distribution Group; All 3rd Grade Teachers Distribution Group; All 3rd-4th Grade Teachers Distribution Group; All 4th Grade Teachers Distribution Group; All 4th-5th Grade Teachers Distribution Group; All 5th Grade Teachers Distribution Group

The e-mail message was entitled "Confidential CVE Message" and asked recipients to read the attached letter entitled "Porch Letter 1.doc." Charging Party did not attach the letter to the unfair practice charge but he asserts the letter is the same as his May 27, 2012 e-mail message to Porch. Charging Party asked recipients to e-mail Charging Party and/or "friend" him on Facebook "so that we have a means of communicating with each other." Charging Party asked recipients "to forward a copy to all CVE members for whom you may have an email address." The message also stated "If you are not a CVE member, this memo has reached you by mistake and I would ask you please to del[e]te it." Charging Party received some e-mail messages in response that stated the District e-mail system could not be used for such purposes.

On May 30, 2012, Charging Party sent an e-mail message to Superintendent Francisco Escobedo entitled "CVE Communications on District Email System." The message stated:

> Recently, there has arisen a particular need for CVE members to communicate with each other on union matters. Having no other effective communication system currently in place, I have utilized the district email system for such communications. Some members have claimed that this email system can never be used for union communications and have even implied that a member could face severe discipline for such use. I have asked for the basis of such pronouncement, but have received none. In my 14 years with CVESD, I do not recall the district ever putting out a statement or adopting limiting regulations of the email system. I also do not find any support for such a position in the law. I ask if you will please clear up this matter by stating now any official position the district has on [the] matter.

In the message, Charging Party quoted portions of EERA and cited *State of California, California Department of Transportation* (1981) PERB Decision No. 159-S in support of his statement that "[T]he Public Employ[ment] Relations Board has found that otherwise valid limiting rules cannot be sustained if they are discriminatory to union activity."

Superintendent Escobedo sent an e-mail message to Charging Party the same morning and stated it had come to his attention that Charging Party was "inappropriately using our e-mail service to share derogatory information that can be construed as slanderous and litigious. This case is being reviewed by our district attorney and will be recommending possible disciplinary action. I would suggest that you contact you[r] union representative or personal attorney." Charging Party responded to Escobedo's message the same morning and reiterated his request that Escobedo clarify the District's position regarding e-mail usage and also provide the authority the District relies on in support of its position.

On June 1, 2012, Principal Sherroll Stogsdill informed Charging Party that Assistant Superintendent of Human Resources Sandra Villegas-Zuniga (Zuniga) wanted to meet with Charging Party that day and also informed Charging Party he could have a union representative present. Charging Party wanted to have his personal attorney present and the parties scheduled the meeting on a day when his attorney could attend.

The meeting took place on June 14, 2012. At the meeting Charging Party asserted the e-mail system was a public forum; that the District could not restrict his protected activity without a policy; that no policy existed; and that the District was discriminating against his protected activity of union communications in that other non-business e-mails, e.g., social announcements, including one sent by Principal Stogsdill, prompted no investigation. Charging Party asked when he could expect a decision on disciplinary action and the District's attorney stated it was hard to determine but typically a decision was reached in two to three weeks.

On August 7, 2012, Charging Party sent an e-mail message to Zuniga and asked whether the District intended to impose disciplinary action. Charging Party also stated that the District's failure to articulate an e-mail policy was creating a delay and restraining his protected activity by causing him to refrain from further use of the District e-mail system.

Charging Party alleges in part that the District violated EERA section 3543.5, subdivision (d) by hiring former CVE President Myers.

Discussion

Charging Party asserts Respondent's hiring of Peg Myers "was inherently destructive to all [his] protected activity in that [he] ha[s] lost faith and trust in a union leadership that could at any time be usurped by the District by hiring them." Charging Party further states he is "loath to exercise [his] right to file grievances" because he has lost faith and trust in CVE and CVE is the party who has discretion to take a grievance to binding arbitration, not an individual

employee. This information, however, fails to provide information demonstrating that the District is liable for Charging Party's loss of trust in the CVE.

Government Codes section 3543, subdivision (d), provides:

> It is unlawful for a public school employer to...[d]ominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

To state a prima facie violation of EERA section 3543.5(d), the charging party must allege facts which demonstrate that the employer's conduct tends to interfere with the internal activities of an employee organization or tends to influence the choice between employee organizations. (*Santa Monica Community College District* (1979) PERB Decision No. 103; *Redwoods Community College District* (1987) PERB Decision No. 650.) Proof that an employer intended to unlawfully dominate, assist or influence employees' free choice is not required. Nor is it necessary to prove that employees actually changed membership as a result of the employer's act. (*Santa Monica CCD*; *Redwoods CCD.*) The threshold test is "whether the employer's conduct tends to influence [free] choice or provide stimulus in one direction or the other." (*Santa Monica CCD*, at p. 22.)

Here, the District hired the former CVE President. This information is insufficient to demonstrate that the employer's conduct tends to interfere with the internal activities of an employee organization or tends to influence the choice between employee organizations. Charging Party does not allege that the former CVE President, once appointed to her new position, engaged in any way in the internal affairs of CVE.

Further, the Board has long held that, "The collective negotiations process established by the EERA gives the parties the right to appoint their own negotiators and forbids either side from dictating who their opposing representatives may be." (*Yolo County Superintendent of Schools* (1990) PERB Decision No. 838, citing *San Ramon Valley Unified School District* (1982) PERB Decision No. 230; *Booth Broadcasting Co.* (1976) 223 NLRB 867; *Retail Clerks, Local 770 (Fine Foods Co.)* (1977) 228 NLRB 1166.)

Based on this precedent, which would preclude CVE from refusing to deal with the former CVE President in her new capacity, it is unclear how an individual employee can successfully challenge the District's hiring decision.

For these reasons the allegation that the District's hiring of the CVE President was in violation of Government Code section 3543.5, subdivision (d), as presently written, does not state a prima facie case.[2] If there are any factual inaccuracies in this letter or additional facts that

[2] In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make "a

would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before November 5, 2012,[3] PERB will dismiss the above-described allegation from your charge. If you have any questions, please call me at the telephone number listed above.

Sincerely,

Mary Weiss
Senior Regional Attorney

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determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the 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." (*Ibid.*)

[3] A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)