

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**



CORNELIUS OLUSEYI OGUN SALU,

Charging Party,

v.

SAN DIEGO UNIFIED SCHOOL DISTRICT,

Respondent.

Case No. LA-CE-5930-E

PERB Decision No. 2666

August 27, 2019

Appearances: Cornelius Oluseyi Ogunsalu, on his own behalf; Amy J. Bozone, Assistant General Counsel II, for San Diego Unified School District.

Before Shiners, Krantz, and Paulson, Members.

DECISION

PAULSON, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by Cornelius Oluseyi Ogunsalu (Ogunsalu) to a proposed decision by an administrative law judge (ALJ), which dismissed the complaint and unfair practice charge. The complaint alleged that the San Diego Unified School District (District) violated the Educational Employment Relations Act (EERA)¹ by taking adverse actions against Ogunsalu in retaliation for his protected activities. Based on our review of the proposed decision, the entire record, and relevant legal authority in light of the parties' submissions,² we affirm the dismissal of the complaint for the reasons set forth below.

¹ EERA is codified at Government Code section 3540 et seq. All statutory references are to the Government Code unless otherwise indicated.

² After the filings in this matter were complete, Ogunsalu filed a response to the District's response to his exceptions. Because PERB Regulations do not expressly permit or prohibit reply briefs, we have discretion to consider them. (*City of Milpitas* (2015) PERB

BACKGROUND

On July 1, 2013, Ogunsalu became a probationary teacher at the District's Bell Middle School. Michael Dodson (Dodson) was the principal and Precious Hubbard-Jackson (Hubbard-Jackson) and Marco Samaniego (Samaniego) were vice principals. Thelma Hernandez-Felix (Hernandez-Felix) was the campus police officer assigned to Bell.

On October 7, 2013, a student reported that Ogunsalu pulled him by either his backpack or a chain around his neck after the student refused Ogunsalu's command to remove the chain. Ogunsalu admitted that when the student tried to walk past him, he pulled the student by his backpack to stop him. On November 22, 2013, a student filed a complaint against Ogunsalu stating that he "keeps on pulling people, and he pulled me like 5 times." On December 2, 2013, Hubbard-Jackson saw Ogunsalu pulling a student by the backpack toward the administrative office. After the student wriggled out of the backpack, Ogunsalu threw it in the direction of the student.

On December 3, 2013, Hubbard-Jackson spoke with Ogunsalu about the November 22 complaint and December 2 incident. Ogunsalu admitted grabbing the backpack on December 2 and throwing it because the student refused his instructions to leave the classroom. Hubbard-Jackson ordered Ogunsalu to refrain from making physical contact with students. On December 5, Samaniego ordered him to "keep his hands off student clothing, backpacks, and persons."

Decision No. 2443-M, p. 13.) We have reviewed Ogunsalu's response and determined that it does not assist our review of this case and would not, in any event, alter the outcome. We therefore have not considered his response in rendering our decision.

On February 4, 2014, Officer Hernandez-Felix saw Ogunsalu engage in a tug-of-war with a student over a backpack in front of her office.³ Hernandez-Felix reported the incident to Dodson. On February 7, Dodson e-mailed Interim Chief Human Resources Officer Bernadette Nguyen (Nguyen) that he had a probationary teacher he wanted to non-reelect⁴ “because he can’t seem to keep his hands off the students.” On March 11, the District Board of Education approved Dodson’s recommendation to non-reelect Ogunsalu.

On March 12, Dodson told Ogunsalu about the non-reelection. Dodson initially gave him the option to take paid administrative leave for the rest of the school year or continue teaching, but two days later determined that the better course was to place Ogunsalu on paid administrative leave.

On March 13, the day before Dodson placed him on administrative leave, Ogunsalu suspected he may be replaced by a substitute. He logged into the substitute finder website, found a substitute assigned to his class the next day, and removed the substitute assignment. Then, at 1:29 a.m. on March 14, he sent an e-mail to Dodson, Hubbard-Jackson, Samaniego, Bell Middle School teachers, and others, accusing Dodson of a lack of judgment because “[m]y replacement for the rest of the school year is going to come from the custodian’s office.”

Later that morning, Dodson asked Hernandez-Felix to bring Ogunsalu to his office. District police detective Keith Boyd (Boyd) trailed behind Hernandez-Felix and Ogunsalu as they walked to Dodson’s office. Once there, Dodson told Ogunsalu the District was putting him on paid administrative leave. Ogunsalu went to his classroom to gather some personal

³ Unless otherwise specified, all further dates refer to 2014.

⁴ Non-reelection is a release from probation, terminating employment. (Ed. Code, § 44929.21, subd. (b).)

items and left the school. Shortly thereafter, Information Technology staff shut down Ogunsalu's District e-mail.

Ogunsalu immediately began inappropriate communications with Dodson, including texting Dodson on his personal cell phone. On March 23, Nguyen ordered Ogunsalu "to discontinue your contacts and communications to [Principal] Michael Dodson." But beginning on April 26 at 3:15 a.m., Ogunsalu resumed his e-mails, which became increasingly vulgar and abusive. Nguyen repeated her order to stop and warned, "[y]our refusal to comply will be deemed as insubordination." Nonetheless, Ogunsalu continued sending messages, including racist comments, gendered pejoratives, and allusions to violence.

Dodson grew concerned by the increasingly menacing character of Ogunsalu's messages and requested the District seek a restraining order. On April 28, Hernandez-Felix filed a police report on behalf of Dodson. On April 29, District General Counsel Andra Donovan directed Ogunsalu to immediately stop contacting District staff and warned of legal consequences for continued harassment. Ogunsalu continued sending messages of the same character to Dodson and began sending similar messages to Samaniego. On May 5, district police detectives went to Ogunsalu's home, asked him to stop sending messages to Dodson and Samaniego, and warned him that since Dodson had reported being a victim of a crime, continued harassment could be considered witness intimidation. But Ogunsalu's messages continued. Boyd filed a police report and submitted both the Dodson and Samaniego claims to the San Diego City Attorney's Office for them to make charging decisions.

Ogunsalu filed an unfair practice charge with PERB on June 23. He later amended the charge and withdrew certain allegations. PERB's Office of the General Counsel issued a complaint on July 6, 2015. On or about January 23, 2016, Ogunsalu made a motion to amend

the complaint, which was granted, in part, on February 12, 2016. The amended complaint alleged the District took multiple unlawful adverse actions including events leading up to and including his non-reelection, failure to provide training and evaluations, and various responses to Ogunsalu's conduct after he was notified of his non-reelection. The ALJ conducted a prehearing conference, four days of hearing, a second conference, and an additional three days of hearing. On April 11, 2018, he issued a proposed decision dismissing the complaint. Ogunsalu timely filed exceptions to nearly all of the ALJ's findings and conclusions.

DISCUSSION

Although the Board reviews exceptions to a proposed decision de novo, to the extent exceptions merely reiterate factual or legal contentions resolved correctly in the proposed decision, the Board need not further analyze those exceptions. (*City of Calexico* (2017) PERB Decision No. 2541-M, pp. 1-2.) The majority of Ogunsalu's exceptions raise arguments the ALJ considered and resolved appropriately, and we therefore do not address them here. We also decline to address arguments Ogunsalu makes for the first time in his exceptions. (*Los Angeles County Superior Court* (2018) PERB Decision No. 2566-C, pp. 11-12; *Colusa Unified School District* (1983) PERB Decision No. 296, p. 4.)

Furthermore, the Board need not address alleged errors that would have no impact on the outcome of the case. (*Los Angeles Unified School District* (2015) PERB Decision No. 2432, p. 2; *Regents of the University of California* (1991) PERB Decision No. 891-H p. 4.) Some of Ogunsalu's exceptions assert that certain factual findings constitute error but fail to explain how the alleged error impacts the outcome of his case. For example, though the ALJ found that Dodson, who initiated Ogunsalu's non-reelection, was aware that the San Diego Education Association (SDEA) had assisted Ogunsalu in obtaining second-year probationary

teacher status, Ogunsalu further excepts to the finding that Human Resources Officer Darin Noyes (Noyes), who was not involved in the non-reelection process, was not similarly aware, but does not explain how finding such knowledge on Noyes' part would change the outcome of this case. Absent such a showing, we need not consider these exceptions. (*Lake Elsinore Unified School District* (2019) PERB Decision No. 2633, p. 7; *Stanislaus Consolidated Fire Protection District* (2012) PERB Decision No. 2231a-M, pp. 7-8.)

Although we decline to address the majority of Ogunsalu's exceptions, we briefly summarize the predominant reason why Ogunsalu has not established an EERA violation. To demonstrate that an employer has discriminated or retaliated against an employee in violation of EERA section 3543.5, subdivision (a), a charging party must establish a prima facie showing that the exercise of employee rights granted by EERA was a motivating factor in the adverse action(s) taken by the employer. (*Novato Unified School District* (1982) PERB Decision No. 210, pp. 6-8 (*Novato*)). If a charging party establishes such a prima facie case, the burden shifts to the employer to prove that its action(s) would have been the same despite the protected activity. (*Id.* at p. 14.) To prove this affirmative defense, the employer must demonstrate it had both an alternative, non-discriminatory reason for taking the adverse action and that it, in fact, acted because of this alternative, non-discriminatory reason, and not because of the employee's protected activity. (*Palo Verde Unified School District* (2013) PERB Decision No. 2337, pp. 12-13, 31 (*Palo Verde*)).

The evaluation of evidence under this framework "is less formulaic than it may appear from our usual articulation of the *Novato* standards." (*San Diego Unified School District* (2019) PERB Decision No. 2634, p. 13, fn. 7.) The essence of the *Novato* test is to determine whether the employer acted for a discriminatory reason. (*Regents of the University of*

California (2012) PERB Decision No. 2302-H, p. 3.) To make this determination, we weigh the evidence supporting the employer’s justification for the adverse action against the evidence of the employer’s unlawful motive. (*Los Angeles County Superior Court, supra*, PERB Decision No. 2566-C, p. 19; *Rocklin Unified School District* (2014) PERB Decision No. 2376, p. 14; *Palo Verde, supra*, PERB Decision No. 2337, p. 33.) As a result, the outcome of a discrimination or retaliation case ultimately is determined by the weight of the evidence supporting each party’s position. (See *Novato, supra*, PERB Decision No. 210, p. 14 [“After all the evidence is in, it is a question of the sufficiency of the proof proffered by the various parties.”].)

The District has not excepted to the ALJ’s findings that Ogunsalu engaged in protected activity, the District knew of Ogunsalu’s exercise of employee rights, the District took some adverse actions against him, and the District was at least partially motivated by Ogunsalu’s protected activity.⁵ However, based on a thorough review of the record, we find the ALJ correctly determined that the District established its affirmative defense that it would have taken the same actions even absent such protected activity.⁶

The ALJ’s findings of numerous incidents in which Ogunsalu violated school norms and policies by engaging physically with students, as well as his inappropriate communications

⁵ Ogunsalu’s protected activity included seeking and obtaining help from his union, SDEA, as well as sending several communications to District administrators and teachers containing protected statements.

⁶ In this case, the evidence supporting the District’s burden on the retaliation allegations is also sufficient to meet its burden in response to the concurrent interference allegations, i.e., that operational necessity justified any harm to Ogunsalu’s EERA-granted rights.

with school administrators, are amply supported by the record.⁷ As the ALJ correctly observed, the evidence that the District was motivated by Ogunsalu's protected activities is "sparse," while the evidence supporting the District's legitimate, non-discriminatory reasons for the adverse actions is substantial. The District thus convincingly demonstrated that Ogunsalu's erratic and non-protected behavior would have led to the same consequences even had it not been intermixed with limited protected activity by Ogunsalu.

Finally, Ogunsalu describes parts of his exceptions as a request for injunctive relief and motion for reconsideration of the ALJ's ruling on his motion to amend the complaint. While neither was filed consistent with PERB's regulations, even if they had been, we would deny them because they lack merit.

ORDER

The complaint and underlying unfair practice charge in Case No. LA-CE-5930-E are DISMISSED.

Members Shiners and Krantz joined in this Decision.

⁷ Ogunsalu asks the Board to consider new evidence that his criminal conviction for sending threatening communications to Dodson and Samaniego has been set aside. We decline to do so because the evidence in the record does not suggest that the District "exaggerated or otherwise mischaracterized [the facts that led to the criminal charges], thereby evidencing an unlawful motivation." (*Adelanto Elementary School District* (2019) PERB Decision No. 2630, p. 11.) That a court later set aside the conviction thus is irrelevant to our inquiry. (See *Santa Ana Unified School District* (2012) PERB Decision No. 2235, p. 14 ["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."].)