STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

WILLIAM F. WILLIS, Charging Party, v. TEMECULA VALLEY UNIFIED SCHOOL DISTRICT Respondent.	)	Case No. LA-CE-2837 PERB Decision No. 836 September 7, 1990

Appearances: William F. Willis, on his own behalf; Atkinson, Andelson, Loya, Ruud & Romo by Karen E. Gilyard, Attorney, for Temecula Valley Unified School District.

Before Craib, Shank and Cunningham, Members.

DECISION

SHANK, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal of a proposed decision (attached) of an administrative law judge (ALJ), dismissing a charge filed by William F. Willis (Willis) against the Temecula Valley Unified School District (District). In his charge, Willis alleges that the District violated section 3543.5(a) and (b) of the Educational Employment Relations Act (EERA)[1] when Patricia Novotney (Novotney), a district superintendent, threatened Mark Schaeferle (Schaeferle), the chapter president of the California School Employees Association with adverse employment consequences if he assisted Willis at a grievance hearing. The ALJ found that the evidence did not establish that the alleged conversation

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

between Schaeferle and Novotney ever took place[2] and, based upon this finding, dismissed the complaint in its entirety.

PERB Regulation 32300[3] requires the party filing exceptions to a proposed decision to comply with specific guidelines, which mandate that the statement of exceptions include: (1) a statement of the specific issues of procedure, fact, law or rationale to which each exception is taken; (2) identification of the page or part of the decision to which each exception is taken; (3) designation of the portions of the record relied upon; and (4) the grounds for each exception. (Regulation 32300, subd. (a)(1) (4).) Additionally, the matters raised in the exceptions may only come from the record. (Regulation 32300, subd (b).)

Compliance with the regulations is required in order to afford the respondent and the Board an adequate opportunity to address the issues raised. (Ibid., see also San Diego Community College District (1983) PERB Decision No. 368.) A failure to comply with Regulation 32300 can result in the dismissal of an appeal. (See California State Employees Association (O'Connell) (1989) PERB Decision No. 726-H at p. 3; Los Angeles Unified School District (Mindel) (1989) PERB Decision No. 785.)

The District urges the Board to dismiss this appeal for failure to comply with PERB's regulations. In the case currently

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[2]In fact, Schaeferle denied making the statements attributed to him and Novotney denied having any conversations at all with Schaeferle regarding Willis' grievance or Schaeferle's representation of Willis at the March 7 grievance hearing.

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

before us, Willis has submitted exceptions consisting solely of various factual statements that can be construed as either disputing or supplementing some of the ALJ's factual findings, with no reference whatsoever to the record. Significantly, the only way that Willis could have prevailed in this case was if he had produced credible evidence that Novotney had threatened Schaeferle with adverse employment consequences if Schaeferle represented Willis in the March 7, 1989 board grievance hearing. Two exceptions go to this issue, both of which are discussed below.

(1) Willis states that: "Schaeferle told me on March 8, 1990 [sic] his reason for not representing me at the meeting March 7, 1990 [sic]."

This statement, in and of itself, is insufficient to apprise the District and the Board of exactly what Willis contends was said by Schaeferle and, more significantly, what evidence in the record supports his contentions as to what was actually said by Schaeferle.[4]

(2) He further claims, in his exceptions, that: "All statements by Schaeferle and Novotney are false."

Willis does not, however, point to any evidence in the record that would rebut the testimony of Schaeferle and Novotney

[4]We note that even if Willis could point to such evidence, the conversation between Willis and Schaeferle is hearsay and insufficient, in and of itself, to prove the contents of the conversation between Schaeferle and Novotney.

as recounted by the ALJ. Accordingly, Willis offers nothing to support this exception.

Willis' failure to comply with PERB's regulations renders his appeal fatally defective. We, therefore, affirm the ALJ's dismissal of the complaint.

ORDER

The charge and complaint in Case No. LA-CE-2837 are hereby DISMISSED.

Members Craib and Cunningham joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

WILLIAM F. WILLIS, Charging Party, v. TEMECULA VALLEY UNIFIED SCHOOL DISTRICT, Respondent.	)	Unfair Practice Case No. LA-CE-2837 PROPOSED DECISION (6/2 9/90)

Appearances: William F. Willis, on his own behalf; Atkinson, Andelson, Loya, Ruud & Romo by Karen E. Gilyard, Attorney, for Temecula Valley Unified School District.

Before W. Jean Thomas, Administrative Law Judge.

I. PROCEDURAL HISTORY

On March 2, 1989, William F. Willis (hereafter Willis or Charging Party) filed an unfair practice charge with the Public Employment Relations Board (hereafter PERB or Board) against the Temecula Valley Unified School District (hereafter District or Respondent). The charge alleged violations of the Educational Employment Relations Act (hereafter EERA or Act).[1]

The charge was amended on May 31, 1989, to delete certain factual allegations contained in the original charge. In his first amended charge, the Charging Party alleged that the president of the local classified union, California School Employees Association, Chapter 538 (hereafter CSEA or Association) told the Charging Party that he did not provide

[1]The EERA is codified at Government Code section 3 540 et seq. All section references, unless otherwise noted, are to the Government Code.

representation for him at a grievance hearing before the District governing board because the president had been threatened by the District superintendent and "feared for his job" if he gave Willis any assistance.

The General Counsel of PERB issued a complaint on June 21, 1989, which alleged employer interference with Willis' right of representation and, concurrently, the representational rights of his exclusive representative in violation of sections 3543.5(a) and (b).[2]

Respondent filed an answer to the complaint on July 12, 1989, denying all allegations of unfair practice and asserting, as an affirmative defense, that the complaint failed to state a prima facie unfair practice charge.

On July 17, 1989, an informal conference was held to explore voluntary settlement possibilities. However, the dispute was not resolved.

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[2]Section 3543.5 states, in pertinent part:

> UNLAWFUL PRACTICES: EMPLOYER
>
> It shall be unlawful for a public school employer to:
>
> (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.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

A formal hearing was conducted by the undersigned on September 13, 1989. Post-hearing briefs were filed on November 17, 1989, and the case was thereafter submitted for proposed decision.[3]

II. FINDINGS OF FACT

William F. Willis is an employee and the District is a public school employer within the meaning of the EERA. Willis is a member of the classified bargaining unit exclusively represented by CSEA. He has been employed by the District for several years and currently works as a custodian.

Mark Schaeferle has been employed by the District as its purchasing agent for approximately three years. Schaeferle is a classified employee and has been the president of the Association for at least two years.

CSEA and the District are parties to a collective bargaining agreement (CBA) that contains, among other provisions, a five-level grievance procedure.[4]

Patricia Novotney has been employed by the District as its superintendent since July 1, 1985. She has known Willis since she began her employment with the District. Novotney has known Schaeferle for approximately three years. CSEA has been the

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[3]Due to an apparent misunderstanding by the Charging Party about the procedure for serving briefs on opposing parties, Charging Party's brief was not served on the Respondent until March 27, 1990, pursuant to an order issued by this administrative law judge.

[4]Official notice is taken of the CBA between CSEA and the District contained in the PERB Los Angeles Regional Office files.

exclusive representative of the classified bargaining unit since Novotney commenced her employment with the District. Since her tenure began, Novotney has never known the president of CSEA to represent an employee in a grievance hearing before the District board.

In December 1988, Willis filed a grievance, dated December 6, 1988, alleging that another custodial employee, Janet Evans, had received favored treatment that violated Article 7 (Hours) of the collective bargaining agreement.

Novotney first saw this grievance in January 1989. She referred it to District Assistant Superintendent of Educational Support Services Jay Hoffman for processing. Novotney, however, did not personally speak with Willis, Schaeferle or any other classified employee about the grievance.

The grievance eventually proceeded to Level III of the grievance procedure, a hearing before the District governing board. The board set the matter for hearing on March 7, 1989.

Prior to March 7, Willis and Schaeferle had two meetings about Willis' grievance. The first meeting was held about one month before the hearing date. The second meeting occurred on February 13, 1989. George Holihan, the CSEA representative for Chapter 538, was also present at the February 13 meeting.

During the February 13 meeting, Schaeferle declined to represent Willis at the March 7 board grievance hearing. Schaeferle had never represented a bargaining unit member at a grievance hearing before the District board. Schaeferle felt

that Holihan should represent Willis. Schaeferle then asked Holihan to represent Willis and Holihan agreed to do so. When the February 13 meeting ended, Schaeferle understood that Holihan would represent Willis at the March 7 board hearing.

At the March 7, 1989 District board grievance hearing, the board granted Willis' grievance, but denied the remedy that he sought. Willis had no union representation since neither Schaeferle nor Holihan attended the March 7 hearing.

During the early afternoon of March 7, 1989, Willis telephoned Schaeferle's office and left a message for Schaeferle to call him. It is unclear whether Willis' message explained the reason for his call. When Schaeferle did receive the message, it was late in the day, so he returned Willis' call early the morning of March 8, 1989. Schaeferle, however, did not reach Willis.

Later in the day of March 8, Willis arrived at Schaeferle's office, very upset that Schaeferle did not attend the March 7 grievance hearing to represent him. Willis angrily accused Schaeferle of not representing him (Willis) or CSEA and abruptly left Schaeferle's office.

On or about March 29', 1989, Willis again spoke with Schaeferle about Schaeferle's nonrepresentation of him at the March 7 board hearing. Schaeferle allegedly told Willis that he did not come to the grievance hearing because he "feared for his job" if he gave any assistance to Willis. Schaeferle also allegedly told Willis that Superintendent Novotney had intimated/

threatened Schaeferle with denial of a promotion if he represented Willis at the grievance hearing.[5]

Both Schaeferle and Novotney testified about these alleged statements. Schaeferle denies ever making the statements attributed to him. Novotney denies ever having any discussion with Schaeferle about Willis' grievance or Schaeferle's representation of Willis at the March 7 grievance hearing. She further denies having any knowledge of Schaeferle's alleged representation of Willis concerning the December 1988 grievance. She also denies having any conversations with Schaeferle at any time during the 1988-89 school year about promotional vacancies. Schaeferle was not seeking a promotion between February 13 and March 7, 1989.

Since no evidence was presented to rebut the testimony of either Schaeferle or Novotney, it is found that the alleged statements attributed to Schaeferle and Novotney were not made.

Willis also sent a letter to the CSEA state office on March 29, 1989, complaining about the lack of representation by Schaeferle and Holihan at the March 7, 1989, board hearing. The letter asked for assistance from CSEA with Willis' appeal of his grievance to the next level of the grievance procedure. Willis

[5]Willis did not testify about this conversation with Schaeferle or present any other affirmative evidence to prove the alleged interfering conduct.

sent a copy of his March 29 letter to Schaeferle, but Schaeferle did not respond to it.[6]

III. ISSUES

Whether the District interfered with the Charging Party's right of representation and the representational rights of his exclusive representative by threatening adverse employment effects, including the denial of a promotion to the chapter president, if he assisted the Charging Party at a grievance hearing on March 7, 1989, thereby violating sections 3543.5(a) and (b)?

IV. CONCLUSIONS OF LAW

Section 3543.5(a) makes it unlawful for an employer to "interfere with, restrain, or coerce employees because of their exercise of rights guaranteed" by the Act. PERB has held that the Act protects the right of employees to be represented by their employee organization in grievance proceedings, pursuant to section 3543's guarantee of the right to ". . . participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-

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[6]In unfair practice charge No. LA-CO-487, William F. Willis v. CSEA, Chapter tt538. filed June 22, 1989, Willis alleged, in part, that the Association, through Schaeferle, arbitrarily and in bad faith failed to represent him at the March 7, 1989 grievance hearing. This conduct was alleged to be in violation of the Association's statutory duty of fair representation under EERA.

This dispute was resolved through an informal settlement reached by the parties, and the case was closed on April 24, 1990.

employee relations." Rio Hondo Community College District (1982) PERB Decision No. 272.

Section 3543.5(b) makes it unlawful for an employer to deny to employee organizations rights guaranteed to them by the Act. These rights, as embodied in section 3543.1(a), have been held to include the right to represent a unit member in a grievance matter with the employer. Rio Hondo Community College District, supra.

A prima facie case of "interference" is established when a charging party demonstrates that the employer has engaged in conduct which tends to or does result in some harm to employee rights. Where the harm to employee rights is slight and the employer offers justification based on operational necessity, the competing interests are balanced. If the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof it was occasioned by circumstances beyond the employer's control and no alternative course of action was available. Proof of unlawful intent is not required in establishing the necessary elements of interference. Anderson Union High School District (1986) PERB Decision No. 584, citing Carlsbad Unified School District (1979) PERB Decision No. 89. See also Novato Unified School District (1982) PERB Decision No. 210.

In this case the conduct constituting interference with the Charging Party's rights and also those of the Association, was an alleged conversation between Superintendent Novotney and

Association President Schaeferle sometime between February 13 and March 7, 1989. During this conversation, Novotney supposedly told Schaeferle that he would be denied a promotion if he assisted Willis at the March 7, 1989 District board grievance hearing. Because of this alleged threat, it is charged that Schaeferle did not attend the March 7 hearing because he "feared for his job" and the loss of a promotional opportunity.

A. The Alleged Section 3543.5(a) Violation

As a threshold matter here, the Charging Party's initial burden is to establish that the alleged conversation between Novotney and Schaeferle actually occurred during the time in question. A review of the record shows that the Charging Party's proffered evidence failed to prove this fact.

The only evidence presented to prove this allegation was the testimony of Schaeferle and Novotney. The unrebutted testimony of both witnesses shows that they never had a discussion at any time between February 13 and March 7, 1989, about the Willis grievance or Schaeferle's representation of him. Further, no evidence was presented to establish that Novotney even knew that Willis had sought Schaeferle's assistance with the grievance or that Schaeferle was supposed to represent him at the March 7 hearing. The evidence does show that Holihan agreed to represent Willis, but failed to appear at the hearing on March 7, 1989, as promised. No explanation was offered for Holihan's nonappearance.

Schaeferle also denied telling Willis on March 29, 1989, that Novotney had threatened him with the loss of a promotion, or intimated possible adverse employment consequences, if he represented Willis at the March 7 grievance hearing. Since the Charging Party did not testify about this conversation, Schaeferle's testimony is uncontroverted. Further, it is noted that no evidence was presented to establish that Schaeferle had applied for, or was being considered for, a promotion at the time of his alleged conversation with Novotney.

Based on this lack of proof, it is concluded that the District did not engage in the complained-of conduct, and thereby interfere with Willis' right of union representation at the March 7, 1989, District board grievance hearing. Any harm that may have been caused to the Charging Party because of this lack of representation is not attributable, in this case, to the District.

Having determined that a prima facie case of interference was not established, the section 3543.5(a) allegation must be dismissed.

B. The Alleged Section 3543.5(*b*) Violation

Charging Party also failed to present evidence that the Association's representational rights were adversely affected by any conduct engaged in by the District. As discussed earlier, the record failed to establish that the District threatened, coerced, or otherwise interfered with Schaeferle, or any other

Association representative, to dissuade him or them from representing the Charging Party at the March 7 grievance hearing.

Since the section 3543.5(b) allegation is also factually unsupported, it must be dismissed.

V. SUMMARY

Based on a thorough examination of the entire record, it is determined that there is insufficient evidence upon which to conclude that the Respondent engaged in conduct that amounted to a violation of either section 3543.5(a) or (b) of the Act. Therefore, the charge and its accompanying complaint must be dismissed.

VI. PROPOSED ORDER

Upon the foregoing findings of fact, conclusions of law and the entire record of this case, it is hereby ORDERED that the entire complaint and the underlying unfair practice charge are DISMISSED.

Pursuant to California Administrative Code, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. See California Administrative Code, title 8, section 32300. A document is considered "filed" when actually received before the close of business (5:00 p.m.)

on the last day set for filing ". . .or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . . ." See California Administrative Code, title 8, section 32135. Code of Civil Procedure section 1013 shall apply. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. See California Administrative Code, title 8, sections 32300, 32305 and 32140.

Dated: June 29, 1990

W. JEAN THOMAS
Administrative Law Judge