STATE OP CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

LAUREL BURCHELL,	)	
	)	
Charging Party,	)	Case No. LA-CE-3293
	)	
v.	)	PERB Decision No. 1059
	)	
CENTRALIA SCHOOL DISTRICT,	)	September 23, 1994
	)	
	)	
Respondent.	)	
	)	

Appearances: Laurel Burchell, on her own behalf; Atkinson, Andelson, Loya, Ruud and Romo by Robert L. Sammis, Attorney, for Centralia School District.

Before Carlyle, Garcia and Johnson, Members.

DECISION

JOHNSON, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Laurel Burchell (Burchell) of the administrative law judge's (ALJ) proposed decision (attached). In that decision the ALJ dismissed Burchell's unfair practice charge which alleged that the Centralia School District (District) violated section 3543.5(a) of the Educational Employment Relations Act (EERA)[1] by taking

[1]EERA is codified at Government Code section 3540 et seq. Section 3543.5 states, in pertinent part:

> It shall be 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.

adverse action against Burchell. Although the ALJ found "some evidence of minimal protected activity," Burchell could not prove that the District's motivation, even in part, was based on her protected activity.

The Board has reviewed the entire record in this case, including the ALJ's proposed decision, the transcript, exhibits, Burchell's statement of exceptions[2] and the District's opposition to the exceptions. The Board finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and, therefore, adopts them as the decision of the Board itself consistent with the following discussion.

BURCHELL'S EXCEPTIONS

On appeal, Burchell excepts to 11 statements made by the ALJ in the proposed decision. Burchell excepts to the ALJ's discussion which implies that there was little or no circumstantial evidence that the District was motivated, even in part, by Burchell's protected activity. Burchell next takes exception to the ALJ's finding that there was no violation that whenever the District wanted to engage in discussions regarding disciplinary issues, they would ensure that Burchell was represented by her union.

Furthermore, Burchell argues that the District's motivations and decision to terminate her was not due to her poor work performance but based on retaliation, disparate treatment,

[2]Burchell's request for oral argument in this case was previously denied by the Board.

shifting justifications and inadequate information. Finally, Burchell objects to the ALJ's dismissal of her charge, especially when the District was under no obligation to put forth any facts or evidence in its defense.

DISTRICT'S OPPOSITION TO EXCEPTIONS

The District refers to the ALJ's proposed decision in responding to Burchell's exceptions. The District states that Burchell's exceptions relate to matters of fact found by the ALJ and raise no challenge to the legal standards applied by the ALJ. Further, the District confirms that the ALJ correctly applied the legal standards to the facts presented by Burchell and correctly concluded that the District never denied Burchell the right to union representation.

DISCUSSION

The ALJ appropriately relied on the Board's decision in Novato Unified School District (1982) PERB Decision No. 210 (Novato), where the Board set out the elements of a prima facie case of discrimination or retaliation.

In order to state a prima facie case under Novato, Burchell must prove: (1) that she engaged in protected activity, (2) that the District had knowledge of her protected activity, (3) that the District took adverse action against her, and (4) the District took adverse action against her because she engaged in that protected activity. (See also, Carlsbad Unified School District (1979) PERB Decision No. 89.) Generally, if direct proof of a connection or nexus between protected activity and the

adverse action is unavailable, the charging party must rely on circumstantial evidence and/or inferences drawn from the record as a whole.

Novato also instructs that once a prima facie case has been established, the burden then shifts to the District to prove that it would have taken the action regardless of any protected activity. In the present case, Burchell did not establish a prima facie case. The burden does not shift to the District. Therefore, the District was under no obligation to put forth any evidence. Burchell failed to prove either by direct evidence or circumstantial evidence that the District was motivated, even in part, by her protected activity.

Assuming for argument sake that Burchell did in fact state a prima facie case, we further agree with the ALJ's finding that there was enough evidence presented in this record, without the District offering anything else, to rebut a prima facie case and prove that the District would have terminated Burchell, in spite of any protected activity. The record demonstrated that Burchell's behavior created an intolerable working relationship between herself and other teachers she was assigned to work with, as well as the principal.

In reaching his decision the ALJ found that there was no evidence of disparate treatment; there was no evidence of shifting justifications from the District; and in fact, there was no evidence of protected activity presented by Burchell that played a role in the District's decision making process. The

District's evidence showed that on numerous occasions various methods were used to effectuate change in Burchell's behavior, but to no avail.

Accordingly, the ALJ found that the. District's decision to terminate Burchell was based on poor performance and her rude and abusive behavioral tendencies, not on protected activity. We agree with the ALJ's conclusion that Burchell failed to establish a prima facie case.

ORDER

The unfair practice charge in Case No. LA-CE-3293 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Carlyle and Garcia joined in this Decision

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

LAUREL BURCHELL,	)	
	)	
Charging Party,	)	Unfair Practice
	)	Case No. LA-CE-3293
v.	)	
	)	PROPOSED DECISION
THE CENTRALIA SCHOOL DISTRICT,	)	(2/11/94)
	)	
Respondent.	)	
	)	

Appearances; Laurel Burchell, on her own behalf; Atkinson, Andelson, Loya, Ruud and Romo, by Robert L. Sammis, Attorney, for the Centralia School District.

Before JAMES W. TAMM, Administrative Law Judge.

PROCEDURAL HISTORY

On March 12, 1993, Laurel Burchell (Burchell or Charging Party) filed this unfair practice charge against the Centralia School District (District or Respondent). The charge was amended on March 25, 1993. On April 2, 1993, the case was placed in abeyance by the parties until June 2, 1993. On August 12, 1993, a complaint was issued by the general counsel's office of the Public Employment Relations Board (PERB or Board) alleging violations of section 3543.5(a) of the Educational Employment Relations Act (EERA).[1]

[1]**EERA** is codified at Government Code section 3540 et seq. The pertinent portion of section 3543.5 reads:

> 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.

The complaint specifically alleged that the District took adverse action against Burchell by denying her use of leave time, denying pay for a staff development day, issuing written reprimands, giving negative evaluations and terminating her employment because of her exercise of protected activity. The complaint further alleged that on several occasions the District denied Burchell the right to be represented by her union during interviews which would result in disciplinary action or in the alternative posed "highly unusual circumstances."

At the start of the formal hearing, the Charging Party amended the complaint, changing the dates of some allegations and adding additional allegations of denial of pay.

At the conclusion of the third day of hearing, the Charging Party rested her case and the District made a motion to dismiss the complaint. The parties waived transcripts but chose to file briefs. The matter was submitted January 21, 1994. After careful consideration of the entire record, the District's motion to dismiss is granted.

Negative Evaluations. Written Reprimands and Termination

Charging Party was a resource specialist assistant for the District since 1989. While her initial performance evaluations were satisfactory, she began having problems in her working relationships with her resource specialist teacher, Judee Comings, early in her employment.

During the 1991-92 school year Charging Party began having tardiness problems and her relationship with her principal,

Richard Hoss, deteriorated. That school year Charging Party-received reprimands for insubordination due to rudeness, and carelessness in leaving children unattended, among other reasons.

During the 1992-93 school year Charging Party's behavioral problems continued. Comings testified in a very credible manner, listing numerous examples, that the Charging Party undermined her efforts to teach, was generally incompetent to handle the tasks she was assigned and acted in an unprofessional manner. Comings testified that Burchell had an explosive temper and was verbally abusive and rude. Comings was clearly frightened to work with her. Comings asked the District to move Burchell to a different work assignment and even offered to teach without the support of a resource aide if the District would transfer Burchell. Comings generally described Charging Party's relationship with students as bizarre and inappropriate.

Comings testimony was supported by the credible testimony of Hoss, who characterized Charging Party's behavior as inappropriate and unprofessional. Hoss testified that he tried to change Charging Party's inappropriate behavior through informal and formal discussions with her, notes and directives, and then finally, written reprimands, however, nothing worked. According to Hoss, whenever he raised performance issues with Charging Party, she would get very upset and storm out of his office.

The Charging Party has put forth some evidence of minimal protected activity. For example, she raised concerns about her

work hours, safety issues, changes in assigned duties and pay. She also used the grievance procedure regarding the use of personal necessity leave, and filed a formal grievance regarding the use of sick leave. The formal grievance, however, was filed after the District had already decided to terminate her.[2]

In order to prove a prima facie violation, the Charging Party must prove (1) that she engaged in protected activity; (2) that the District had knowledge of her protected activity; (3) that the District took adverse action against her; and (4) the District took the adverse action against her because she engaged in that protected activity. (Novato Unified School District (1982) PERB Decision No. 210; Carlsbad Unified School District (1979) PERB Decision No. 89.)

Once the Charging Party has established a prima facie case, the burden then shifts to the Respondent to prove that it would have taken the action regardless of any protected activity. If, however, the Charging Party has not proven a prima facie case, the burden does not shift to the Respondent and it is under no obligation to put forth any evidence.

Here, Burchell had engaged in some minor protected activity. The District was aware that Burchell had engaged in protected activity. The District also admits that it took adverse action

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[2]The Charging Party has also claimed that a February 1992 meeting between Charging Party and the superintendent was also protected. I find, however, that the subject matter of that meeting was Charging Party's allegations of child abuse and thus, not a matter protected by EERA. (Regents of the University of California (Yeary) (1987) PERB Decision No. 615-H.)

against her. The final element that Charging Party must prove is that the District was motivated, at least in part, by her protected activity. Since an employer's motivation can seldom be proven by direct evidence, unlawful motivation can often be inferred from circumstantial evidence. Here, however, Charging Party has failed to prove by either direct or circumstantial evidence that the District was motivated, even in part, by her protected activity.

Charging Party's working relationship with the resource teacher and the principal was deeply troubled due to her rudeness, anger and her undermining of Coming's teaching. While the adverse action may have occurred at the same time as some of her protected activity, that is insufficient to prove unlawful intent. (Charter Oak Unified School District) (1984) PERB Decision No. 404.)

There was no evidence of disparate treatment or an inappropriate departure from established practices. There was no evidence of shifting justifications from the employer. There is certainly no evidence that the District based it's decision upon inadequate information. The District tried numerous methods to effectuate change in Charging Party's behavior, over a long period of time, to no avail.

In summary, it appears that the District based their decisions upon Charging Party's poor work performance and her rude and abusive behavioral tendencies. There is no evidence that Charging Party's protected activity played any role in the

District's decision making process. Charging Party has therefore not been able to prove a prima facie case, and the District is under no obligation to put forth any evidence in its defense.

If, however, assuming for argument's sake only, the Charging Party had proven a prima facie case, there is already enough evidence in this record, without the District offering anything else, to prove that the District would have taken the adverse action, including the termination, in spite of any protected activity. The evidence is clear that Charging Party's behavior had created an intolerable working relationship between herself and the teacher she was assigned to work with, as well as her principal.

Loss of Pay and Denial of Leave

The Charging Party has the same burden of proof on this issue as in the last issue. Here, however, Charging Party has not only failed to prove a nexus between her protected activity and adverse action, she has also failed to prove that any adverse action has occurred. In her brief, Charging Party claims that she was denied pay for 6 or 7 staff development and teacher preparation days. The record simply does not support such a claim.

It is not clear from the record that Charging Party was ever denied pay. For example, there was credible testimony from both District and Union officials that classified employees have the option of either working, taking vacation, or taking time off without pay for certain days Charging Party is alleging she

should have been paid. Charging Party was never told she could not work and receive pay. On one such occasion, Charging Party, in fact, came to work and then left on her own accord.

On another occasion, there was a dispute about the denial of personal necessity leave for regular doctor appointments. Even Charging Party's union representative testified that, contrary to Charging Party's wishes, it was improper to use personal necessity leave for such absences.

On another occasion, there was a dispute regarding Charging Party's failure to provide a requested medical verification of her illness. The contract, however, clearly and unequivocally allows the District to require verification of illness and there was no evidence that the policy was being applied in a retaliatory manner.

It appears that the issue from the District's point of view was the Charging Party's failure to comply with personal necessity and sick leave rules and policies rather than any retaliation for protected activity. Thus, the Charging Party has failed to prove a prima facie case regarding allegations that the District denied her use of leave and/or pay.

Denial of Representation Rights

The Board's policy regarding the right of an employee to be represented in meetings with an employer is based, in part, on the National Labor Relations Board's (NLRB) long standing

Weingarten rule.[3] Under that policy, private sector employees have a right to union representation at "investigatory interviews" when the employee reasonably believes the investigation will result in disciplinary action. Employers may, however, continue to carry out their investigation without interviewing the employee. Thus, the employee may be left with a choice of being interviewed without union representation or having no interview and foregoing the possible benefits that might occur from an interview.

In Redwoods Community College District v. PERB (1984) 159 Cal.App.3d 617 [205 Cal.Rptr 523], the circumstances providing for employee representation at investigatory interviews were broadened to those involving "highly unusual circumstances even though there may be no expectation of discipline." In that case, the employee was required to attend an interview regarding a negative evaluation. The meeting was conducted in a formal manner by a high level administrator, in spite of the fact that the employee and her supervisor had worked out their differences and had both requested that the meeting be cancelled. The court held the meeting to be both investigatory and intimidating. Although there was no reasonable expectation of discipline in that case, the court provided the right of representation at the meeting due to the highly unusual circumstances of the interview.

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[3]NLRB v. Weingarten, Inc. (1975) 420 U.S. 251 [88 LRRM 2689].

Nothing in that case, however, suggests that the employee's right to be represented is violated when an employer decides not to conduct an investigatory interview. In this case, the employer did not require the Charging Party to attend any interviews. Quite the contrary is true. The District scrupulously avoided requiring Charging Party's attendance at investigatory meetings without her union representative. "The evidence is clear that the only time the Charging Party attended meetings without a union representative was when she demanded to meet (in spite of the District's desire to put off the meeting until the union representative could attend) or when the District simply presented Charging Party with disciplinary action (written reprimand or termination papers) and did not seek to discuss the matters. Even in the latter situation, the District would typically contact the union representative first and inform her that the District was going to present Charging Party with disciplinary action, and offer an opportunity for the union representative to attend.

Whenever the District wanted to engage in discussions regarding disciplinary issues, they would ensure that the Charging Party was represented by her union representative, even if that meant rescheduling the meeting. It appears that the District felt it was in the District's best interests, just as much as in Burchell's interest, to have the union representative present when any performance/disciplinary discussions occurred.

Therefore the Charging Party has failed to prove that she was ever denied union representation in investigatory meetings which could lead to discipline or in any meetings involving "highly unusual circumstances" as outlined in Redwoods Community College District, supra.

CONCLUSION AND ORDER

For the above listed reasons, the District's motion to dismiss is granted and this complaint is hereby dismissed in its entirety.[4]

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a Notice of Intent to File Exceptions and a completed Transcript Order form (attached hereto) with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. Any party anticipating filing a responsive statement, pursuant to section 32310, should forward a completed Transcript Order form within 5 days of receipt of a Notice of Intent to File Exceptions. Within 20 days of service of the transcript, the party shall file a statement of exceptions with the Board itself at the headquarters office in Sacramento.

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[4]At the hearing the District raised an objection to Charging Party's introduction of transcripts of her secretly recorded telephone calls and conversations. The District based its objection on Penal Code section 631 (wiretapping). Those motions to exclude are denied, however, nothing in the transcripts or Charging Party's offer of proof regarding conversations not yet transcribed, would alter in any way, my decision on the District's motion to dismiss this complaint. It is therefore unnecessary to deal with the issue of the accuracy of the tapes or transcripts.

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 Cal. Code of Regs., tit. 8, sec. 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 Cal. Code of Regs., tit. 8, sec. 32135; Code Civ. Proc, sec. 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 Cal. Code of Regs., tit. 8, secs. 32300, 32305 and 32140.)

James W. Tamm
Administrative Law Judge