STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MICHAEL WAYMIRE, Charging Party, v. MONTEREY PENINSULA COMMUNITY COLLEGE DISTRICT, Respondent.	Case No. SF-CE-2246-E PERB Decision No. 1492 July 31, 2002

Appearance: Michael Waymire, on his own behalf.

Before Baker, Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Michael Waymire (Waymire) of a Board agent's dismissal (attached) of his unfair practice charge. The charge alleged that the Monterey Peninsula Community College District (District) violated the Educational Employment Relations Act (EERA)[1] by, among other things, conspiring with the Federal Bureau of Investigation to harass him. Waymire alleged that this conduct constituted a violation of EERA section 3543.5(a).[2]

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

[2]EERA section 3543.5 provides, 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

After reviewing the entire record in this matter, including Waymire's unfair practice charge, the warning and dismissal letters, and Waymire's appeal, the Board dismisses the unfair practice charge in accordance with the following discussion.

DISCUSSION

The Board agent dismissed the case on the basis that Waymire was not a "public school employee" under EERA section 3540.1(j).[3] She supported her conclusion citing the factors set forth in Goleta Union School District (1984) PERB Decision No. 391. She reasoned that, as of January 22, 1998, Waymire no longer worked for the District and therefore, the Board did not have jurisdiction over violations identified in the charge that were alleged to have occurred after that date. All violations alleged in the charge took place in 2001. In addition, Waymire had not provided any evidence that, at the time of the alleged violations, he was performing services for or receiving compensation from the District. Since Waymire lacks standing to invoke the protection of EERA, the Board lacks jurisdiction over this charge.

Although dismissing the charge on this jurisdictional basis, the Board agent nonetheless addressed the alleged violations. She found that, assuming he was an employee under EERA, Waymire had still failed to state a prima facie case of either discrimination or interference.

> of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

[3]EERA section 3540.1(j) provides:

> (j) "Public school employee" or "employee" means any person employed by any public school employer except persons elected by popular vote, persons appointed by the Governor of this state, management employees, and confidential employees.

The Board agrees with the Board agent's conclusion that Waymire is not a "public school employee" under EERA. In the Board's decision in Goleta Union School District (1984) PERB Decision No. 391, pp. 15-17, the Board provides guidance in determining who is a "public school employee" under Section 3540.1(j). The Board looks at the statutory language and at indicia of employment. (Id.) Under the statute, the charging party must be "employed" by the public school employer. Such factors denoting "employment" include: (1) the individual provides services to the District; (2) the individual receives compensation from the District; (3) the individual is under the supervision of the site principal; (4) the individual is performing services at the District's school site; and (5) the individual uses the District's supplies and facilities. (Id.) In this case, Waymire has not provided services to the District or on the District's premises, received compensation from the District, or been under the supervision of District management since January 22, 1998. Therefore, Waymire is not a "public school employee" under EERA.

Only an employee, employee organization, or employer has standing to file an unfair practice charge under EERA.[4] Since Waymire clearly lacks such standing, the Board, as a

[4]EERA section 3541.5 provides, in pertinent part:

> The initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board. Procedures for investigating, hearing, and deciding these cases shall be devised and promulgated by the board and shall include all of the following:

result, does not have jurisdiction to adjudicate his charge. (See, e.g., the discussion regarding Board jurisdiction in North Orange County Regional Occupational Program (1990) PERB Decision No. 857.)

Accordingly, there is no need to evaluate the alleged EERA violations in Waymire's charge, and the Board, thereby, does not adopt that portion of the dismissal in its decision.

ORDER

The unfair practice charge in Case No. SF-CE-2246-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Baker and Neima joined in this Decision.

(a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following.
(Emphasis added.)

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-7242
Fax: (916) 327-6377

April 10, 2002

Michael Waymire
2095 Highland Street
Seaside, CA 93955-3309

Re: Michael Waymire v. Monterey Peninsula Community College District
Unfair Practice Charge No. SF-CE-2246-E
DISMISSAL LETTER

Dear Mr. Waymire:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 1, 2002. You allege that the Monterey Peninsula Community College District (District) discriminated against you and violated the Educational Employment Relations Act (EERA)[1]

I indicated to you in my attached letter dated March 28, 2002, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to April 8, 2002, the charge would be dismissed.

On April 8, 2002, I received a letter from you indicating that you will not file an amended charge. Therefore, I am dismissing the charge based on the facts and reasons contained in my letter dated March 28, 2002.

Right to Appeal

Pursuant to PERB Regulations,[2] you 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. (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 before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight

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

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

delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Regulations 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of 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. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

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

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 Regulation 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (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. (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,

ROBERT THOMPSON
General Counsel

By _____
Rehema Rhodes
Board Agent

Attachment

cc: Daniel A. Osher
Sonja Johnson

RR

STATE OF CALIFORNIA GRAY DAVIS, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-7242
Fax: (916) 327-6377

March 28, 2002

Michael Waymire
2095 Highland Street
Seaside, CA 93955-3309

Re: Michael Waymire v. Monterey Peninsula Community College District
Unfair Practice Charge No. SF-CE-2246-E
WARNING LETTER

Dear Mr. Waymire:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 1, 2002. You allege that the Monterey Peninsula Community College District (District) discriminated against you and violated the Educational Employment Relations Act (EERA)[1] by using and influencing others to interfere with the exercise of your protected employee rights under EERA.

FACTS

Your employment as a Utility Specialist for the District ended on January 22, 1998.

The facts that gave rise to this charge are as follows:

On March 9, 2001, two of the unfair practice charges you filed against the District and the California School Employees Association (CSEA) (SF-CE-2177-E and SF-CO-580-E) were investigated and dismissed by the Board agent. You timely filed an appeal.

On March 18, 2001, while typing a proof of service form to Gwen Miller of CSEA, your typewriter printed out "KILL" three times before it corrected itself on the fourth attempt. You suspected the District and the Federal Bureau of Investigation (FBI) conspired to have an FBI agent enter your home and program your typewriter to type "KILL."

On March 19, 2001, you were admitted to the Community Hospital of the Monterey Peninsula (CHOMP). On March 23, 2001, Vicki Hulsey, the District's Warehouse Supervisor, came to your hospital room, opened the door, and stared at you for few minutes.

On March 25, 2001, you attended a group meeting in the ward of CHOMP. During the meeting, you were introduced to a very talkative teenage female. On March 26, 2001, Ms.

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

Hulsey furnished your home phone number to the teenage female. The teenage female made a harassing call to your residence the same day.

On June 14, 2001, while flying to Denver, Colorado to visit your children and grandchildren, the District and the FBI arranged for an FBI agent to also be on the plane with you. The FBI passed several messages to you by putting the notes in large print in the middle of each page of his magazine and holding the magazine up for you to read it. The messages were as follows:

1. DON'T FIGHT THE FEDS!
2. NATION'S #1 BEST SELLER NOT AVAILABLE
3. TRAVEL-TRAPPED IN AMERICA
4. TRAVEL ASSISTANCE FOR THE DISABLED

When the plane landed in Denver, the District and the FBI arranged for the flight attendant to announce over the intercom, "Everyone be careful out there, as we all know, SHIT HAPPENS."

In June of 2001, the District and the FBI arranged for FBI agent Larry Mefford to rapidly accelerate pass you in a black and blue sports utility vehicle as you were coming out of the Del Monte Shopping Center in Monterey, CA. There was also another occasion where you believed the District and the FBI arranged to have the FBI agent teaching self-defense at the Monterey Peninsula College Police Academy (MPCPA) strike up a conversation with you at the Orchard Supply Hardware store in Sand City, CA.

On June 25, 2001, the PERB Board upheld the dismissals of the unfair practice charges you filed (SF-CE-2177-E and SF-CO-580-E) and issued Decision Nos. 1448 and 1449.

In November, 2001, you requested a copy of your medical records from CHOMP. On January 7, 2002, you received your medical records and discovered omitted and false information in your medical records. You suspected that Dr. Michael Lebowitz, your treating physician, and the District conspired to omit and add false information to your medical records.

On March 13, 2002, we discussed your present charge against the District. On March 18, 2002, per our conversation on March 13, 2002, you provided additional information to support your unfair practice charge.

On March 18, 2002, Robert Thompson, General Counsel, responded to your March 13, 2002, letter requesting clarification as to whether PERB would prosecute your current charges. Mr. Thompson informed you that as an administrative agency, PERB does not prosecute charges, but rather, investigates charges that are filed in order to determine whether a violation of the EERA has occurred and if there is a violation and the charge was timely filed, issues a complaint.

On March 19, 2002, you received another harassing phone call by a female who said, "DIE!" and hung up the phone.

On March 21, 2002, you forwarded to me additional evidence to support your contention that Dr. Michael Lebowitz falsified your medical records at CHOMP. In your letter to me, you acknowledged the fact that the issue of whether or not Mr. Lebowitz falsified your medical records is not within PERB's jurisdiction to investigate but rather, is a matter that belongs to the medical review board.

DISCUSSION

Definition of Employee Under the EERA

Under EERA subsection 3540.1(j), a public school employee is defined as:

> "...any person employed by any public school employer except persons elected by popular vote, persons appointed by the Governor of this state, management employees, and confidential employees."

Factors to be considered in determining whether an individual is an employee under the EERA are: (1) receipt of compensation from the District, (2) the individual provides a service to the District, (3) individual's services are performed at the District's school site, and (4) the individual is under the supervision of the site principal. (Goleta Union School District, (1988) PERB Decision No. 391. p. 14-17.)

Due to the fact that your position with the District was terminated on January 22, 1998, it appears PERB lacks jurisdiction over your charges of discrimination and interference which occurred after that date. Moreover, you have not provided any facts to support a finding that you were either being compensated by or providing services to the District at the time the events described in the charge occurred. Thus, because you do not have standing to invoke the protection of EERA and you were not an employee at the time of the events, PERB does not have jurisdiction over this charge.

Discrimination Charge

Further, even assuming you were an employee of the District at the time the events occurred, you fail to present a prima facie case. In order to demonstrate a violation of EERA section 3543.5(a), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.)

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), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following

additional factors must also be present: (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; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; (6) employer animosity towards union activists (Cupertino Union Elementary School District) (1986) PERB Decision No. 572.); or (7) any other facts which might demonstrate the employer's unlawful motive. (Novato; North Sacramento School District, supra, PERB Decision No. 264.)

You state that the District discriminated against you by conspiring with the FBI in order to violate your protected rights under the EERA. However, you have not articulated any facts that would impute the District in a conspiracy to impact your employment. There are no facts to support your contention that the District arranged to have the FBI break into your home to re-program your typewriter, send messages to you on the airplane to Colorado, and drive by you at a mall. Therefore, you have failed to show the District discriminated against you based on the exercise of your protected rights under the EERA.

Interference Charge

To demonstrate a prima facie cases of interference, the charging party must show that the Respondent's conduct tends to or does result in some harm to employee rights guaranteed by the EERA. (Carlsbad Unified School District (1979) PERB Decision No. 89 at p. 10.) In Chula Vista City School District (1990) PERB Decision No. 834, at pp. 10-13, the Board reviewed and quoted from its decision in Rio Hondo Community College District (1980) PERB Decision No. 128, stating:

> "...employer speech causes no cognizable harm to employee rights granted under EERA unless it contains threats of reprisal or force or promise of a benefit. Therefore, a prima facie case of interference cannot be based on speech that contains no threats of reprisal or force or promise of a benefit."

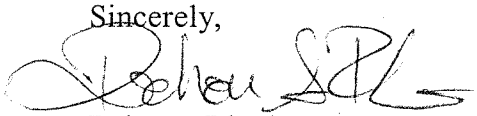
Whether the employer's speech is protected or constitutes a proscribed threat or promise if determined by applying an objective rather than a subjective standard. (California State University (1989) PERB Decision No. 777-H, P.D., p. 8.) Thus, "the charging party must show that the employer's communications would tend to coerce or interfere with a reasonable employee in the exercise of protected rights." The fact, "That [sic] employees may interpret statements, which are otherwise protected, as coercive does not necessarily render those statements unlawful." (Regents of the University of California (1983) PERB Decision No. 366-H, fn. 9, pp. 15-16; BMC Manufacturing Corporation (1995) 113 NLRB 823 [36 LRRM 1397].)

The Board has also held that statements made by an employer are to be viewed in their overall context (i.e., in light of surrounding circumstances) to determine if they have a coercive meaning. (Los Angeles Unified School District (1988) PERB Decision No. 659, p. 9, and cases cited therein.)

You state that Ms. Hulsey visited your hospital room and stared at you for a few minutes on March 23, 2002. An employer's speech will only cause cognizable harm to employee rights if the speech contains threats or reprisal or promise of benefit. Here, Ms. Hulsey did not say anything to you, nor did she make any threatening gesture or use any force while standing in the doorway of your hospital room. Therefore, you have not shown Ms. Hulsey's presence at CHOMP tended to result in any harm to your protected employee rights.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, please 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 the 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 I do not receive an amended charge or withdrawal from you before April 8, 2002, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,



Rehema Rhodes
Board Agent

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