STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MAURA HOGAN LARKINS, Charging Party, v. CHULA VISTA ELEMENTARY SCHOOL DISTRICT, Respondent.	Case No. LA-CE-4382-E PERB Decision No. 1557 November 20, 2003

Appearances: Maura Hogan Larkins, on her own behalf; Parham & Rajcic by Marc R. Bresee, Attorney, for the Chula Vista Elementary School District.

Before Baker, Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case comes before the Public Employment Relations (PERB or Board) on appeal by Maura Larkins (Larkins) of a Board agent's dismissal (attached) of her unfair practice charge. The charge, which was filed February 7, 2002, alleged that the Chula Vista Elementary School District (District) violated the Educational Employment Relations Act (EERA) [1] by subjecting Larkins, a teacher, to false allegations regarding conduct at the worksite, twice removing her from her classroom, issuing a disciplinary letter against her, directing her to meet with an unauthorized district official regarding a change of assignment, unjustifiably suspending her employment without pay, depriving her of an evidentiary hearing regarding her suspension, terminating her benefits, and threatening her with dismissal in retaliation for the protected activity of filing grievances and complaining about District

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

non-compliance with the terms governing several official programs. Larkins alleged that this conduct constituted a violation of EERA section 3543.5.[2]

The Board agent dismissed Larkins charge and first amended charge for failure to state a prima facie case in that she had not alleged facts establishing a nexus between her alleged protected activity and the District's imposition of alleged adverse action against her.

DISCUSSION

Considering the parties' filings, arguments and submissions on appeal, and the Board agent's analysis, the Board adopts the warning and dismissal letters as the decision of the Board itself, subject to the following discussion.

---

[2] EERA 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. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.
>
> (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.
>
> (e) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).

Larkins argues on appeal that the Board agent failed to address several allegations contained in the charge and improperly relied on District representations to resolve disputed issues of fact in order to reach the decision to dismiss the charge. The District argues that Larkins failed to produce factual allegations to support a claim that its actions were motivated by her protected activity.

After a thorough review of the parties' filings, the Board agent's analysis, and the parties' submissions on appeal, the Board finds the warning and dismissal letters to be free of prejudicial error. Larkins is correct that the Board agent omitted discussion of some of her allegations. However, the Board finds that the allegations not specifically discussed by the Board agent, even when considered and treated as true, do not cure Larkins' failure to state a prima facie case.

Larkins is also correct that the Board agent derived some of her factual presumptions from the District's submissions. However, it does not appear that the Board agent credited the District's assertions over those from Larkins when they were in conflict. Rather, the Board agent used District submissions (primarily in the form of copies of correspondence) to provide a factual context during time periods when Larkins provided no detail and made, at most, only conclusionary statements.

ORDER

The unfair practice charge filed by Maura Hogan Larkins in Case No. LA-CE-4382-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Baker and Whitehead joined this Decision.

STATE OF CALIFORNIA GRAY DAVIS, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 322-3198
Fax: (916) 327-6377

June 7, 2002

Maura Hogan Larkins
1935 Autocross CT
El Cajon, CA 92019

Re: Maura Hogan Larkins v. Chula Vista Elementary School District
Unfair Practice Charge No. LA-CE-4382-E
DISMISSAL LETTER

Dear Ms. Larkins:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 7, 2002. Your charge alleges that the Chula Vista Elementary School District violated the Educational Employment Relations Act (EERA),[1] Government Code section 3543.5(a), by discriminating against you for engaging in protected activity.

I indicated to you in the attached letter dated March 29, 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 16, 2002, the charge would be dismissed. Your requests for extensions of time to file an amended charge were granted. Your amended charge was filed on May 31, 2002.

You are employed as a third-grade bilingual education teacher at Castle Park Elementary School. Your charge alleges that the District discriminated against you for engaging in protected activity when it removed you from the classroom on April 20, 2001; placed you on unauthorized leave without pay on September 26, 2001; notified you on November 14, 2001 that your benefits would end effective December 1, 2001; and on November 15, 2001, threatened you with dismissal. (Novato Unified School District (1982) PERB Decision No. 210; Carlsbad Unified School District (1979) PERB Decision No. 89, see discussion of discrimination standard in attached letter.)

You engaged in protected activity when you filed grievances against the District and sought assistance from the union. Your amended charge provides details of your eight grievances.[2]

---

[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] The grievances demonstrate that the statute of limitations was tolled during exhaustion of the grievance procedure.

In your amended charge, you contend that the nexus or connection between your protected activity and the District's adverse action is established based on the following conduct. In August 2001, Assistant Superintendent Richard Werlin began calling to inform you that you had been cleared to return to work. He instructed you to meet with him to discuss your options for teaching assignments for the 2001-2002 school year. You were aware that the District was considering transferring you to another school site. Prior to the school year there were several vacant positions available for transfer. When you did not respond to the telephone calls, Mr. Werlin sent you at least five letters during the month of September 2001 directing you to meet with him concerning your teaching assignment. Mr. Werlin informed you that the District was not able to hold teaching assignment vacancies indefinitely.

You finally responded to a letter dated October 3, 2001, from Superintendent Libia Gil directing you to meet with her on October 5. During the October 5 meeting, Ms. Gil informed you that a teaching position was available at Loma Verde Elementary School. You were directed to report for duty on October 8, 2001 at Loma Verde Elementary School. You contend that the District departed from the involuntary transfer provisions in the collective bargaining agreement (CBA) when the District did not provide you with written reasons for your transfer.

Article 33 of the CBA provides procedures for involuntary transfers. Section 33.4.1 provides procedures for transfers prior to the start of the school year. Within this provision, section 33.4.1(f), is the requirement that the District provide its reasons for transfer in writing upon written request from the employee.

Section 33.4.2 provides criteria for transfers which occur during the school year. This provision does not require a written statement of reasons for transfer.

Finally, section 33.5 states:

> Notwithstanding any other provision in this article, should a determination be made by the Superintendent that an involuntary administrative transfer is reasonably necessary, such transfer may be made by the Superintendent following a conference with the employee.

Beginning in August 2001, before the start of the school year, the District attempted to schedule meetings with you to discuss your teaching assignment for the 2001-2002 school year. However, you failed to respond to the District. After the school year began, you again failed to respond to numerous written directives in September 2001 to meet with the District concerning your teaching assignment. Ultimately, on October 5, 2001, the District made a determination to transfer you to Loma Verde Elementary School. Under the provisions of Section 33.5, the District is not required to provide its reasons for transfer in writing. Thus, this conduct does not demonstrate nexus.

You also contend that the District violated Article 38, Employee Discipline, by failing to conduct a full evidentiary hearing after it suspended you without pay on September 26, 2001.

This provision, and its hearing requirement, are inapplicable. On August 22, 2001, you were cleared to return to work. As discussed above, you failed to respond to the District's numerous directives in August and September 2001 to report to work. On September 26, 2001, the District notified you that your failure to report for work constituted unauthorized leave and your pay was stopped. This conduct does not meet the criteria for employee discipline under Article 38. Accordingly, the District did not breach this provision when it failed to give you a full evidentiary hearing.

You assert that the District engaged in disparate treatment by responding to other employees' safety concerns by removing you from the classroom, at the same time ignoring your safety concerns. You contend that you felt threatened by Mr. Werlin's verbal abuse and refused to meet with him in August and September 2001. However, as Mr. Werlin stated in his letters, several District representatives were set to participate in these meetings and union representation was available to you. This conduct also fails to demonstrate the required nexus.

Your charge also makes various other claims of inconsistent conduct by the District, including alternately removing and returning you to work; failing to investigate your concerns, and placing you on sick leave on March 7, 2001 when you were out on paid administrative leave.

These claims failed to demonstrate a connection between your protected activity and the adverse action. The District informed you that you were removed from the classroom on February 12 and April 20, 2001, based on concerns for employee and student safety. There is no evidence the District provided you with differing reasons for your removal from the classroom. Further, your charge states that the District did conduct an investigation and issued a report on November 21, 2001. Finally, your charge does not provide facts which demonstrate that your placement on sick leave was inappropriate under the circumstances of your removal from the classroom. Accordingly, your charge fails to demonstrate a prima facie case of discrimination and is hereby dismissed.

Right to Appeal

Pursuant to PERB Regulations,[3] 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

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

shown on the postal receipt or postmark, or delivered to a common carrier promising overnight 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 _____
Robin W. Wesley
Regional Attorney

Attachment

cc: Mark Bresee

STATE OF CALIFORNIA GRAY DAVIS, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8385
Fax: (916) 327-6377

March 29, 2002

Maura Hogan Larkins
193 Autocross CT
El Cajon, CA 92019

Re: Maura Hogan Larkins v. Chula Vista Elementary School District
Unfair Practice Charge No. LA-CE-4382-E
WARNING LETTER

Dear Ms. Larkins:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 7, 2002. Your charge alleges that the Chula Vista Elementary School District violated the Educational Employment Relations Act (EERA),[1] Government Code section 3543.5(a), by discriminating against you for engaging in protected activity.

Your charge makes the following factual allegations. You are employed by the District as a third grade teacher at Castle Park Elementary School. At some point during the school year, you complained about "violations of the State Education Code and the subversion of the Comer Program for which [the] school had paid over $10,000." You explained that the Comer Program is a relationship process where teachers, students and parents are respected. At some point, a group of teachers at your school were angry because you objected to another program.

On February 12, 2001, you attended a meeting with Assistant Superintendent Richard Werlin. Mr. Werlin informed you that two teachers had filed a complaint alleging that you had behaved as if you were going to kill someone and they feared for their safety. Mr. Werlin informed you that you were being removed from your classroom.

In March 2001, Mr. Werlin informed you that you had been cleared to return to school. On March 27, 2001, while visiting your classroom you spoke with Mr. Werlin. Following the meeting, Mr. Werlin accused you of irrational behavior and throwing pens at him.

You returned to your teaching assignment on April 16, 2001. You stated that after you returned to work, the atmosphere was intense. Some people were upset and others believed the false accusations about you and were afraid of you. On April 20, 2001, Mr. Werlin telephoned you and told you that you were being removed from the classroom and placed on paid administrative leave.

[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.

Gina Boyd, President of the Chula Vista Elementary Educators Association, demanded that you attend a meeting with Mr. Werlin on April 25, 2001. You did not attend the meeting. Ms. Boyd later told you that Mr. Werlin stated that you needed a fitness for duty evaluation.

In May 2001, the Association filed a grievance on your behalf concerning Mr. Werlin's accusation in March 2001 that you were irrational. You retained an attorney and with her assistance you also filed a separate grievance concerning this matter in May 2001.

On June 9, 2001, you filed a grievance challenging your April 20, 2001 removal from the classroom.

In August 2001, Mr. Werlin began calling you to inform you that you had been cleared to return to work. He also instructed you to meet with him concerning your teaching assignment. When you did not respond to his phone messages, Mr. Werlin sent you letters dated September 3, 7, 17, 20 and 26, 2001, directing you to meet with him regarding your class assignment for the new school year. You did not attend the scheduled meetings. Mr. Werlin stated in his September 17 letter:

> You are once again directed to report to my office on Friday, September 21, 2001 at 7:30 A.M. to discuss possible assignments for the 2001-02 school year and to make arrangements for you to pick up the rest of your personal property. Your repeated failure to appear per earlier directives outlined in letters sent on September 7, 2001 and September 3, 2001 constitutes insubordination. Failure to follow the directive to appear in my office this Friday will be viewed as insubordination.

Your charge states that you were afraid to meet with Mr. Werlin because he had previously falsely accused you of throwing pens at him.

In a September 26, 2001 letter, Mr. Werlin stated, in part:

> As of this date, you have persistently refused to comply with specific directives to meet with us to resolve the issues addressed above. We continue to have a number of administrators and other support staff on hand at all of these meetings to help resolve pending issues. Repeated failure to follow our directives constitutes insubordination.
>
> Please be advised that your decision and subsequent repeated actions to refuse to report to my office coupled with your failure to report back for duty this school year have placed you in an *unpaid status.*

Your pay was stopped effective September 1, 2001.

Within ten days of receiving the September 26 letter, you "demanded a full evidentiary hearing regarding [your] suspension without pay." The District refused to schedule a hearing despite your contention that a hearing was required by the collective bargaining agreement. The District states that you were never placed on "suspension without pay." While on administrative leave you continued to be paid. However, when you refused to report for assignment, the District states you were placed on "unauthorized leave" and your salary payments were discontinued.

On October 3, 2001, Superintendent Libia Gil sent you a letter directing you to meet with her on October 5. On October 4, Ms. Gil denied your request to postpone the meeting.

During your meeting with Ms. Gil on October 5, you were directed to report to your teaching assignment on October 8 at Loma Verde Elementary School. In a letter confirming the assignment, dated October 5, 2001, Ms. Gil stated, in part:

> Please be advised that failure to comply with the directive contained in this letter may result in disciplinary action up to and including dismissal from employment.

You did not report for work on October 8, 2001, "out of fear for [your] safety."

On November 13, 2001, you filed three grievances concerning your safety, suspension without pay and your illegal transfer to a new school site. All of your grievances, including those filed in May and June 2001, were denied by the District.

On November 14, 2001, you were notified that your benefits would end on December 1, 2001. You were provided with information regarding your COBRA rights.

On November 15, 2001, your charge states that you were threatened with dismissal although there is no information provided concerning this alleged threat. To date, you have not been dismissed from employment.

Based on the facts stated above, your charge fails to state a prima facie case.

EERA section 3541.5(a)(1) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.) The charging party bears the burden of demonstrating that the charge is timely filed. (Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.)

Your charge was filed on February 7, 2002. The statute of limitations period extends six months prior to the filing of your charge to August 7, 2001. Accordingly, only alleged unfair practices which occurred on or after August 7, 2001 are timely filed.

EERA section 3541.5(a) provides that the statute of limitations period may be tolled during the time it takes a charging party to exhaust the grievance procedure. Your charge alleges that you filed a grievance on June 9, 2001 challenging your removal from the classroom on April 20. The charge does not indicate when the District denied this grievance. Absent these facts, PERB cannot determine whether the statute of limitations was tolled concerning this allegation. Thus, this allegation is also untimely and must be dismissed.

To demonstrate discriminatory conduct in violation of EERA section 3543.5(a), a 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 engaged in protected activity when you filed several grievances. Your employer was aware of this conduct. Assuming this allegation is timely filed, the District took adverse action against you when it removed you from the classroom on April 20, 2001. The District also took action adverse to your employment when it placed you on "unauthorized leave" and stopped your pay, and when it notified you that your benefits would end December 1, 2001.

The charge does not provide facts, however, which demonstrate a nexus or connection between the filing of your grievances and your removal from the classroom on April 20 and your

placement on unauthorized leave on September 26. The timing of the District's notice on November 14, 2001 that your benefits were ending is in close proximity to your filing grievances on November 13. However, as noted above, timing alone is insufficient to demonstrate the required nexus. Additional evidence is required to establish a connection between your protected activity and the adverse act. Accordingly, the allegation that the District discriminated against you for engaging in protected activity fails to state a prima facie case and must be dismissed.

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 16, 2002, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Robin W. Wesley
Regional Attorney