STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

DIANE M. KAISER, Charging Party, v. FREMONT UNIFIED SCHOOL DISTRICT, Respondent.	Case No. SF-CE-2251-E PERB Decision No. 1571 December 24, 2003

Appearances: Diane M. Kaiser, on her own behalf; Liebert Cassidy Whitmore by Stacy L. Saetta, Attorney, for Fremont Unified School District.

Before Baker, Whitehead and Neima, Members.

DECISION

BAKER, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Diane M. Kaiser (Kaiser) of a Board agent's dismissal (attached) of her unfair practice charge. The charge alleged that the Fremont Unified School District (District) violated the Educational Employment Relations Act (EERA)[1] by twice reassigning Kaiser to teach a different grade level.

The Board has reviewed the entire record in this case including the original and amended unfair practice charge, the warning and dismissal letters, Kaiser's appeal and the District's response to the appeal. The Board finds the dismissal letter to be free from prejudicial error and adopts it as the decision of the Board itself subject to the following discussion.

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

DISCUSSION

Although Kaiser presented her charge as a failure to follow the contract, the Board agent analyzed the charge under a theory of discrimination. The Board agent found that the majority of the charge was untimely, noting that only allegations of unfair practices which occurred on or after September 4, 2001 are timely. On this basis, the Board agent dismissed the allegations pertaining to conduct between October 2000 and August 2001.

The Board agent found only one allegation timely; the allegation that on March 26, 2002, the District discriminated against Kaiser when it assigned her to teach second grade for the 2002-2003 school year. The Board agent acknowledged that Kaiser engaged in protected activity by meeting with Principal Ed Tucker in a "Level I Complaint Meeting" and filing a grievance over the reassignment for the 2001-2002 school year. The Board agent noted, however, that the charge did not provide any facts which provide a nexus between the protected activity and the March 26, 2002 reassignment.[2] The Board agent, therefore, dismissed the charge for failure to state a prima facie case.

On appeal to the Board, Kaiser continues to allege various contractual violations relating to the reassignment for the 2001-2002 school year. Her appeal does not address the timeliness of the allegations related to this first reassignment at all. She does not attempt to cure the nexus deficiency with regard to the second reassignment, which constitutes her only timely allegation presented to the Board agent. Finally, she alleges for the first time on appeal that in February 2002, the District refused the Department of Fair Employment and Housing's

[2]The dismissal letter contains an incorrect date at page 5, line 5. The date May 26, 2002 should be corrected to March 26, 2002. This error did not impact the Board agent's dismissal.

(DFEH) request to mediate issues in violation of its obligation to meet and confer in good faith pursuant to EERA section 3543.5(c)[3].

The Board agent properly identified the September 4, 2001, cut-off date for timely allegations and properly dismissed all the untimely allegations pertaining to conduct between October 2000 and August 2001.

For the timely allegation of the March 26, 2002, grade level reassignment, the Board agent correctly found there was not a sufficient nexus between the protected activity and the reassignment established in Kaiser's charge. On appeal, Kaiser only reiterates her arguments regarding contractual violations and does nothing to cure the nexus defect identified in both the warning and dismissal letters.

In response to Kaiser's appeal, the District argues that the allegations in the charge must be deferred to the grievance machinery contained in the parties' collective bargaining agreement. If the District is correct and the charge is deferrable, the Board would be without jurisdiction to address the merits of the charge. EERA section 3541.5 provides, in pertinent part, that the Board shall not:

> Issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration.

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[3]EERA section 3543.5(c) states, in pertinent part:

> It shall be unlawful for a public school employer to do any of the following:
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

The parties' collective bargaining agreement does not contain an applicable "non-discrimination" clause. It does, however, contain a section on reassignments. Article 11 of the parties' collective bargaining agreement has both procedural and substantive components. For purposes of the second reassignment of Kaiser, the Board need focus only on the substantive provisions. Section 11.16.1 of the agreement provides that reassignments are to be based on "instructional need and unit member preference" and "shall be made on an equitable basis." Read in a most favorable light, Kaiser's unfair practice charge alleges the reassignment was made in retaliation for her exercise of protected activity. Based on the Board's precedent, this language is insufficient to require deferral of this charge.

In Los Angeles Unified School District (1990) PERB Decision No. 860, the Board made it clear that the exercise of PERB's jurisdiction is not precluded unless the alleged unfair practice is arguably prohibited by the parties' agreement. Accordingly, it is not sufficient for the agreement to merely cover or discuss the matter; the conduct alleged to be an unfair practice must be prohibited. (Fremont Union High School District (1993) PERB Order No. Ad-248.) Although the grievance/arbitration machinery could potentially cover the reassignment issue, it is clear that the discrimination alleged in the unfair practice charge is not "arguably prohibited" by the parties' agreement. Without an applicable "non-discrimination" clause, the Board's precedent holds that this type of case is not deferrable. The merits of the charge were, therefore, properly reviewed by the Board agent, and the Board agent's decision on the merits was correct.

Finally, Kaiser attempts to offer for the first time on appeal an allegation that in February 2002, the District refused the DFEH's request to mediate issues in violation of its obligation to meet and confer in good faith. A charging party may not, without good cause,

present new evidence or new allegations on appeal. (PERB Regulation 32635(b)[4]; Peralta Community College District (2001) PERB Decision No. 1418; Regents of the University of California (1998) PERB Decision No. 1271-H.) No good cause having been shown for Kaiser's failure to raise this claim before the Board agent, the Board will not address the merits of this new allegation.

ORDER

The unfair practice charge in Case No. SF-CE-2251-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Whitehead and Neima joined in this Decision.

[4]PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB Regulation 32635 states, in pertinent part:

> (b) Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence.

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

May 30, 2002

Diane M. Kaiser
4572 Gertrude Drive
Fremont, CA 94536

Re: Diane M. Kaiser v. Fremont Unified School District
Unfair Practice Charge No. SF-CE-2251-E
DISMISSAL LETTER

Dear Ms. Kaiser:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 4, 2002. Your charge alleges that the Fremont Unified School District violated the Educational Employment Relations Act (EERA)[1] by discriminating against you for engaging in protected activity.

I indicated in the attached letter dated April 22, 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 May 6, 2002, the charge would be dismissed. On May 6, 2002, you filed an amended unfair practice charge.

As amended, your charge makes the following factual allegations. You are employed as a teacher by the District at Grimmer Elementary School. During the 2000-2001 school year, you were assigned to teach grade 3.

The District's curriculum included the Packard Grant/Open Court Language Arts Program. Teachers in certain grades were required to utilize this reading program. Maureen Smith, a teacher, was designated as the "Literacy Coach" for the Open Court reading program at Grimmer Elementary School. In or about early October 2000, Ms. Smith placed a memo in each teacher's mailbox requesting information on their progress through the reading program. When you did not respond to Ms. Smith's second memo, Principal Ed Tucker sent you a memo directing you to respond by October 6, 2000.

On October 27, 2000, you met with Mr. Tucker to discuss your evaluation goals for the 2000-2001 school year. During the meeting, Mr. Tucker threatened to assign you to a grade level which did not utilize the Packard Grant/Open Court Reading Program, if you did not fully

[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.

implement the reading program. On one occasion, Mr. Tucker observed you utilizing a publication that was not from Open Court. Mr. Tucker said he would be discussing the teachers' progress in the program with Ms. Smith.

Bev Chernoff, District Coordinator of the Packard Grant/Open Court Language Arts Program, explained in a letter to Greg Bonaccorsi, President of the Fremont Unified District Teachers Association and Peg Tracey, Executive Director, dated November 7, 2000, that the Packard Foundation required schools to provide certain information to evaluate the Open Court reading program. She stated that the literacy coach was to assist teachers in achieving the goals of the grant program and collect information utilized by the Packard Foundation. The information collected by the literacy coach was not provided to the site principal, was not utilized for teacher evaluations and the literacy coach was not an evaluator.

On January 18, 2001, Mr. Tucker "fraudulently authored Teacher Comments on [your] first evaluation." The charge does not describe Mr. Tucker's comments or explain why they are fraudulent. There is no indication that your evaluation included comments concerning your progress in the Open Court reading program.

On March 14, 2001, you requested a "Level I Complaint Meeting" with Mr. Tucker. During the meeting, you raised concerns about Mr. Tucker's interference with your professional relationships with your students and their parents, your responsibility to evaluate your students, repeated interruption of your classroom lessons, infringing on your preparation periods and his unprofessional attitude toward you. Mr. Bonaccorsi attended the meeting as your union representative.

On March 30, 2001, Mr. Tucker made an impromptu 60 minute formal observation of your class. Your charge alleges that Mr. Tucker "seriously misrepresented the lesson observed in [your] second evaluation." The charge does not describe any misrepresentation in your second evaluation.

On April 2, 2001, Mr. Tucker handed you a memo dated March 30, 2001 which stated that your grade level assignment for the 2001-2002 school year had been changed from grade 3 to grade 4/5. The memo stated that the change was required because you had not been providing your students with the skills they needed for reading. Your charge alleges that Mr. Tucker had never observed you teaching the Open Court reading program.

You informed both the Association and Mr. Tucker that you did not agree with the assignment to teach grade 4/5.

You allege that Mr. Tucker sexually harassed you on numerous occasions. On April 2, 2001, you requested that Mr. Tucker cease his abusive behavior. You also notified the Association of Mr. Tucker's conduct.

On April 23, 2001, the Association filed a grievance on your behalf challenging your assignment to teach grade 4/5. You and Mr. Bonaccorsi attended a Level I grievance meeting

with Mr. Tucker on May 18, 2001. At the meeting you provided Mr. Tucker with two evaluation forms which included your corrections. Mr. Tucker denied your Level I grievance on May 25, 2001.

You appealed your grievance to Level II before Cheryl Bushmire, Director of Certificated Personnel. Following knee surgery, Mr. Tucker was unavailable to participate in the Level II grievance meeting throughout the summer.

In June 2001, Douglas Gephart, Assistant Superintendent, Human Resources, "violated the confidentiality of the May 18, 2001 Level I grievance meeting" when he obtained the corrected evaluation forms you gave to Mr. Tucker. Mr. Gephart threatened you with criminal charges, claiming you had altered your evaluations.

On August 28, 2001, two days before you were to report to work, you sent a letter to Ms. Bushmire which stated in part:

> Due to the delay in the Level II Grievance proceedings, as Ed Tucker, site administrator of Grimmer Elementary School, was unavailable throughout the summer, the difficulty of Greg Bonaccorsi and myself coordinating our communications due to vacations, meetings, etc., and the pending start of the 2001-2002 school year, I am submitting this memo to you.

You requested that Ms. Bushmire maintain your grade 3 teaching assignment until your grievance was resolved.

You allege that Ms. Bushmire ignored your request and failed to timely schedule a Level II grievance meeting prior to the start of the 2001-2002 school year.

You reported for work at the beginning of the 2001-2002 school year. You were absent from work September 6, 2001 to April 1, 2002, due to illness or injury.

On March 26, 2002, Mr. Tucker assigned you to teach grade 2 for the 2002-2003 school year.

Article 11 of the CBA states, in pertinent part:

> 11.10 . . . Unit members may be assigned to teach within their credentialing. A principal shall discuss any unit member's assignment with him/her upon request. Subsequently, upon request, the principal shall reduce the reason(s) for the assignment to writing.
>
> 11.11 Elementary teachers will know the school and grade level to which they have been tentatively assigned by April 1.

> 11.16 Each principal shall notify his/her staff by March 1 that they may submit by March 15 up to three (3) preferences for work assignment(s) within the site. The principal shall consider these stated preferences before changing work assignments of unit members within the site.
>
> 11.16.1 Assignments are to be based on instructional need and unit member preference. These determinations are to be made with unit members' input. Assignments shall be made on an equitable basis. Upon request, the principal shall discuss the assignment with the teacher.

Based on the facts stated above, your charge does not state a prima facie case of discrimination.

As discussed in the attached letter, 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 six-month 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.)

As I previously explained in my April 22, 2002 letter, your charge was filed on March 4, 2002. PERB may only consider unfair practices which occurred within six months prior to the filing of an unfair practice charge. The statute of limitations in your case began to run on September 4, 2001. Thus, only allegations of unfair practices which occurred on or after September 4, 2001 are timely filed. Accordingly, the conduct you described which occurred between October 2000 and August 2001 is untimely and these allegations are hereby dismissed.

One allegation falls within the limitations period. You allege that on March 26, 2002, the District discriminated against you when it assigned you to teach grade 2 for the 2002-2003 school year.

As previously discussed, to demonstrate a prima facie case of discrimination, 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; Carlsbad Unified School District (1979) PERB Decision No. 89.)

You demonstrated that you engaged in protected activity on March 14, 2001 when you requested a "Level I Complaint Meeting" with Mr. Tucker. You also participated in protected activity on March 23, 2001 when you filed a grievance challenging your assignment to teach grade 4/5 for the 2001-2002 school year. However, the charge does not provide facts which demonstrate a connection or nexus between your protected activity and the May 26, 2002 assignment to teach grade 2. The facts do not establish that the District departed from the procedures when it made the 2002-2003 teaching assignment. Thus, this allegation fails to state a prima facie case and is dismissed.

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 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).)

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

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: Stacey L. Saetta

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

April 22, 2002

Diane M. Kaiser
4572 Gertrude Drive
Fremont, CA 94536

Re: Diane M. Kaiser v. Fremont Unified School District
Unfair Practice Charge No. SF-CE-2251-E
WARNING LETTER

Dear Ms. Kaiser:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 4, 2002. Your charge alleges that the Fremont Unified School District violated the Educational Employment Relations Act (EERA)[1] by discriminating against you for engaging in protected activity.

Your charge states in its entirety:

> Fremont Unified School District has violated my employment contract during my employment with them. The violations occurred under Article/s 6, 8, 9, 10, 28, 29, and Board Policy 4119 and AR 4119 of my F.U.S.D. employment contract. I will be submitting an amended charge. Attachment/s: A, B, C, D, E, F, G, H.

Attached to the charge are copies of correspondence that you wrote to various union and District officials which appear to concern a grievance, claims of harassment and medical verification of absence.

On March 7, 2002, I called you and spoke you about your charge. You stated that you had additional information and intended to file an amended charge. I explained that you needed to include in your amended charge a detailed statement describing the conduct which you allege demonstrates that the District discriminated against you for engaging in protected activity. To date, I have not received an amended charge or any further information. As filed, your charge fails to state a prima facie case.

PERB Regulation 32615(a)(5) states that a charge must contain a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." A charging party must allege

[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.

the "who, what, when, where and how" of an unfair practice. Legal conclusions are insufficient to demonstrate a violation of EERA. (State of California (Department of Food and Agriculture) (1994) PERB Decision No. 1071-S; United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision No. 944; Charter Oak Unified School District (1991) PERB Decision No. 873, fn. 6.)

Furthermore, allegations of unfair labor practices under the EERA are covered by a six-month statute of limitations. 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 March 4, 2002. The statutory limitations period began to run six months prior to the filing of the charge on September 4, 2001. Thus, only alleged unfair practices which occurred on or after September 4, 2001 are timely filed. Your charge does not provide dates or describe conduct which occurred within the statutory limitations period. Your charge will be considered untimely filed unless you allege facts which demonstrate unlawful conduct occurred within the six months prior to the filing of your charge.

Assuming your charge is timely filed, to demonstrate a prima facie case of discrimination 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.)

Evidence of adverse action is also required to support a claim of discrimination or reprisal under the Novato standard. (Palo Verde Unified School District (1988) PERB Decision No. 689.) In determining whether such evidence is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (Ibid.) In a later decision, the Board further explained that:

> The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment. [Newark Unified School District (1991) PERB Decision No. 864; emphasis added; footnote omitted.]

As filed, the charge fails to provide a clear statement of your protected activity and when that activity occurred; when and how the District was aware of your protected activity; the specific adverse action taken again you by the District and when that action was taken; and facts demonstrating a nexus or connection between your protected activity and the adverse action. Accordingly, your charge fails to state a prima facie case of discrimination 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 May 6, 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