STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SHARIKA GREGORY, Charging Party, v. OAKLAND UNIFIED SCHOOL DISTRICT, Respondent.	Case No. SF-CE-2636-E PERB Decision No. 1965 June 26, 2008

Appearance: Sharika Gregory, on her own behalf.

Before Neuwald, Chair; Wesley and Rystrom, Members.

DECISION

WESLEY, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Sharika Gregory (Gregory) of a Board agent's dismissal of her unfair practice charge. The charge alleged that the Oakland Unified School District (District) discriminated against Gregory for engaging in protected activity in violation of the Educational Employment Relations Act (EERA)[1] when it terminated her employment. The Board agent dismissed the charge as untimely filed.

We have reviewed the record, including the unfair practice charge, amended charge, the District's position statement, the warning and dismissal letters, and Gregory's appeal. Based on this review, we reverse the dismissal and remand this case to the General Counsel's office for issuance of a complaint.

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

BACKGROUND

Gregory was hired by the District as a paraprofessional on October 4, 2004. She was a member of the bargaining unit represented by the American Federation of State, County and Municipal Employees (AFSCME). During the 2005-06 school year, Gregory was assigned to the Community Immersion Program. Following a dispute over a job performance evaluation, Gregory was assigned to Oakland Tech High School for the 2006-07 school year. On her first day, August 28, 2006, the supervising teacher indicated she did not need Gregory as she had a sufficient number of aides.

Gregory received a new school assignment and on August 29, 2006, she reported to Munk Elementary School. Upon her arrival at the school, Gregory discovered that an individual who had filed a lawsuit against her family worked at the same school. In a letter dated September 1, 2006, Gregory notified the District that she had consulted with an AFSCME representative and been advised to request an immediate transfer to a different school.

On September 6, 2006, Gregory met with Program Coordinator John Rusk (Rusk) regarding a new work assignment. On September 7, 2006, Gregory reported to Brookfield Elementary School. Gregory was assigned to a class to assist children with special medical needs. Gregory believed she lacked the necessary medical background to assist with some of the students' needs. Gregory went to Rusk's office several times between September 12 and 20 to discuss other assignment options. On September 21, Gregory returned to Brookfield Elementary School but no training was made available.

Gregory made several visits to Rusk's office and left messages to discuss a new assignment. Rusk was either unavailable or indicated he had no information for her. On October 10, 2006, Gregory reported to Brookfield Elementary School believing that training

would be provided. However, due to confusion as to which aide was to receive training, the training was canceled.

On October 18, 2006, Gregory returned to Brookfield Elementary believing that medical training would be provided. At that time, Gregory was told that she was not a suitable candidate for the position due to her lack of medical experience.

Gregory continued to attempt to reach Rusk regarding a new work assignment. During a meeting on October 26, 2006, Rusk told Gregory that she had been absent from her work assignment without cause and directed her to fill out absent leave forms. Gregory refused to complete the forms. Rusk stated that a meeting would need to be scheduled with Human Resources Analyst Bill Whyte (Whyte).

On October 31, 2006, Gregory discovered the District had electronically withdrawn wages from her account for the period October 1-15, 2006. Thereafter, Gregory made several visits to Rusk's office and left messages asking that he contact her regarding further work assignments. There is no indication that Rusk responded to Gregory's inquiries.

On January 22, 2007, Gregory received a letter from the District offering her COBRA health benefits due to her separation from the District. Gregory immediately contacted the AFSCME chapter president who directed her to contact the site representative.

On January 29, 2007, Gregory received a letter from Whyte dated January 16, 2007, charging that she had abandoned her position. The letter was titled, "Abandonment of Position - Special Education," and stated, in part:

> The Human Resources Division has been notified that you have not reported to work since October 2006 nor have you notified anyone of what your plans are for the remainder of the school year. Your continued absence is considered unauthorized and therefore will be unpaid. According to Administrative Bulletin 8010, Personnel Procedures (f), abandonment of position is cause for dismissal.

> You have the right to a hearing to review your unauthorized absence. Your right to a hearing will be deemed waived and dismissal proceeding [sic] will be initiated if you do not contact the Human Resources Division within ten (10) working days.
>
> . . . . . .
>
> Also enclosed is a Resignation Form - Classified Employees. If you return this form within ten days we will process your request, and not proceed with the Abandonment process.

Gregory immediately responded to the District's letter with a verbal and written request for a hearing. She also wrote to the District stating that she had not abandoned her job and requested that her benefits not be terminated.

Gregory's health benefits were terminated as of February 1, according to a letter Gregory received from the health care provider on or about February 16, 2007.

The District alleges that a second identical notice of job abandonment dated February 16, 2007, was sent to Gregory, but Gregory denies receiving the notice.

Between February and July 2007, Gregory had numerous contacts with various AFSCME representatives regarding the District's notice of job abandonment. On July 26, 2007, Gregory was informed by AFSCME Business Agent Jo Bates that a meeting was scheduled with the District on August 17, 2007. At the meeting, Whyte stated that he had scheduled a hearing for Gregory in February 2007, but that Gregory did not appear at the hearing. Whyte could not provide the date of the hearing, produce correspondence that notified Gregory of the date of the hearing or provide written findings that documented the hearing was convened.

Gregory filed her charge on August 15, 2007, and submitted an amended charge on September 14, 2007, alleging the District terminated her employment because of her protected activity. The Board agent dismissed the charge on February 8, 2008, finding that Gregory's charge was untimely filed.

GREGORY'S APPEAL

On appeal, Gregory disputes the Board agent's characterization of her charge as untimely filed. While she does not dispute receiving a letter related to her alleged job abandonment in January 2007, she believes it is relevant that the District held a meeting with her in August 2007.

Gregory also argues that she has stated a prima facie case under the facts alleged in her charge. Specifically, she asserts that her complaints to the District about her working conditions are protected activity. She cites her complaints surrounding job assignments, training, wages and working conditions which she argues are protected under EERA.

DISCUSSION

At the outset we must determine whether Gregory's charge was timely filed. 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." In Regents of the University of California (2004) PERB Decision No. 1585-H (Regents), the Board determined that with allegations of termination of employment, it is the effective date of termination that triggers the running of the statute of limitations.

Gregory filed her charge against the District on August 15, 2007. Therefore, only alleged unfair practices that occurred on or after February 15, 2007, are timely filed.

Applying PERB precedent from Regents, it is clear that Gregory's official termination date was after February 15, 2007. The District acknowledges sending two identical letters to Gregory dated January 16, 2007 and February 16, 2007. The letters state that dismissal proceedings "will be initiated" if she did not contact the District's Human Resources division. Gregory did request a hearing which was to be held before her termination was effective. Based

on the fact that the effective date of her termination was after February 15, 2007, her charge was filed within the statutory limitations period.

On the merits of her charge, Gregory alleges the District terminated her employment because of her protected activity. 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 (North Sacramento School District)), 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 that might demonstrate the employer's unlawful motive. (Novato; North Sacramento School District.)

The evidence demonstrates that Gregory first contacted AFSCME on or before September 1, 2006, when she sought assistance from AFSCME about a transfer to another school site. In her September 1, 2006 letter to Whyte, Gregory informed the District that AFSCME advised her to request a transfer. Thus, Gregory engaged in protected activity by seeking assistance from AFSCME and the District's knowledge of the protected activity is evident from the letter Gregory sent to the District.

Gregory has also alleged sufficient facts to demonstrate a nexus between her protected activity and the District's action in terminating her employment. The timing of the adverse action is in proximity to Gregory's protected activity. Furthermore, the District's failure to follow established procedures in Gregory's dismissal are both numerous and obvious. The District sent Gregory two identical letters a month apart offering her the opportunity for a hearing. Gregory denies receiving the second letter. The District contends that it scheduled a hearing with Gregory, but the charge alleges that the District did not notify Gregory of the hearing. The District then allegedly held the hearing sometime in February 2007, but cannot pinpoint when exactly and all parties agree that Gregory was not present. There are no written conclusions or findings that resulted from the purported February hearing. Finally, there is no final notice of the District's termination, although the District met with Gregory in August 2007. Based on these allegations, the charge states a prima facie case of discrimination in violation of EERA section 3543.5(a).

ORDER

The Board reverses the dismissal of the unfair practice charge in Case No. SF-CE-2636-E and REMANDS this case to the General Counsel's office for further processing consistent with this Decision.

Chair Neuwald and Member Rystrom joined in this Decision.