STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

RIO TEACHERS ASSOCIATION, Charging Party, v. RIO SCHOOL DISTRICT, Respondent.	Case No. LA-CE-5090-E PERB Decision No. 1986 November 21, 2008

Appearance: California Teachers Association by Michael D. Hersh, Attorney, for Rio Teachers Association.

Before McKeag, Wesley and Dowdin Calvillo, Members.

DECISION

DOWDIN CALVILLO, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Rio Teachers Association (Association) of a Board agent's partial dismissal of its unfair practice charge. Relevant to this appeal, the charge alleged that the Rio School District (District) violated the Educational Employment Relations Act (EERA)[1] by: (1) bargaining in bad faith; (2) participating in impasse procedures in bad faith; (3) retaliating against Association President Rebecca Barbetti (Barbetti); and (4) interfering with Barbetti's and the Association's EERA-granted rights.[2]

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

[2]The charge also alleged numerous other EERA violations by the District. The Association withdrew several of these other allegations before the Board agent acted on the charge. Simultaneously with the partial dismissal, the Office of the General Counsel issued a complaint on the remaining allegations. These allegations went to hearing before an administrative law judge (ALJ) on April 7, 8 and 10, 2008. The ALJ issued a proposed decision finding several violations and dismissing the remainder of the allegations in the complaint. Neither party filed exceptions to the proposed decision. As a result, the decision became final and binding on the parties on August 25, 2008.

The Board has reviewed the entire record in this case, including but not limited to, the original and amended unfair practice charge, the District's position statements, the Board agent's warning and dismissal letters, and the Association's appeal. Based on this review, the Board affirms the partial dismissal of the charge for the reasons discussed below.

BACKGROUND

Bad Faith Bargaining and Impasse Allegations

On October 5, 2006, the Association "sunshined"[3] its initial proposal for 2006-2007 re-opener negotiations. The District responded by sunshining its initial proposal on November 2. The parties began bargaining over the re-opener proposals on January 23, 2007 and met again for bargaining on January 25. On February 1, the District sunshined its initial proposal for a 2007-2008 successor collective bargaining agreement (CBA).

During negotiations on February 13, 2007, the District formally presented its initial proposal on the successor agreement to the Association, even though the subject of a successor agreement was not on the agenda for that session. The District acknowledged that its successor agreement proposal was vague but stated it would provide more specifics at a later time.

At the outset of the next bargaining session on February 22, 2007, the District stated it was contemplating a declaration of impasse on re-opener negotiations because the parties were still far apart on salary. Later in the session, the District presented a more detailed successor agreement proposal. The Association responded that it needed more time to consider the proposal.

[3]EERA section 3547(a) states in full: "All initial proposals of exclusive representatives and of public school employers, which relate to matters within the scope of representation, shall be presented at a public meeting of the public school employer and thereafter shall be public records." This is commonly referred to as "sunshining" the proposal.

Soon after, the Association declared impasse on the re-opener issues. On March 4, 2007, PERB certified that the parties were at impasse on the re-opener proposals.

On March 12, 2007, the District filed an impasse determination request with PERB regarding the successor agreement. In its filing, the District asserted that the Association had refused to bargain over the successor agreement proposal at the February 13 and 22, 2007, bargaining sessions and had never made a counterproposal on the successor agreement. During the impasse investigation, the District told the Board agent that the parties' bargaining relationship had deteriorated so much during the re-opener negotiations that agreement on a successor CBA was unlikely without a mediator.

On March 16, 2007, Barbetti wrote to District Assistant Superintendent Monalisa Hasson, the head of the District's bargaining team. Barbetti's letter stated that "it is clearly the intent of the Association to negotiate a successor agreement" and asked for more time to develop an initial proposal. The District did not respond to the letter. However, it did place its impasse request in abeyance pending action by the Association. By April 3, the District still had not received word on when the Association would sunshine its initial proposal or meet for bargaining. On that date, the District's request was taken out of abeyance and PERB certified the parties were at impasse on the successor agreement.

Retaliation and Interference Allegations

On May 3, 2007, Barbetti spoke at a District school board meeting. She accused various District administrators of failing to properly observe probationary teachers and teachers accused of misconduct. She offered to provide the school board with additional information upon request.

On May 7, 2007, District Superintendent Sherianne Cotterell (Cotterell) issued a letter directing Barbetti to provide her with "specific teacher names and school assignments" for

each of the allegations she made at the May 3 school board meeting. The letter demanded the information by the close of business on May 9, 2007, but did not threaten Barbetti with discipline for non-compliance. The letter also asserted that Barbetti had disclosed "confidential and privileged information" to the public at the May 3 meeting. The letter did not threaten Barbetti with discipline for this conduct but did say that Barbetti would be required to "sign a statement of confidentiality in any future employee situations" in which she participated on behalf of the Association.

Barbetti did not provide the information by close of business on May 9. As a result, on May 10, 2007, Cotterell issued Barbetti a letter of reprimand. The letter stated that Barbetti's failure to produce the information Cotterell demanded constituted insubordination. It further stated that if Barbetti did not provide the information by 5:00 p.m. the following day, the reprimand would be placed in her personnel file. The charge does not allege that Barbetti ever provided the information demanded by Cotterell.

Unfair Practice Charge and Partial Dismissal

The Association's unfair practice charge alleged in relevant part that the District: (1) engaged in bad faith bargaining by "rushing to impasse" on the successor agreement; (2) participated in impasse procedures in bad faith by maintaining its request for impasse determination after the Association had indicated in writing that it wanted to negotiate a successor agreement; (3) retaliated against Barbetti for her protected activity of speaking at a school board meeting by directing her to provide information and then reprimanding her for not providing it; and (4) interfering with Barbetti's and the Association's EERA-granted rights by issuing the directive and reprimand.

In the charge, the Association argued that the District bargained in bad faith by seeking impasse certification when no bargaining had yet taken place on a successor agreement. After

noting that an unfounded declaration of impasse is not a per se violation of the duty to bargain, the Board agent examined the allegation under a "totality of the conduct" analysis. The Board agent found the charge failed to allege facts establishing that the District lacked a subjective intent to reach agreement on a successor CBA.

The charge also alleged that the District failed to participate in impasse procedures in good faith by publishing an update on negotiations which stated that the District had proposed multi-year salary increases during post-impasse mediation. According to the Association, the District never made such a proposal and furthermore had violated the confidentiality of mediation by publicly discussing its proposal. The Board agent found the charge failed to establish that the District had not presented such a salary proposal to the mediator or that the District had breached any duty of confidentiality.

Regarding the retaliation allegation, the Board agent found that the May 7, 2007 letter directing Barbetti to produce the information was not adverse to her nor was it issued for an improper purpose. As for the May 10, 2007 letter of reprimand, the Board agent found the charge failed to establish a nexus between the letter and Barbetti's protected activity.[4] The Board agent did not address the interference allegation based on these same facts.

The Association's Appeal

On December 18, 2007, the Association filed a timely appeal of the partial dismissal. The Association argues that the District's premature declaration of impasse was a per se violation of its duty to bargain because it "frustrated negotiations completely." Alternatively, the Association contends that the charge established bad faith under the "totality of the

[4]The Board agent also dismissed an allegation that a June 7, 2007 letter to Barbetti from the District's counsel was issued in retaliation for Barbetti's protected activity. On appeal, the Association states it withdrew that allegation in the amended charge. Accordingly, the allegation regarding the June 7, 2007 letter is not before the Board on appeal.

conduct" test. The main thrust of the Association's argument on this issue, however, is that the Board agent improperly credited the District's factual allegations over those in the charge.

In its appeal, the Association abandons its argument that the District failed to participate in impasse procedures in good faith by publishing the negotiations update. Instead, the Association relies exclusively on the fact that the District failed to withdraw its request for impasse determination after the Association expressed a desire to negotiate a successor agreement. According to the Association, this conduct "demonstrated bad faith and misuse of the PERB impasse proceedings."

As for the retaliation allegation, the Association argues that Barbetti's statements at the May 3, 2007 school board meeting were protected because they concerned teacher evaluations. The Association then contends that the District's reasons for issuing the May 7 and 10, 2007 letters were pretextual and, alternatively, that a hearing is necessary to determine the District's true motive for issuing the letters.

DISCUSSION

1. Bad Faith Bargaining

The charge alleged that the District violated EERA section 3543.5(c) by bargaining in bad faith over the 2007-2008 successor agreement. In determining whether a party has bargained in bad faith, PERB utilizes either a "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Decision No. 143 (Stockton).) When a party's bargaining conduct has "a potential to frustrate negotiations and to undermine the exclusivity of the bargaining agent," a per se violation of the duty to bargain may be found without determining whether the party lacked a subjective intent to reach agreement. (Pajaro Valley Unified School District (1978) PERB Decision No. 51 (Pajaro Valley).)

The Association argues that the District's declaration of impasse on the successor agreement and request for an impasse determination from PERB constituted a per se violation of the District's duty to bargain. This is so, the Association asserts, because "[t]he immediate consequence of the District's conduct was the end of negotiations and the parties being thrust into impasse proceedings that are not designed for a situation where there has been no bargaining."

PERB has previously held that an untimely or otherwise unfounded declaration of impasse is not a per se violation of the duty to bargain. (Regents of the University of California (1985) PERB Decision No. 520-H (Regents).) In reaching this conclusion, the Board noted that statutory impasse procedures "contemplate a continuation of the bilateral negotiations process" with the assistance of a neutral third party. (Regents, citing Moreno Valley Unified School District (1982) PERB Decision No. 206 (Moreno Valley).) Thus, contrary to the Association's assertion, a declaration of impasse does not end negotiations but instead attempts to move negotiations forward with the help of a mediator. Moreover, PERB Regulation 32793(a)[5] gives the Board agent only five working days from the date a request is filed to determine whether impasse exists. Consequently, bargaining would only be interrupted for a short period of time. (Regents.) Finally, as the Board observed in Regents: "To rule that such a declaration of impasse is a per se unfair practice would discourage parties from using the impasse procedures at all." For these reasons, we reaffirm that an untimely or unfounded request for determination of impasse does not constitute a per se violation of the duty to bargain.

The Association argues Regents is not applicable because in that case the parties engaged in substantial bargaining before impasse was declared, whereas here the parties never

[5]PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

bargained over the successor agreement. While the facts of the two cases are certainly different, the reasoning and policy behind the Regents decision apply equally here. Thus, we reject the Association's argument that the District's declaration of impasse was a per se violation because it occurred before any bargaining had taken place.

Nonetheless, an unfounded declaration of impasse may be evidence of bad faith bargaining under the "totality of the conduct" test. (Regents.) Applying this test, PERB examines the totality of a party's bargaining conduct to determine whether there are sufficient objective indicia of a subjective intent to participate in good faith, or conversely, of an intent to frustrate the bargaining process. (Pajaro Valley.) Conduct that moves the parties away from agreement, rather than toward agreement, is considered evidence of bad faith. (Id.)

Applying this standard, we find that the District's declaration of impasse and request for impasse determination do not indicate bad faith. The charge alleged that the District declared impasse even though no bargaining on the successor agreement had taken place and the Association had indicated it needed more time to fashion its initial proposal. Viewed in isolation, this conduct might indicate that the District had no intent to reach agreement on a successor CBA.

However, when viewed in the context of the parties' ongoing bargaining relationship, the District's conduct demonstrates an intent to move negotiations forward. It is undisputed that the parties had reached impasse on the re-opener negotiations over salary and health benefits just three weeks before the District filed its request. Therefore, it would be reasonable for the District to conclude that further discussion of those topics during the ongoing negotiations for a successor agreement would be futile. Furthermore, because salary and health benefits are major economic issues, impasse on the successor agreement could exist even though the parties might be able to reach agreement on other issues. (Regents.) Thus, the

charge alleges facts showing that the District's declaration of impasse on the successor agreement was well-founded. Accordingly, rather than moving the parties away from agreement, the District's impasse determination request was aimed at using the EERA impasse procedures to help move negotiations forward.

Nevertheless, even if the District's declaration of impasse did indicate bad faith, it would be insufficient standing alone to demonstrate a prima facie case of unlawful conduct. (Regents.) The Association must allege additional conduct by the District that, when viewed as a whole, establishes that the District lacked a subjective intent to reach agreement on the successor CBA. (Oakland Unified School District (1982) PERB Decision No. 275.) The essence of a bad faith bargaining charge is that a party goes through the motions of negotiations, but in fact is weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent agreement. (Muroc Unified School District (1978) PERB Decision No. 80.) Such conduct may include: recalcitrance in the scheduling of meetings, canceling meetings, or failing to prepare for meetings (Oakland Unified School District (1983) PERB Decision No. 326); conditioning agreement on economic matters upon prior agreement on non-economic subjects (State of California (Department of Personnel Administration) (1998) PERB Decision No. 1249-S); negotiator's lack of authority (Stockton); insistence on ground rules before negotiating substantive issues (San Ysidro School District (1980) PERB Decision No. 134); and reneging on tentative agreements the parties already have made (Charter Oak Unified School District (1991) PERB Decision No. 873).

The charge alleged additional facts that purportedly established bad faith bargaining by the District.[6] First, the charge alleged that the District cancelled bargaining sessions scheduled

[6]These facts were originally pled in support of independent allegations of bad faith bargaining that were later withdrawn by the Association. Nonetheless, PERB may still consider the facts underlying the allegations as evidence of the District's intent to reach

for October and November, 2006.[7] The charge also quoted an e-mail from Hasson, the District's lead negotiator, to Association President Barbetti asking for additional time to review "budgetary information" and to allow the District's new superintendent and school board time to set the District's bargaining priorities. Thus, the facts alleged in the charge show that the District cancelled scheduled bargaining sessions so that it could better prepare for negotiations. This does not indicate bad faith by the District.

Second, the charge alleged that the District violated bargaining ground rules by presenting its initial successor agreement proposal during re-opener negotiations on February 13, 2007 even though the item was not on the agenda for that session. However, the charge provides no evidence that the ground rules prohibited discussion of subjects not listed on the agenda for that particular session. Thus, the manner in which the District presented its initial successor agreement proposal does not indicate bad faith by the District.

Finally, the charge alleged that the District conditioned agreement on re-opener issues on agreement on the successor CBA. At the February 13, 2007 bargaining session, the District presented both its initial proposal on the successor agreement as well as its responses to Association proposals on re-opener issues. The District presented the same proposal and responses at the February 22 bargaining session. However, the charge does not allege any facts showing that the District tied agreement on the re-opener issues to agreement on the successor CBA. Accordingly, this conduct fails to support a finding of bad faith bargaining.

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agreement. (See North Sacramento School District (1982) PERB Decision No. 264 (North Sacramento) [PERB may consider conduct underlying dismissed allegations when conduct is relevant to establishing the employer's unlawful motive].)

[7]The cancellation occurred outside the six month statute of limitations period. However, this conduct may be considered to the extent it sheds light on the true character of the District's bargaining conduct within the limitations period. (Sparks Nugget v. NLRB (9th Cir. 1992) 968 F.2d 991, 995 [140 LRRM 2747]; see Trustees of the California State University (2008) PERB Decision No. 1970-H [conduct outside of limitations period may be used to establish unlawful motive].)

In sum, the Association has not alleged facts establishing a prima facie case of bad faith bargaining by the District. For this reason, the Board agent properly dismissed the bad faith bargaining allegation.

2. Failure to Participate in Impasse Procedures in Good Faith

In its charge, the Association alleged that the District failed to participate in impasse procedures in good faith because the District published a negotiations update that contained misstatements and violated the confidentiality of mediation. On appeal, the Association has withdrawn that basis for the allegation and now relies solely on the theory that the District's failure to withdraw its request for impasse determination after the Association stated in writing that it intended to bargain over the successor agreement constituted bad faith participation in impasse procedures.

Under EERA section 3543.5(e), it is an unfair practice for an employer to refuse or fail to participate in good faith in EERA's statutory impasse procedures. PERB's standard for determining bad faith participation in impasse procedures is identical to its standard for determining bad faith bargaining. (Gavilan Joint Community College District (1996) PERB Decision No. 1177 (Gavilan).) Therefore, we must determine whether the District's alleged conduct was so detrimental to the impasse resolution process that it constituted a per se violation or whether it shows the District lacked the subjective intent to participate in the impasse procedures in good faith.

The District's failure to withdraw its request for impasse determination did not have the potential to frustrate the statutory impasse resolution process in the same way as would a unilateral change to a matter within the scope of bargaining. (See Moreno Valley [recognizing unilateral change as a per se violation because such conduct "frustrates the EERA's purpose of achieving mutual agreement" through its statutory impasse procedures].) Indeed, the District's

conduct indicated that it wished to proceed with the statutory impasse procedures as soon as possible. Thus, the failure to withdraw did not constitute a per se violation of the District's duty to participate in impasse procedures in good faith.

Nor did the failure to withdraw the request indicate the District was merely going through the motions of the impasse procedures without a subjective intent to reach agreement. Though the District did not withdraw its request, it did place it in abeyance to allow the Association time to present a proposal on the successor agreement. When the Association failed to make a proposal within several weeks, the request was taken out of abeyance so that PERB could certify impasse and the parties could proceed to mediation. Thus, the District's conduct is consistent with a desire to move forward with the statutory impasse procedures.

Further, even if the failure to withdraw is evidence of bad faith, under the "totality of the conduct" test this alone is insufficient to establish a prima facie case. (Regents.) Though the Association has withdrawn the allegations regarding the District's published negotiations update, we may still look at the underlying facts to determine whether they establish bad faith on the part of the District when considered along with the failure to withdraw. (North Sacramento.) As alleged in the charge, the District's negotiations update stated that during mediation the District presented "several options for a salary proposal which included multi-year salary increases." If, as the Association argues, this statement was a misrepresentation, it would be evidence of bad faith. (Gavilan.) However, the charge fails to establish that the District did not present such a proposal to the mediator, even though the mediator may never have communicated the proposal to the Association. Moreover, the charge does not establish that the District disclosed specific terms of the proposal or that it in any other way disclosed information that the parties agreed would be kept confidential. Thus, the totality of the District's conduct does not show that it participated in the impasse procedures in bad faith.

For these reasons, the charge failed to establish that the District intended to, or actually did, frustrate the statutory impasse process in order to prevent agreement on a successor CBA. Accordingly, the Board agent properly dismissed the allegation that the District failed to participate in impasse procedures in good faith.

3. Retaliation Against Barbetti

To demonstrate retaliation in violation of EERA section 3543.5(a), the Association must show that: (1) Barbetti exercised rights under EERA; (2) the District had knowledge of the exercise of those rights; and (3) the District imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained, or coerced Barbetti 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 (Carlsbad).)

a. Protected Activity

The Association argues that Barbetti engaged in protected activity by serving as Association president and leading the union's bargaining team. Additionally, the Association asserts Barbetti's statements at the May 3, 2007 school board meeting that District administrators were not properly observing probationary teachers and teachers accused of misconduct were protected by EERA.

PERB has held that serving as chapter president and participating on a union's bargaining team are protected activities under EERA. (Klamath-Trinity Joint Unified School District (2005) PERB Decision No. 1778.) Additionally, an employee's speech criticizing school administration is protected if the speech is "related to matters of legitimate concern to the employees as employees so as to come within the right to participate in the activities of an employee organization for the purpose of representation on matters of employer-employee

relations." (Rancho Santiago Community College District (1986) PERB Decision No. 602.) However, "[s]peech which is related to employer-employee relations may nonetheless lose its statutory protection where it is found to be so opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice as to cause substantial disruption of or material interference with school activities." (Id.; internal quotations and citations omitted.)

Barbetti's statements at the May 3, 2007 school board meeting addressed whether District administrators were properly evaluating the performance of particular teachers. Thus, her statements concerned a matter of legitimate concern to both the teachers being evaluated, whose employment could be impacted by the evaluations, and the other teachers in the District, whose ability to transfer or promote could be affected by retention of teachers who should not have been retained because of misconduct or inadequate performance. Because Barbetti's statements were not of a kind that would disrupt or interfere with school activities, they did not lose their protected status. Therefore, the charge alleged facts establishing that Barbetti engaged in activity protected by EERA. Further, the District had knowledge of Barbetti's protected activity because it communicated with her in her role as Association president and bargaining team leader, and her protected statements were made at a public meeting of the District's governing board.

b. Adverse Action

The Association contends that both the May 7, 2007 letter directing Barbetti to provide the District with specific information regarding the accusations she made at the May 3 school board meeting and the May 10, 2007 reprimand letter based on her failure to provide that information constituted adverse action.

In determining whether an employer's action is adverse, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (Palo Verde Unified

School District (1988) PERB Decision No. 689.) 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; fn. omitted.)

PERB has long held that a letter of reprimand is an adverse action. (San Mateo County Office of Education (2008) PERB Decision No. 1946 (San Mateo); Oakdale Union Elementary School District (1998) PERB Decision No. 1246.) Additionally, a memorandum that does not impose discipline but merely threatens discipline at a future time has been found to be an adverse action. (Los Angeles Unified School District (2007) PERB Decision No. 1930.)

The May 7, 2007 letter directed Barbetti to provide District Superintendent Cotterell with the "specific teacher names and school assignments" for each of the accusations Barbetti made at the May 3 school board meeting. The letter requested those names by the close of business on May 9, 2007. It did not indicate that Barbetti's failure to provide the information by that time would subject her to discipline. The letter did, however, state that because Barbetti had disclosed confidential information at the board meeting, she would be required to sign "a statement of confidentiality in any future employee situations that require you to be present." While a violation of the terms of a statement of confidentiality might subject an employee to discipline, such a consequence is not mentioned in the letter. Accordingly, we find that the May 7, 2007 letter was not an adverse action.

The May 10, 2007 letter, on the other hand, was clearly an adverse action. The letter stated that Barbetti's failure to provide Cotterell with the requested information constituted insubordination. The letter further said that if Barbetti did not provide the information by the

end of the following day, the letter would be placed in Barbetti's personnel file. Because the letter gave Barbetti a chance to avoid discipline, it did not constitute an adverse action at the time it was issued. (County of Merced (2008) PERB Decision No. 1975-M.) However, the charge does not allege that Barbetti ever provided the information and it is therefore reasonable to infer that the letter was eventually placed in her personnel file. Once this occurred, the May 10, 2007 letter constituted an adverse action.

c. Nexus

To establish a prima facie case of retaliation, the Association must demonstrate a "nexus" between Barbetti's protected activity and the District's adverse actions. In other words, the Association must show that the District acted with discriminatory intent. Because direct evidence of discriminatory intent is rarely possible, the Board has held that "unlawful motive can be established by circumstantial evidence and inferred from the record as a whole." (Novato.)

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), 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 (Trustees of the California State University (1990) PERB Decision

No. 805-H); (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 (McFarland Unified School District (1990) PERB Decision No. 786); (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).

The timing of the May 10, 2007, letter of reprimand, just one week after Barbetti spoke at the school board meeting, strongly supports an inference of unlawful motive. Nonetheless, the charge does not allege facts to establish any of the other nexus factors. The Association asserts "no other District employee has been required to provide information concerning statements made at a school board meeting, or threatened with discipline for failing to do so." Yet the charge alleges no facts showing that another employee who accused District administration of misconduct was treated differently than Barbetti. (See San Mateo [rejecting an argument for disparate treatment when the charging party failed to present evidence about similarly situated employees].) The Association also states that the District departed from established procedure in reprimanding Barbetti for her failure to provide the information. However, because the charge does not set forth the District's established procedure for reprimanding employees, there is insufficient evidence to show that the District departed from that procedure. (Trustees of the California State University (Sacramento) (2005) PERB Decision No. 1740-H.) Accordingly, the Association has failed to establish a nexus between Barbetti's May 10, 2007 reprimand and her protected activity.

For the reasons above, the charge did not establish that the District reprimanded Barbetti on May 10, 2007 because of her protected activity. Thus, the Board agent properly dismissed the retaliation allegation for failure to state a prima facie case.[8]

4. Interference with EERA Rights

In addition to its retaliation claim, the Association alleged in the charge that the May 7 and 10, 2007 letters interfered with Barbetti's and the Association's rights under EERA. The Board agent did not address this allegation in the warning or dismissal letters nor did the Association object to the Board agent's failure to do so. Nonetheless, the Board may consider the interference allegation on appeal because it arises from the same facts as the retaliation allegation. (Chula Vista Elementary School District (2003) PERB Decision No. 1557; see ABC Unified School District (1991) PERB Decision No. 831b [the Board may decide an unappealed issue that is "inextricably intertwined" with an issue that has been appealed].)

The test for whether a respondent has interfered with the rights of employees under EERA does not require that unlawful motive be established, only that at least slight harm to employee rights results from the conduct. "[I]n order to establish a prima facie case of unlawful interference, the charging party must establish that the respondent's conduct tends to or does result in some harm to employee rights granted under EERA." (State of California (Department of Developmental Services) (1983) PERB Decision No. 344-S [citing Carlsbad].) In Clovis Unified School District (1984) PERB Decision No. 389, the Board held that a finding

[8]On appeal, the Association argues that the District's reasons for the reprimand were pretextual or, in the alternative, that the District had "mixed motives" for the reprimand. As the Association correctly notes, both of these are factual determinations to be made by an ALJ following an evidentiary hearing. However, these issues only come into play when the charge establishes a prima facie case of retaliation. (E.g., Oakland Unified School District (2007) PERB Decision No. 1880 ["If the charging party establishes a prima facie case of retaliation, the burden then shifts to the employer to prove that its action(s) would have been the same despite the protected activity."].) Because the Association's charge failed to state a prima facie case of retaliation, it is unnecessary to consider pretext or mixed motive in this case.

of interference does not require evidence that the employee actually felt threatened or intimidated or was in fact discouraged from participating in protected activity.

The Association's argument on this issue appears to be based on the assumption that the District reprimanded Barbetti for her protected conduct of speaking at the May 3, 2007 school board meeting. Discipline of an employee for engaging in protected activity interferes with the employee's protected rights under EERA because it chills participation in protected activity. (Alisal Union Elementary School District (1998) PERB Decision No. 1248.) However, the May 10, 2007 letter of reprimand shows that Barbetti was reprimanded for failing to comply with Superintendent Cotterell's directive to provide information related to the accusations Barbetti made at the school board meeting, not for the protected activity of making the accusations themselves. Further, it is unreasonable to believe that an employer would not seek information necessary to investigate accusations of misconduct from the individual making the accusations or that an employer would not discipline an employee for disobeying a direct order. Thus, neither the directive to provide the information nor the reprimand for insubordination chilled, or would tend to chill, Barbetti's exercise of her right to speak on issues of employer-employee relations. (See Carmichael Recreation and Park District (2008) PERB Decision No. 1953-M [no interference when employee's belief that employer conduct was threatening or retaliatory is unreasonable].) Consequently, though the Board agent did not dismiss the charge on this ground, dismissal was proper because the charge failed to state a prima facie case of interference.

ORDER

The partial dismissal of the unfair practice charge in Case No. LA-CE-5090-E is hereby AFFIRMED.

Members McKeag and Wesley joined in this Decision.