STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 715, AFL-CIO,	)	
Charging Party,	)	Case No. SF-CE-1274
v.	)	PERB Decision No. 742
LOS GATOS-SARATOGA SCHOOL DISTRICT,	)	June 19, 1989
Respondent.	)	

Appearance: Van Bourg, Weinberg, Roger & Rosenfeld by Vincent A. Harrington, Jr., Attorney, for Service Employees International Union, Local 715, AFL-CIO.

Before Hesse, Chairperson; Porter and Craib, Members.

DECISION

HESSE, Chairperson: This case is before Public Employment Relations Board (Board) on appeal by charging party of the Board agent's partial dismissal, attached hereto, of its charge that the respondent violated section 3543.5(a) of the Educational Employment Relations Act. We have reviewed the partial dismissal and, finding it to be free of prejudicial error, adopt it as the decision of the Board itself.

That portion of the unfair practice charge in Case No. SF-CE-1274 dismissed by the Board agent is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Member Porter joined in this Decision.

Member Craib's concurrence and dissent begins on page 2.

Member Craib, concurring and dissenting: I would affirm the partial dismissal insofar as it pertains to the allegation that the alleged discrimination is so inherently destructive to employee rights that it states an independent interference violation irrespective of proof of unlawful motive. (See, e.g., Carlsbad Unified School District (1979) PERB Decision No. 89; NLRB v. Erie Resistor Corp. (1963) 373 U.S. 221 [53 LRRM 2121].) However, the charging party's appeal addresses only the regional attorney's refusal to recognize that a derivative interference violation necessarily results from a finding of discrimination. Such a violation, due to its derivative nature, could not be found without first finding that the charging party has met its burden of proof on the discrimination allegation.

It is axiomatic that discrimination against a union activist not only affects that individual, but also has a chilling effect upon the rights of all employees. Under the National Labor Relations Act, the interference and discrimination prohibitions are in separate subdivisions (section 8, subdivisions (a)(l) and (a)(3), respectively). The National Labor Relations Board has consistently held that a violation of subdivision (a)(3) (discrimination) also constitutes a derivative violation of subdivision (a)(l) (interference). (See, generally, Morris, The Developing Labor Law (2d ed. 1983) vol. I, p. 75.)

Under the Educational Employment Relations Act (EERA), the interference and discrimination prohibitions are contained in the same subdivision (section 3543.5, subdivision (a)). This structural difference in the two statutes does not, of course,

affect the logic of finding such derivative interference violations. If anything, it is more natural under EERA, since it would not require a finding as to a subdivision that may not have been formally pled.

In sum, on appeal the charging party simply asks that the Board recognize that discrimination against even one individual has a chilling effect upon the rights of all employees. In other words, the Board is asked to recognize an elementary principle of labor law. The complaint is sufficient, as drafted, for it simply alleges a violation of subdivision (a) of section 3543.5 based on purportedly discriminatory conduct. However, it is important for the Board to expressly recognize the derivative interference theory (rather than affirm the regional attorney's analysis), so that the administrative law judge who hears the case and renders a proposed decision will not feel constrained to reject it.

STATE Of CALIFORNIA GEORGE DEUKMEJIAN, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
177 Post Street, Suite 900
San Francisco, CA 94108-4737
(415)557-1350

January 18, 1989

Vincent A. Harrington, Jr.
Law Offices of Van Bourg et al
875 Battery Street
San Francisco, CA. 94111

Re: PARTIAL DISMISSAL OF ALLEGATIONS AND PARTIAL REFUSAL TO ISSUE COMPLAINT
SEIU, Local 715, AFL-CIO v. Los Gatos-Saratoga School District, Unfair Practice Charge No. SF-CE-1274

Dear Mr. Harrington:

I indicated to you in my attached letter, dated January 13, 1989, that the above-referenced charge, in part, does not state a prima facie violation of EERA section 3543.5(a). You were advised that if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, you should amend the charge accordingly. You were further advised that unless you amended the charge to state a prima facie case, or withdrew it prior to January 18, 1989, the pertinent allegations of the charge would be dismissed.

You and I spoke by telephone on January 13, 1989. You stated during that conversation that you understand, although do not accept, the reasoning underlying the conclusion that a Partial Dismissal should issue in this case. Further, you stated that you are not aware of additional facts or argument which could be presented to cure what I claim are deficiencies in the charge. Therefore, you have no intention of amending or withdrawing this charge.

I have received neither a withdrawal nor an amended charge. I am therefore dismissing the allegations described in the attached Warning Letter based on the facts and reasons described therein.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, 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 (California Administrative Code, title 8, section 32635(a)). To be timely filed, the original and five copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing (California Administrative Code, title 8, section 32135). Code of Civil Procedure section 1013 shall apply. The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

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 calendar days following the date of service of the appeal (California Administrative Code, title 8, section 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 California Administrative Code, title 8, section 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.

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 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 (California Administrative Code, title 8, section 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,

CHRISTINE A. BOLOGNA
General Counsel

By _____
Peter Haberfled
Regional Attorney

Attachment

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
177 Port Street. Suite 900
Son Francisco, CA 94108-4737
(415)557-1350

January 13, 1989

Vincent A. Harrington, Jr.
Law Offices of Victor Van Bourg, et al
875 Battery Street
San Francisco, CA 94111

Re: WARNING LETTER
Service Employees International Union, Local 715, AFL-CIO, v. Los Gatos-Saratoga School District, Unfair Practice Charge No. SF-CE-1274

Dear Mr. Harrington:

On September 9, 1988, you filed an unfair practice charge on behalf of the Service Employees International Union, Local 715, AFL-CIO (Union) against the Los Gatos-Saratoga School District (District) alleging violation of EERA section 3543.5(a). More specifically, you allege that the District discriminated against Ms. Norma Pal when it failed/refused, because of her union activities, to offer to her, as an alternative to layoff, a vacant position as a Library Technician . You also allege that independent of any specific motivation or animus which the employer may have borne toward Ms. Pal, its refusal to place Pal in the vacant Library Technician position constitutes an employer action which is inherently destructive of important employee rights and interests and therefore constitutes an interference in violation of EERA section 3543.5(a).

You allege that Norma Pal has been an active, visible, outspoken union adherent who engaged in activities that involved serving as Union steward for several years up through October 1, 1988, the date on which she was laid off, and negotiator for the Union's local Chapter organization during 1985 and 1986. The Union had informed the District that Ms. Pal was elected to serve on the Union negotiating committee during 1987 but she was unable to do so because of a medical condition. Similarly, the Union notified the District that she had been elected to serve in the same capacity during 1988, but she was unable to do so after having been laid off.

The District is small, consisting of two high schools and approximately ninety unit members. Allegedly, Ms. Pal represented other classified unit members informally and formally in a variety of different contexts. Although she was employed at Saratoga High School, she was known to the Principal of the Los Altos High School because he served on the District's negotiating team.

The District informed the Union, as early as June 1988, that Ms. Pal was slated for layoff. In response, the Union made a formal presentation to the Board of Education in which it urged that rather than laying off Ms. Pal, a union activist, the District, instead, should solve budget problems by not filling vacancies which come about through natural attrition. The Board took formal action to lay off Ms. Pal on August 15, 1988. The notice to lay off Ms. Pal, to take effect on October 1, 1988, was issued to her on August 17, 1988.

Between the date on which Ms. Pal learned of the impending layoff and the date she received formal notice, she applied for a Library Technician II position which was vacant at Los Altos High School. The District denied her the requested transfer on August 5, 1988. She met many of the published requirements for the position and offered to enroll in school to fulfill the few remaining specifications. However, the District interviewers, Los Altos Principal Simonsen and Ms. Ropshan, the Librarian, hired another individual who did not possess Ms. Pal's seniority, background or experience with the District. The Union states that Ms. Ropshan was a teacher at Los Gatos High School during the time Ms. Pal was active there on behalf of classified employees. Both she and Principal Simonsen were aware of Ms. Pal's protected activities.

The Union contends that the District has a policy of awarding vacant positions to qualified persons within the District rather than hiring a non-District employee. The Union complains that, despite the policy and Ms. Pal's being qualified to perform the duties of the job, an outsider was chosen to fill the vacancy.

The Union alleges that the District applied its policy two years ago to hire Ms. Jean Ridley, Ms. Pal's co-worker. Ms Ridley, a Clerk-Typist at Saratoga High School was slated for layoff. She applied for and was transferred to fill a vacant Library Technician position at Saratoga High School. Like Ms. Pal, Ms. Ridley did not meet all the qualifications, yet the District agreed to place Ms. Ridley in the Library Technician position and allow her to pursue further training on the job. Ms. Ridley was not a Union activist.

You, on behalf of the Union, have responded in writing to the District's contention that the job required that Ms. Pal be able to type more than nine (9) words per minute. You explain that

Ms. Pal states that she was not asked whether her typing speed had changed over the years since it was measured at 9 wpm; she,

> assured the interviewers that she had been typing cards and writing to publishers in her present position and had a basic facility in typing;

the two interviewers (Ted Simonsen, Assistant Principal, and Linda Ropshan, the Librarian) told her that the main responsibilities of the job would be to,

> man (sic) the counter, help students find books and check things in and out using the computer;

two library technicians at Los Gatos High School said they did some typing—book requisitions, lists, card catalogue entries--but the main job of the half-time worker is to be in charge of the periodicals; the half-time worker claimed that she spent between one-half hour and one hour per day performing typing duties; and, the full-time librarian said she spends between one and two hours per day. The job description provided by the District does not list as a job qualification that the applicant type a required number of words-per-minute. The Union urges that this information indicates that the typing requirement is not a bona fide disqualifying factor in Ms. Pal's case..

Based on the facts described above, the allegation that the District's refusal to hire Ms. Pal interfered with employee rights does not state a prima facie violation of EERA for the reasons which follow.

In Novato Unified School District (1982) PERB Decision No. 210, the Board described two types of violation which may be alleged under EERA Section 3543.5(a). First, facts which suggest that the employer's conduct injured or tended to injure the exercise of employee rights under EERA, akin to those alleged and reviewed in Carlsbad Unified School District (1979) PERB Decision No. 89, set forth an "interference" violation. Second, facts which suggest that an employer subjected an employee to adverse treatment because s/he engaged in protected activity, similar to those analyzed in Wrightline, a division of Wrightline, Inc. (1980) 251 NLRB No. 150 [105 LRRM 1169], set forth a "discrimination" violation. In Novato, supra, the PERB found a discrimination violation.

The facts alleged here are similar to those alleged in Novato, supra. Therefore, a complaint will issue alleging a discrimination violation.

In neither Novato nor other Board decisions which involve violations of section 3543.5(a) has the Board found that the facts on which the discrimination violation is based

automatically give rise to a derivative or independent interference violation. The allegations of this charge are not distinguishable from Novato and its progeny. Accordingly, the allegations that the District also violated EERA section 3543.5(a) on an "interference" theory shall be dismissed.

If there are any factual inaccuracies in this letter or any additional facts that would correct the deficiencies explained above, please amend the charge accordingly. 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 must be signed under penalty of perjury by the charging party. The amended charge must be served on the respondent and the original proof of service must be filed with PERB. For the reasons set forth above, unless the allegations that the District's conduct gives rise, on an "interference theory, to an independent and/or derivative violation of section 3543.5(a) are withdrawn or amended before January 18, 1988, they will be dismissed.

Sincerely,

Peter Haberfeld
Regional Attorney