STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

STEVE LOHMANN,	)	
	)	
Charging Party,	)	Case No. LA-CE-3020
	)	
v.	)	PERB Decision No. 879
	)	
SAN DIEGO UNIFIED SCHOOL DISTRICT,	)	May 21, 1991
	)	
Respondent.	)	
	)	

Appearances: Steve Lohmann, on his own behalf; Jose A. Gonzales, Assistant General Counsel, for San Diego Unified School District.

Before Hesse, Chairperson; Camilli and Carlyle, Members.

DECISION AND ORDER

HESSE, Chairperson: This case is before the Public Employment Relations Board (Board) on appeal by Steve Lohmann of the Board agent's dismissal (attached hereto) of his charge that the San Diego Unified School District violated section 3543.5(a) of the Education Employment Relations Act (EERA).[1] We have reviewed the dismissal and, finding it to be free of prejudicial error, adopt it as the Decision of the Board itself.

---

[1]EERA is codified at Government Code section 3540 et seq. Section 3543.5 states, in pertinent part:

> It shall be unlawful for a public school employer to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

The unfair practice charge in Case No. LA-CE-3020 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Camilli and Carlyle joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Boulevard. Suite 650
Los Angeles, CA 90010-2334
(213) 736-3127

March 11, 1991

Steve Lohmann

Re: Steve Lohmann v. San Diego Unified School District
Unfair Practice Charge No. LA-CE-3020, First Amended Charge
DISMISSAL OF CHARGE AND REFUSAL TO ISSUE COMPLAINT

Dear Mr. Lohmann:

The above-referenced charge was initially filed on August 22, 1990. A First Amended Charge was filed March 4, 1991 (U.S. Express Mail). The First Amended Charge alleges that the San Diego Unified School District (District) violated EERA section 3543.5(a) by committing unlawful reprisals and/or other acts against Mr. Lohmann.

I indicated to you in my attached letter dated February 26, 1991, that for the case to go further, you needed to file an amended charge which included, among other things, the adverse actions you believe the District engaged in. I also indicated in summary that the amended charge should contain facts and dates describing your protected/union activity, the District's knowledge of said activity, the adverse actions taken by the District, and the reasons you believe the adverse actions were taken in retaliation for your protected activity (i.e. nexus between the adverse actions and protected activity). You were further advised that unless I received an amended charge or withdrawal from you before March 5, 1991, the charge would be dismissed.

Your first three adverse actions are, in essence, that on December 11, 1989, you were involved in an unfair interview for promotion, you discovered on or about February 9, 1990, that the District violated their administrative procedures, and that on February 15, 1990, Mr. James R. Rhetta, Director of Classified Personnel, advised you to file an administrative procedures violation on a Merit System Rules complaint form, knowing that it should have been filed as a grievance by the union. These three alleged adverse actions fail to state a prima facie case as they are untimely. Section 3541.5(a) of EERA does not allow a complaint to issue regarding a charge based upon an alleged unfair practice occurring more than six months prior to the

filing of the charge. The adverse actions above occurred prior to February 22, 1990, and are therefore untimely and will be dismissed. Also, although you have some protected activity occurring prior to the other two adverse actions, you have alleged no prior protected activity for the first adverse action occurring on December 11, 1989.

Next, you allege that Mr. Rhetta made his decision denying your merit system complaint on February 22, 1990. Although you have prior protected activity, you have failed to demonstrate that Mr. Rhetta's response was made in retaliation for your protected activity. You essentially contend, in part, that proper or standard procedures were not followed in that (1) the District, in part, violated their administrative procedures in December 1989 and (2) Mr. Rhetta incorrectly and/or knowingly advised you to file this issue on a Merit System Rules complaint form instead of as a grievance filed by the union. First, the alleged violation of the District's administrative procedures relates to the above December 1989 interview problem, and does not demonstrate nexus for Mr. Rhetta's February 22, 1990 response to your Merit System Rules complaint (which you filed February 15, 1990, and then revised February 20, 1990). Second, Mr. Rhetta's recommendation was proper according to Article XIII, section 6.M. of the Collective Bargaining Agreement (Agreement) between the District and the union, which states that "Actions to challenge the Merit System, procedures and policies of the District. . . or to appeal the District's adherence to or application of any of the aforementioned shall not be undertaken through the grievance procedure." (Emphasis added.) Thus, your Merit System Complaint in February 1990 regarding the entire December 1989 incident was not inappropriate. You have not demonstrated that standard policy or procedures were not followed or shown nexus in any other way.

You argue that only the union can file grievances over violations of the District's administrative procedures. You point out that the Agreement at Article III, Employee Organization Rights, Section 11, Administrative Regulations and Procedures, states that "The District will provide the Union one (1) set of Administrative Regulations & Procedures and revisions thereto." Section 19, Rights Grievable, states that "Rights granted by this Article III shall be grievable only by the Union." This only means that should the union not be given one set, only it can file a grievance. It does not mean that only the union can grieve violations of the Administrative Regulations & Procedures.

Next, you allege that you appealed[1] to the Assistant to the Superintendent for Personnel Services, Mr. George Russell, and he "either knowing (sic) or negligently allowed this inappropriate procedure to continue." Negligence does not violate EERA. Also, it is unclear this is an adverse action based on the above. Palo Verde Unified School District (1988) PERB Decision No. 689. Even if it is adverse, there is no evidence of nexus. Furthermore, pleading a bare allegation, without supporting facts, is insufficient for purposes of alleging a prima facie case. California State University (Pomona) (1988) PERB Decision No. 710-H.

Next, you allege that Mr. Raymond J. Blake was appointed Merit System Rules fact-finder for your case and that he "either knowing (sic) or negligently decided on an Administrative Procedure violation when he no (sic) right or authority to do so." You further allege that since Mr. Blake took time to decide this matter, he increased his arbitrator's stipend, which resulted in Mr. Lohmann being charged an unfair amount.[2] Negligence does not violate EERA. Also, it is unclear these are adverse actions in light of the above. Palo Verde Unified School District, supra. Also, the Merit System Rules for Classified Employees provide at Article XI, section 5.d.(3) that if the appeal is denied, the appellant and the Board of Education will share equally in the cost of the fact-finder's stipend. Here, your fair share was $213.86, which was in fact refunded to you by the union on or about July 24, 1990. Even if these are adverse actions, there are no facts showing that Mr. Blake's conduct was done in retaliation for your protected activity.

Next, you allege that on May 5, 1990, you appealed the fact-finder's decision to Superintendent Thomas Payzant and asked him to look into the case. On May 18, 1990, in denying your appeal, you allege that "He negligently allowed this violation[3] of the Union Contract to go uncorrected. He stated in his decision 'This was not a matter relative to a union contract but dealt

---

[1]You appealed to Mr. Russell on March 2, 1990, and met with him on March 28, 1990.

[2]Mr. Blake submitted the fact-finder's Review and Advisory Decision in favor of the District on April 23, 1990. A question exists whether the fact-finder is an agent of the District. The fact-finder is being treated here as an agent without deciding the issue.

[3]It is unclear which exact violation you are referring to here.

strictly with Administration of the Merit System Rules and, as such, was totally in the hands of the fact-finder.'" As indicated above, EERA does not make it a violation for school districts to act negligently. Also, you must allege that the superintendent acted in a discriminatory way. You have failed to show any nexus between your protected activity and the superintendent's conduct.

Therefore, I am dismissing this charge without leave to amend based on the facts and reasons contained above and in the attached February 26, 1991 letter.

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 Code of Regulations, 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 Code of Regulations, 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 Code of Regulations, 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 Code of Regulations, 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,

JOHN W. SPITTLER
General Counsel

By _____
Marc S. Hurwitz
Regional Attorney

Attachment

cc: R. Ann Wright, Employee Relations Director
San Diego Unified School District
Jose Gonzales, Assistant General Counsel
San Diego Unified School District

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3S30 Wilshire Boulevard. Suite 630
lot Angeles, CA 90010-2334
(213) 736-3127

February 26, 1991

Steve Lohmann

Re: Steve Lohmann v. San Diego **Unified, School District**
Unfair Practice Charge No. LA-CE-3020
WARNING LETTER
rict

Dear Mr. Lohmann:

The above-referenced charge was filed on August 22, 1990. You allege that the San Diego Unified School District (District) has violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a) and (c) through various adverse actions or reprisals taken against you.[1] At all times relevant hereto, you have been an employee of the District working as a gardener.

After reading your charge, I could not identify the basis for your claims against the District and/or it appeared the elements to state a prima facie case were lacking. I called you in January 1991 and during several telephone conversations you essentially indicated that the following actions (several of which are derived from this charge or your unfair practice charge No. LA-CO-544 against CSEA) were taken for discriminatory reasons:

1. On December 8 and 11, 1989, interviews were held for a vacant Landscape Maintenance Supervisor (LMS) position. You were not invited to interview. Also on December 11, 1989, another LMS position became available. **You were contacted at** work **and** interviewed on short notice, but not selected. (You contend the Merit System Rules for Classified Employees (1986), and the District Administrative Procedures were violated. You subsequently filed one or more complaints under the Merit System Rules.)

[1]Regarding the EERA section 3543.5 (c) violation, there are no facts in this charge that indicate a violation of this type. **For** that reason, this allegation will not be treated in detail. Furthermore, an individual does not have standing to raise this type of violation. Oxnard School District (Gorcey & Tripp) (1988) PERB Decision No. 667. Thus, this allegation is being dismissed.

2. On or about February 10, 1990 or shortly thereafter, the District caused your CSEA Field Representative, Steve Burrell, to be taken off your case or got Mr. Burrell fired. (The union is contending that Mr. Burrell went on a one-year leave of absence effective March 1, 1990.)

3. On February 15, 1990, you met with James R. Rhetta, Director of Classified Personnel, and asked for the procedure to complain about a violation of the District's Administrative Procedures. (Administrative Procedure No. 7450 (Rev. 1-1-84), Section D.2.) He advised you to file a complaint pursuant to the Merit System Rules. You contend this issue should have been handled as a grievance filed by the union and that Mr. Rhetta, knowingly, provided incorrect information so that your Merit System complaint would come back to his office.

4. The District gave you only four days notice of a fact-finder's hearing/investigatory meeting scheduled for April 18, 1990. Due to the short notice, you were unable to obtain union representation for the meeting.

5. On April 23, 1990, the fact-finder, Raymond J. Blake, unfairly decided against you and you were charged $213.00. On April 18, 1990, you were unable to review the December 1989 interview records and resolve some questions due to a thirty (30) minute time limit at the meeting. Also, several witnesses on your behalf were not interviewed by the fact-finder.

6. On May 5, 1990, you appealed the fact-finder's decision to Superintendent Thomas Payzant. You requested another fact-finding meeting concerning your right to union representation and other procedures in your case. On May 18, 1990, the Superintendent denied your appeal and requests. You feel this is a violation of the collective bargaining agreement (Agreement) between the District and the union.

For the case to go further, you need to file an amended charge which includes, among other things, the adverse actions you believe the District engaged in.

To demonstrate these actions are discrimination in violation of EERA section 3543.5(a), you must state facts showing: (1) you exercised rights under the EERA, (2) the employer had knowledge of the exercise of those rights, (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced you, and (4) the employer's actions were motivated by or because

of your exercise of those rights. Novato Unified School District (1982) PERB Decision No. 210; Carlsbad Unified School District (1979) PERB Decision No. 89; Department of Developmental Services (1982) PERB Decision No. 228-S; California State University (Sacramento) (1982) PERB Decision No. 211-H.

To state facts which demonstrate motivation, timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor. It does not, without more, demonstrate such motivation. 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, (2) the employer's departure from established procedures and standards when dealing with the employee, (3) the employer's inconsistent or contradictory justifications for its actions, (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, or (6) any other facts which might demonstrate the employer's unlawful motive. Novato Unified School District. supra; North Sacramento School District (1982) PERB Decision No. 264.

As explained above, your amended charge should contain facts and dates describing your protected/union activity, the District's knowledge of said activity, the adverse actions taken by the District, and the reasons you believe the adverse actions were taken in retaliation for your protected activity (i.e., nexus between the adverse actions and protected activity). 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. If I do not receive an amended charge or withdrawal from you before March 5, 1991, I shall dismiss your charge. If you have any questions, please call me at (213) 736-3127.

Sincerely,

Marc S. Hurwitz
Regional Attorney