

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



SERVICE EMPLOYEES INTERNATIONAL)
UNION, LOCAL 535,)
)
Charging Party,) Case No. SA-CE-1883
)
v.) PERB Decision No. 1335
)
FRESNO UNIFIED SCHOOL DISTRICT,) June 25, 1999
)
Respondent.)
_____)
)
ROBERT MILOVICH,)
)
Real Party in Interest.)
_____)
_____ ; _____)

Appearances: Miller, Brown & Dannis by Enid Y. Rivera, Attorney, for Fresno Unified School District; Robert Milovich, on his own behalf.

Before Caffrey, Chairman; Dyer and Amador, Members.

DECISION

CAFFREY, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Robert Milovich (Milovich) of a Board agent's dismissal (attached) of the unfair practice charge filed on his behalf by the Service Employees International Union, Local 535 (SEIU). Pursuant to PERB Regulation 32164(d)(2)(A)¹ the Board orders the joinder of

¹PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. Regulation 32164 states, in pertinent part:

(d) The Board may order joinder of an employer, employee organization or individual, subject to its jurisdiction, on application of any party or its own motion if it determines that:

Milovich to allow him to protect his interest in the dismissed charge. In the charge, SEIU alleged that the Fresno Unified School District (District) violated section 3543.5(a) of the Educational Employment Relations Act (EERA)² by retaliating against Milovich for his participation in protected activities.

The Board has reviewed the entire record in this case, including SEIU's original and amended unfair practice charge, the Board agent's warning and dismissal letters, Milovich's appeal and the District's response thereto. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself.

(2) The employer, employee organization or individual has an interest relating to the subject of the action and is so situated that the disposition of the action in their absence may:

(A) As a practical matter impair or impede their ability to protect that interest.

²EERA 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.

ORDER

The unfair practice charge in Case No. SA-CE-1883 is hereby
DISMISSED WITHOUT LEAVE TO AMEND.

Members Dyer and Amador joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174.
(916) 322-3198



April 5, 1999

Thomas M. Sharpe, Attorney
2300 Tulare Street, Suite 310
Fresno, CA 93721

Re: **DISMISSAL LETTER**

~~Service Employees International Union, Local 535 v. Fresno
Unified School District~~

Unfair Practice Charge No. SA-CE-1883

Dear Mr. Sharpe:

On January 25, 1999, you filed the above-referenced unfair practice charge on behalf of the Service Employees International Union, Local 535 (SEIU). In this charge, you allege that the Fresno Unified School District (District) violated the Educational Employment Relations Act (EERA) when it terminated substitute teacher Robert Milovich on or about December 14, 1998. You assert that the District terminated Milovich due to his participation in the organizing drive being conducted by SEIU. This organizational activity resulted in a PERB conducted election in January, 1999. It can be inferred from your charge that you allege that the District violated section 3543.5(a) of EERA when it terminated Milovich in December of 1998.

I indicated to you, in my attached letter dated February 25, 1999, 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 March 8, 1999, the charge would be dismissed.

You were granted additional time to amend the charge and on March 22, 1999 the First Amended Charge was filed. The amended charge attempts to address the deficiencies in the original charge by providing information relative to the District's knowledge of Mr. Milovich's protected activity and points to the disparate treatment Mr. Milovich received as compared to other substitute teachers with more than three negative evaluations.

The additional information in your allegations contends that Mr. Milovich became active in SEIU organizing activities in April 1998 and participated in a "blitz" of District schools in May 1998 to gather authorization cards in support of SEIU's filing a request for recognition in a substitute teachers' unit. He was referred to in various SEIU newsletters and bulletins throughout the Summer and Fall of 1998 and attended District Board meetings and a PERB hearing in October 1998.

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On March 25, 1998, Mr. Milovich received a negative evaluation for his work at Bullard Talent Elementary School. He was accused of showing an unauthorized movie in the class in which he was serving as a substitute. This was his third negative evaluation focusing on that subject and his sixth overall negative evaluation. The District has a policy that provides for substitute teachers to be struck from its rosters following three negative evaluations. The District's copy of the March 25 evaluation reflects that it was received in the Personnel office on April 24, 1998. On April 27, 1998, the District notified Mr. Milovich that any further negative evaluations referencing the showing of unauthorized movies in the classroom would result in his name being removed from the available substitutes list. This warning came prior to Mr. Milovich's active role in SEIU's campaign.

You contend that this warning came close in time to Mr. Milovich meeting with Gordon Lindberg, the District's Labor Relations Administrator, and Deberie Gomez, Associate Superintendent. The meeting was held in mid-April to discuss the District providing SEIU a list of substitute teachers.

On November 25, 1998, regular teacher, Fred Jacobs, from McLane High School completed a negative evaluation which alleges that Mr. Milovich showed an unauthorized movie on November 23, 1998. The Principal at McLane indicated that Mr. Milovich apologized profusely and that she would recommend he be given future assignments and forwarded the evaluation form to the District office responsible for maintaining the personnel files for substitutes. The District on December 14, 1998 informed Mr. Milovich that his name would be removed from the active roster of substitute teachers based on a review of his work history and evaluations.

The element of "nexus" which you raised in the amended charge was the disparate treatment of Mr. Milovich as compared to other substitute teachers similarly situated. You contend that there are at least three other substitute teachers who have at least three or more negative evaluations who continue to work for the District. I asked you to verify if any of them had received a warning letter similar to Mr. Milovich or if any of them had as many as seven negative evaluations. Your reports back did not support your theory of disparate treatment in that none of the three had as many as six or seven negative evaluations and none had received a warning letter followed by another negative evaluation. (Although you contend that at least one of the three substitutes did receive a warning with his third negative evaluation, he had not received another negative evaluation.)

I find that Mr. Milovich's treatment was not disparate in comparison to these other teachers. Mr. Milovich was specifically warned not to show unauthorized movies but admittedly did so on November 23. No

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other teachers were allowed to ignore such a warning. Nor did other teachers have as many negative evaluations.

You argue that none of the three substitutes had as many years of service as Mr. Milovich. Proportionately, you argue, his seven evaluations over twenty years were fewer than the three that some of these substitute teachers had accumulated in five years of service or less. This is not a basis to find that the District treated Mr. Milovich disparately.

For the reasons outlined in this letter and my February 25, 1999, letter, your charge is hereby dismissed.

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. (Cal. Code Regs., tit. 8, sec. 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. (Cal. Code Regs., tit. 8, sec. 32135(a); see also Cal. Code Regs., tit. 8, sec. 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 Cal. Code Regs., tit. 8, sec. 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. (Cal. Code Regs., tit. 8, secs. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 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

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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. (Cal. Code Regs., tit. 8, sec. 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 Cal. Code Regs., tit. 8, sec. 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. (Cal. Code Regs., tit. 8, sec. 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. (Cal. Code Regs., tit. 8, sec. 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
Deputy General Counsel

Rog^jf Smith
Board Agent

Attachment

cc: Enid Y. Rivera, Attorney

PUBLIC EMPLOYMENT RELATIONS BOARD



Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916) 322-3198



February 25, 1999

Thomas M. Sharpe, Attorney
2300 Tulare Street, Suite 310
Fresno, CA 93721

Re: **WARNING LETTER**
Service Employees International Union, Local 535 v. Fresno
Unified School District
Unfair Practice Charge No. SA-CE-1883

Dear Mr. Sharpe:

On January 25, 1999, you filed the above-referenced unfair practice charge on behalf of the Service Employees International Union, Local 535 (SEIU). In this charge, you allege that the Fresno Unified School District (District) violated the Educational Employment Relations Act (EERA) when it terminated substitute teacher Robert Milovich on or about December 14, 1998. You assert that the District terminated Milovich due to his participation in the organizing drive being conducted by SEIU. This organizational activity resulted in a PERB conducted election in January, 1999. It can be inferred from your charge that you allege that the District violated section 3543.5(a) of EERA when it terminated Milovich in December of 1998.

As I indicated in our telephone conversation, PERB has established standards to prove a prima facie violation of retaliation. The charge as currently filed does not provide factual allegations to support your conclusions. You indicated that you would review this warning letter and respond accordingly. As I also indicated, with the District's concurrence, I am enclosing the employer's response to the charge (without declarations).

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; 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.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an

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important factor, 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; (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 presently written, this charge fails to demonstrate any of these factors and therefore does not state a prima facie violation of EERA section 3543.5(a).

You contend that Milovich actively campaigned on behalf of SEIU but provide no evidence of such activity. Further, you provide no facts to support the necessary element of employer knowledge of the protected conduct other than a broad statement that "managerial and supervisory employees of FUSD were aware" of his protected conduct.

As to the "nexus", you have provided legal conclusions but no facts to support the contention that the District violated the EERA through its termination of Milovich. You assert that the District failed to grant Milovich an informal hearing as it had other substitute employees. What is the informal hearing process? How often does the District use it? Is it used for cases similar to Milovich's?

Furthermore, you contend that the District did not question the validity of the complaint brought by the regular classroom teacher which lead to Milovich's termination. Is this a departure from established procedure?

Finally, you assert that the District took the action of termination despite the willingness of a supervisory employee to give Milovich an opportunity to continue his twenty year employment as a substitute teacher. Have there been instances where supervisors have had the authority to convince management not to terminate employees similarly situated? You need to provide facts to support your allegations.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies

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in this letter or additional facts which 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 March 8, 1999, I shall dismiss your charge. If you have any questions, please call me at (916) 322-3198 ext. 358.

Sincerely,

Roger Smith
Board Agent

RCS:ces

Enclosure