STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

LILLIAN H. BURTON Charging Party, v. LOS ANGELES COUNTY OFFICE OF EDUCATION, Respondent.	)	Case No. LA-CE-4046 PERB Decision No. 1360 November 3, 1999

Appearance; Lillian H. Burton, on her own behalf.

Before Caffrey, Chairman; Dyer and Amador, Members.

DECISION

DYER, Member: This case comes before the Public Employment Relations Board (Board) on appeal by Lillian H. Burton (Burton) from a Board agent's dismissal (attached) of her unfair practice charge.

On March 20, 1999,[1] Burton filed a charge alleging that the Los Angeles County Office of Education violated the Educational Employment Relations Act (EERA)[2] when she was ordered to leave campus on September 22, 1998.

Following a March 26 warning letter from the Board agent, which indicated that the charge did not state a prima facie case, Burton filed an amended charge on April 6. In both the original and amended charges, Burton failed to allege that any specific section of EERA had been violated. A review of the charges by

[1]All dates refer to 1999 unless otherwise noted.

[2]EERA is codified at Government Code section 3540 et seq.

the Board agent demonstrated that they should be analyzed as an alleged violation of EERA section 3543.5(a).[3]

The Board has reviewed the entire record in this case, including the unfair practice charge, the warning and dismissal letters and Burton's appeal. The Board finds the warning and dismissal letters to be free from prejudicial error and adopts them as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. LA-CE-4046 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Caffrey and Member Amador joined in this Decision.

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[3]Section 3543.5(a) provides:

> 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 any applicant for employment or reemployment.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415) 439-6940

June 17, 1999

Lillian H. Burton

Re: **DISMISSAL OF CHARGE/REFUSAL TO ISSUE COMPLAINT**
Lillian H. Burton v. Los Angeles County Office of Education
Unfair Practice Charge No. LA-CE-4046

Dear Ms. Burton:

The above-referenced unfair practice charge, filed March 20, 1999, alleges the Los Angeles County Office of Education (LACOE) violated your due process rights by ordering you to leave campus on September 22, 1998.[1] Charging Party does not allege any specific section of the Educational Employment Relations Act (EERA or Act) has been violated. A review of the charge demonstrates, however, the charge should be analyzed as a violation of Government Code section 3543.5(a).

I indicated to you, in my attached letter dated March 26, 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 April 5, 1999, the charge would be dismissed.

On April 6, 1999, Charging Party filed a first amended charge. The first amended charge contains a six (6) page hand-written narrative, and included a binder of attachments totaling nearly 100 pages. A summary of those documents and Charging Party's allegations follow.

Charging Party provides numerous documents regarding a 1996 incident involving student Ruben Martinez. Apparently Charging

[1] Specifically, Charging Party alleges in Section 6(b) of the unfair practice charge form: "Suspension-Censorship-Expulsion-Coercion to engage in child endangerment activities and other illegal activities. Harassment, invalid grievance procedure-Criminal Activity, Discrimination, etc."

Party provided such information to demonstrate the District's treatment of her. Such information also included police reports filed against Charging Party. Additionally, Charging Party provided several documents regarding her 1997 grievances against the District over her disciplinary suspension. Included in this information are letters between Charging Party, the Los Angeles County Employees Association (LACEA) and the District which date back to 1997. It appears Charging Party was not satisfied with the representation she received in 1997 and was not satisfied with the District's reasons for her suspension.

Charging Party also includes a section entitled "Child Endangerment" in which she includes more information regarding what she believes are unsafe conditions at the District dating back to 1997.

In March 1998, Charging Party requested a Medical Leave of Absence due to a reoccurring back injury allegedly caused by her employment. Charging Party's request was granted, and Charging Party did not return to her position during the 1997-1998 school year.

On June 15, 1998, LACOE sent Charging Party a letter asking whether Charging Party planned to return in September 1998, for the 1998-1999 school year. On June 22, 1998, Charging Party informed the LACOE of her intent to return to teaching. On July 29, 1998, the LACOE instructed Charging Party to report to La Merced Intermediate for the 1998-1999 school year.

On September 22, 1998, Charging Party was met in her classroom by Buena Vista Principal Ms. Hopko and LACOE's Worker's Compensation coordinator, Janice Whittle. Ms. Hopko informed Charging Party that because Charging Party had not provided a doctor's release for her to return to work, she would have to leave campus immediately.[2] As there was only 30 minutes left in the school day, Charging Party asked to stay until the end of the day. Charging Party also requested written confirmation from Ms. Hopko

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[2] Article VII of the parties collective bargaining agreement, entitled Leaves of Absence and Vacation, states the following with regard to Medical Verifications:

> . . . Upon a unit member's return from any extended disability leave, the Office will routinely require the unit member to furnish written medical evidence from a physician releasing the unit member to return to service without duty restrictions.

that she was being told to leave the campus prior to the end of the school day.

Ms. Hopko refused to allow Charging Party to stay until the end of the school day and refused to provide written documentation. As Charging Party walked towards the classroom telephone to contact her union representatives, Ms. Hopko stated she had already spoken with LACEA President, John Kohn. Charging Party then telephoned LACEA site representative Doug Jockinson, seeking his advice. Mr. Jockinson was not aware of the situation and stated it was "bizarre." Mr. Jockinson then attempted to contact another LACEA representative. During this time, Ms. Hopko and Ms. Whittle stationed themselves outside Charging Party's classroom door.

After several minutes had passed, Ms. Hopko telephoned campus security who refused to remove Charging Party from the school grounds. Eventually, the school day ended and Charging Party gathered her things to leave the classroom. Before she could leave, however, Charging Party and Ms. Hopko engaged in a verbal confrontation. Charging Party ended the conversation stating she would return the following day to receive written confirmation of her removal from the classroom.

After leaving school grounds, Charging Party met with Association representative Andrea Wakefield. Ms. Wakefield telephoned Mr. Kohn and confirmed that Mr. Kohn had been informed of Charging Party's situation prior to her removal from the classroom. Charging Party voiced her anger over Mr. Kohn's failure to inform her of the impending events. Ms. Wakefield then telephoned the District's Labor Relations Officer, Rene Gagnon and secured his word that Charging Party would receive written confirmation of the days events the next day. Charging Party also alleges Mr. Gagnon "warned Andrea Wakefield that Ms. Hopko might create a difficult situation."

Charging Party and Ms. Wakefield returned to school grounds on the following day. Upon returning to the school grounds, Charging Party and Ms. Wakefield noticed a Montebello Police Department officer was circling the school parking lot. Charging Party states the police officer was called by Ms. Hopko, who feared Charging Party "might make a-scene." Ms. Hopko was not present at the time, thus Charging Party waited outside. When Ms. Hopko finally arrived, 30 minutes late, Charging Party secured her letter and left the campus.

Charging Party alleges the District's conduct denied her due process and demonstrates discrimination. Charging Party also

contends she was denied her right to union representation under the Agreement.[3]

Based on the facts presented in the original and first amended charges, the charge fails to state a prima facie case of discrimination and denial on union representation, for the reasons provided below.

I. Discrimination

Government Code section 3541.5(a)(1) prohibits the Board from issuing a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. As such, Charging Party allegations with regard to her 1996 and 1997 grievances and suspension are time barred and outside of PERB's jurisdiction.

With regard to the September 22, 1998, incident, the charge fails to demonstrate a prima facie case of discrimination. 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 Charging Party engaged in protected activity in 1996 and 1997, facts presented fail to demonstrate she was removed from the classroom on September 22, 1998, because of these protected activity. As noted in my March 26, 1999, warning letter, Charging Party must demonstrate facts establishing one or more of the following factors: (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

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[3] Article IV of the Agreement provides the following with regard to Representation Rights:

> A unit member shall be entitled to representation by the Association in matters which may effect his/her continued employment with the Office; at times when disciplinary action is contemplated; or when reviewing the unit member's personnel file.

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.)

Charging Party fails to demonstrate that other employees have been allowed to return to work without medical verification or that the LACOE departed from its procedures in attempting to remove Charging Party from the classroom. As Charging Party fails to demonstrate these, or any other, nexus factors, the allegation must be dismissed.

II. Weingarten Rights

Charging Party contends that when Ms. Hopko and Ms. Whittle entered her classroom, Charging Party requested union representation. Charging Party contends this request was denied, although Charging Party engaged in a lengthy telephone conversation with a union representative during the stand-off and met with a union representative at the end of the school day.

A Weingarten[4] violation occurs when an employee requests union representation during a meeting with management and the request is denied. The charging party must demonstrate: (a) the employee requested representation, (b) for an investigatory meeting, (c) which the employee reasonably believed might result in disciplinary action, and (d) the employer denied the request. (See Redwoods Community College District v. Public Employment Relations Board (1984) 159 Cal.App.3d 617.; Fremont Union High School District (1983) PERB Decision No. 301.)

In Rio Hondo Community College District (1982) PERB Decision No. 260, the Board cited with approval Baton Rouge Water Works Company (1979) 246 NLRB 995, which provided:

> the right to representation applies to a disciplinary interview, whether labeled as investigatory or not, so long as the interview in question is not merely for the purpose of informing the employee that he or she is being disciplined.

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[4]In National Labor Relations Board v. Weingarten (1975) 420 U.S. 251, the Court granted employees the right to representation during disciplinary interviews.

In the instant charge, Charging Party did not participate in an investigatory or disciplinary meeting. Despite Charging Party's attempts to classify her removal as disciplinary, Ms. Hopko and Ms. Whittle simply attempted to inform Charging Party of their decision to remove her from the classroom. They did not intend to engage in any meeting or investigation with Charging Party. As no meeting or interview took place, Charging Party was not denied her Weingarten rights.

III. Contractual Representation Rights

Charging Party also alleges the LACOE denied her a contractual right to representation. However, an individual employee lacks standing to present an allegation of unilateral change. (Oxnard School District (1988) PERB Decision No. 667.) As such, Charging Party does not have standing to allege the LACOE unilaterally changed the Representation Rights article of the Agreement between Respondent and LACEA.

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 (2 0) 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

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

By
Kristin L. Rosi
Regional Attorney

Attachment

cc: Steven J. Andelson

STATE OF CALIFORNIA GRAY DAVIS, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415) 439-6940

March 26, 1999

Lillian H. Burton

Re: **WARNING LETTER**
Lillian H. Burton v. Los Angeles County Office of Education
Unfair Practice Charge No. LA-CE-4046

Dear Ms. Burton:

The above-referenced unfair practice charge, filed March 20, 1999, alleges the Los Angeles County Office of Education (LACOE) violated your due process rights by ordering you to leave campus on September 22, 1998.[1] Charging Party does not allege any specific section of the Educational Employment Relations Act (EERA or Act) has been violated. A review of the charge reveals the charge is properly analyzed as a violation of Government Code section 3543.5(a).

Investigation of the charge revealed the following. Charging Party is a Special Education teacher with the LACOE at La Merced Intermediate School (LMI). As a certificated employee, Charging Party is represented by the Los Angeles County Education Association (Association). Prior to September 1998, Charging Party apparently filed a Worker's Compensation claim against the LACOE as the facts described herein, reference a worker's compensation claim.

On September 22, 1998, Charging Party was met in her classroom by Buena Vista Principal Ms. Hopko and LACOE's Worker's Compensation coordinator, Janice Whittle. Ms. Hopko informed Charging Party that because Charging Party had not provided a doctor's release for her to return to work, she would have to leave campus immediately. As there was only 30 minutes left in the school day, Charging Party asked to stay until the end of the day. Charging Party also requested written confirmation from Ms. Hopko

[1] Specifically, Charging Party alleges in Section 6(b) of the unfair practice charge form: "Suspension-Censorship-Expulsion-Coercion to engage in child endangerment activities and other illegal activities. Harassment, invalid grievance procedure-Criminal Activity, Discrimination, etc."

that she was being told to leave the campus prior to the end of the school day.

Ms. Hopko refused to allow Charging Party to stay until the end of the school day and refused to provide written documentation. As Charging Party walked towards the classroom telephone to contact her union representatives, Ms. Hopko stated she had already spoken with LACEA President, John Kohn. Charging Party then telephone LACEA site representative Doug Jockinson, seeking his advice. Mr. Jockinson then attempted to contact another LACEA representative. During this time, Ms. Hopko and Ms. Whittle stationed themselves outside Charging Party's classroom door.

After several minutes had passed, Ms. Hopko telephoned campus security who refused to remove Charging Party from the school grounds. Eventually, the school day ended and Charging Party gathered her things to leave the classroom. Before she could leave, however, Charging Party and Ms. Hopko engaged in a verbal confrontation. Charging Party ended the conversation stating she would return the following day to receive written confirmation of her removal from the classroom.

After leaving school grounds, Charging Party met with Association representative Andrea Wakefield. Ms. Wakefield telephoned Mr. Kohn and confirmed that Mr. Kohn had been informed of Charging Party's situation prior to her removal from the classroom. Charging Party voiced her anger over Mr. Kohn's failure to inform her of the impending events. Ms. Wakefield then telephoned the District's Labor Relations Officer and secured his word that Charging Party would receive written confirmation of the days events the next day.

Charging Party and Ms. Wakefield returned to school grounds on the following day. Ms. Hopko was not present at the time, thus Charging Party waited outside. When Ms. Hopko finally arrived, 30 minutes late, Charging Party secured her letter and left the campus.

Based on the above stated facts, the charge as presently written, fails to state a prima facie case of discrimination, for the reasons provided below.

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 <u>because of</u> the exercise of those rights. <u>(Novato Unified School</u>

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.)

Facts provided demonstrate Charging Party and Ms. Hopko exchanged harsh words over Charging Party's refusal to leave the classroom and Ms. Hopko's failure to provide Charging Party with written confirmation. However, facts provided do not demonstrate Ms. Hopko discriminated against Charging Party because of her protected activity.

Charging Party's only protected activity came after Ms. Hopko ordered her out of the classroom. It was at that time that Charging Party contacted LACEA representatives. There is nothing in the charge to demonstrate that any of Ms. Hopko's actions were motivated by Charging Party's decision to contact the union. Instead, it seems Ms. Hopko's actions were in response to Charging Party's unilateral decision to remain in the classroom. As such, the charge fails to demonstrate a prima facie case of discrimination.

Additionally, Charging Party alleges Ms. Hopko violated Charging Party's contractual rights. However, facts provided do not demonstrate any contractual violations.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies 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 April 5, 1999, I shall dismiss your charge. If you have any questions, please call me at (415) 439-6940.

Sincerely,

Kristin L. Rosi
Regional Attorney