STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

LEE PETERSON, Charging Party, v. CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION & ITS CHAPTER 36, Respondent.	Case No. LA-CO-1174-E PERB Decision No. 1733 December 28, 2004

Appearance: Lee Peterson, on his own behalf.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Lee Peterson (Peterson) of a Board agent's dismissal of his unfair practice charge. The unfair practice charge alleged that the California School Employees Association & its Chapter 36 (CSEA) violated the Educational Employment Relations Act (EERA)[1] by denying him the opportunity to run for union office. Peterson alleged that this conduct constituted a violation of EERA sections 3543, 3543.1, 3543.l(c), 3543.2(a) and 3543.6(b).

The Board has reviewed the entire record in this matter, including the unfair practice charge, CSEA's response to the unfair practice charge, the amended unfair practice charge, the Board agent's warning and dismissal letters, and Peterson's appeal. The Board consequently finds the warning and dismissal letters to be without prejudicial error and thereby adopts the Board agent's dismissal as a decision of the Board itself, subject to the following discussion.

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

BACKGROUND

Peterson is a classified employee of the Santa Monica Community College District (District) who is in the bargaining unit exclusively represented by CSEA. Peterson was a union activist who most recently, from 2001 through 2003, was a job steward. Peterson sought to run for two local chapter offices. On December 9, 2003, CSEA notified Peterson that he was ineligible for candidacy based on the CSEA Chapter 36 Constitution, Article 4, section 5A and Article 8, section 13B. These provisions prohibit candidates for chapter office from being officers of other classified employee organizations. Peterson had been a classified senator until June 30, 2003.

Peterson then challenged CSEA's election pursuant to CSEA Policy 618. On March 8, 2004, Area 1 Director, Jennie Batiste (Batiste) conducted a hearing on the issue. During the hearing, the Chapter 36 president submitted documents in support of CSEA's position. These documents referred to Peterson's activities before PERB and discussions with the District's vice president of human resources regarding grievances.

On June 9, 2003, Peterson filed an unfair practice charge, Case No. LA-CO-1142-E, against CSEA involving these same election rules.[2] According to Peterson, this charge was included in the documentation as a reason to bar his candidacy.

Batiste found that portions of the election were irregular. The CSEA Chapter 36 executive board appealed the ruling. On May 22, 2004, the CSEA board upheld Batiste's decision and ordered new elections, adding Peterson's name to the ballot. The new elections have not yet occurred.

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[2]The Board upheld the Board agent's dismissal of that charge in California School Employees Association & its Chapter 36 (Peterson) (2004) PERB Decision No. 1683 (CSEA (Peterson')').

The unfair practice charge alleges that CSEA retaliated against Peterson for his protected activities. Citing California Association of Psychiatric Technicians (Long) (1989) PERB Decision No. 745-S (Long); California State Employees Association (Hackett, et al.) (1995) PERB Decision No. 1126-S (Hackett), he alleges that the attempted ban from running for union office is an adverse action, akin to a temporary suspension from membership. In the amended charge, Peterson also alleges that CSEA took adverse action against him by disputing his right to file a grievance as an individual in April 2004 and requesting a restraining order against him with the District's police department on May 15, 2003.

BOARD AGENT'S DISMISSAL

The Board agent determined that Peterson did not state a prima facie case of retaliation. First, as there is no evidence that the classified senate is an employee organization under EERA, Peterson's participation in that organization is not protected conduct. Therefore, Peterson's exclusion from the election because of his previous membership in the classified senate is not a violation of EERA. Second, the Board agent found that although his representation of himself and others in grievances may be protected, the exclusion from the election is not adverse action. Such an action must impact the charging party's relationship with his/her employer. (California State Employees Association (Barker & Osuna) (2003) PERB Decision No. 1551-S (Barker and Osuna); Newark Unified School District (1991) PERB Decision No. 864 (Newark); California State Employees Association (Hard, et al.) (2002) PERB Decision No. 1479-S (CSEA (Hard)).) There are no facts alleged supporting such an impact. Third, the Board agent found that his consultation with District officials about matters outside the scope of representation was not protected conduct and so not a basis for a claim of

retaliation.[3] However, even if protected, again the Board agent does not find his exclusion from the election to be an adverse action. (Barker and Osuna.) Finally, the Board agent found Peterson's participation in the PERB process protected, again his exclusion from the election was not an adverse action. (Barker and Osuna.)

The Board agent found that the charge alleged insufficient information to show that CSEA retaliated against Peterson for attempting to bar Peterson from filing a grievance as an individual and the chapter president's allegations against Peterson made to the campus police. With regard to the allegations of false statements made to the campus police, the charge stated that these occurred on September 26, 2003, more than six months before Peterson filed the charge as amended (July 2004). The Board agent thus dismissed this allegation for being untimely.

The Board agent further found that CSEA's exclusion of Peterson from the election did not violate EERA section 3543.1. Peterson argues that his exclusion from the election is tantamount to suspension from membership but has provided no facts to support that comparison. The cases cited by Peterson, Long and Hackett, may be distinguished from the instant matter. In Long, the Board found retaliation when an employee was prevented from becoming a member of the union. There was no allegation of being barred from holding elective office. In Hackett, the Board found retaliation through the union's attempts to suspend the charging parties from membership, its filing of a civil lawsuit against them, and its seeking their lifelong suspension from membership. Although the suspension would have prevented the charging parties from holding elective office, the suspension of membership formed the basis for the Board's decision. Moreover, the Board agent noted, that CSEA's internal

[3]The charge actually alleges that Peterson meets privately with the vice president of human resources and receives confidential information about grievances.

processes overturned the chapter's initial decision to exclude Peterson and ordered a new election. The Board agent thus dismissed this allegation.

The Board agent also found that Peterson's allegation of a violation of rights under EERA section 3543 is addressed as a violation of Section 3543.6(b). The Board agent treated this allegation as a claim of interference with protected rights. The Board has been reluctant to interfere in the internal affairs of an employee organization unless they interfere with the employee's relationship with the employer. (Barker and Osuna.) There are no facts stated in the unfair practice charge that demonstrate such an impact. Therefore, Peterson's candidacy for chapter office is not protected conduct and the allegation must be dismissed.

Finally, the Board agent dismissed the allegations pertaining to Section 3543.l(c) (release time for representatives of an exclusive representative) because this right is owed by the District to CSEA, not to an individual employee, and Section 3543.2(a) (defines the scope of representation) because no facts were stated that demonstrate a violation of that provision.

DISCUSSION

PERB has applied the standard for determining employer discrimination to cases alleging discrimination by the employee organization. (CSEA (Peterson); Barker and Osuna.) To demonstrate a violation of EERA section 3543.6(b), 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 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.)

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 School District (1982) PERB Decision No. 264 (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; (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; (6) employer animosity towards union activists (Cupertino Union Elementary School District) (1986) PERB Decision No. 572); or (7) any other facts which might demonstrate the employer's unlawful motive. (Novato; North Sacramento.)

Evidence of adverse action is also required to support a claim of discrimination or reprisal under the Novato standard. (Palo Verde Unified School District (1988) PERB Decision No. 689.) In determining whether such evidence is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (Ibid.) 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; emphasis added; fn. omitted.]

We agree with the Board agent's conclusion of finding no discrimination by CSEA. The key issue is that Peterson's exclusion from running for union office is not an adverse action. Participation in union elections is an internal union affair. The Board traditionally has refused to interfere in the internal union affairs of an employee organization unless those affairs impact the member's relationship with his/her employer. (Barker and Osuna, citing Service Employees International Union, Local 99 (Kimmett) (1979) PERB Decision No. 106; California School Employees Association and its Shasta College Chapter #381 (Parisot) (1983) PERB Decision No. 280; California State Employees Association (Roberts) (1993) PERB Decision No. 1005-S.) Here, Peterson has shown no impact on the employer-employee relationship. Contrast the Board's finding in California Union of Safety Employees (Coelho) (1994) PERB Decision No. 1032-S (CAUSE), in which the union filed a citizen's complaint against the charging party prompting the employer to investigate the claim. As a result, in CAUSE, there was a clear impact on the charging party's relationship with the employer resulting from the union's conduct.

We also disagree with Peterson's position that exclusion from participation in a union election is the same as suspension or dismissal from membership, a matter subject to Board review under EERA section 3543.1 (a).[4] (Barker and Osuna; CSEA (Hard).) In Barker and Osuna. the charging parties were removed from their positions as bargaining unit chairs and denied reimbursement for their expenses during time spent participating in negotiations. The Board explained that:

> This case differs from CSEA (Hard) in that CSD removed Barker and Osuna from their positions as BUNC chairs and refused to

[4]EERA section 3543.l(a) provides, in pertinent part:

> Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership.

> reimburse them for expenses incurred by individuals in those positions; but CSEA did not suspend or dismiss them from membership. As worded, Dills Act section 3515.5[5] only provides the Board with authority to determine the reasonableness of restrictions regarding who may join, and of rules for the dismissal of individuals from membership. (Section 3515.5; CSEA (Hard).)
> (Emphasis in original.)

In CSEA (Hard), the union suspended the charging parties during an election period, in which the charging parties were running for union office. The Board found a violation of Dills Act section 3515.5 based on the union's violation of its own bylaws in its implementation of summary suspension procedures against the charging parties.

In this case, CSEA's conduct did not pertain to matters subject to Board review, i.e., the reasonableness of restrictions on who may join and rules for dismissal of union members. It is undisputed that, similar to the facts in Barker and Osuna, CSEA precluded Peterson from running for union office. Peterson has cited no Board precedent that would persuade us otherwise. As explained by the Board agent, Long and Hackett are also inapposite.

Peterson further argues that there is a right to self-representation under EERA. This was true prior to amendments to EERA enacted in 2000. Those amendments inexplicably deleted the provision in EERA section 3543 that employees "shall have the right to represent themselves individually in their employment relations with the public school employer." In a recent Board decision, Woodland Joint Unified School District (2004) Decision No. 1722, the Board interpreted the amendments to eliminate the protected right to self-representation under EERA.

[5]The language of the Ralph C. Dills Act (Dills Act) section 3515.5 parallels that of EERA section 3543.1 (a), stating that the employee organization may establish reasonable restrictions as to who may join and may make reasonable provisions for the dismissal of employees from membership. (The Dills Act is codified at sec. 3512, et seq.)

Therefore, we conclude that Peterson has not stated a prima facie case of discrimination under EERA and dismiss the charge.

ORDER

The unfair practice charge in Case No. LA-CO-1174-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Neima joined in this Decision.