

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



ALETHEA J. THOMAS,

Charging Party,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT,

Respondent.

Case No. LA-CE-4522-E

PERB Decision No. 1787

December 8, 2005

Appearances: Alethea J. Thomas, on her own behalf; Office of the General Counsel by Lisa Berman-Lench, Assistant General Counsel, for Los Angeles Unified School District.

Before Duncan, Chairman; Whitehead and Shek, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (Board) on exceptions filed by Alethea J. Thomas (Thomas) to an administrative law judge's (ALJ) proposed decision (attached). The complaint alleged that the Los Angeles Unified School District (District) violated the Educational Employment Relations Act (EERA)¹ in retaliating against Thomas by releasing her from her assignment with the District. Thomas alleged that this conduct constituted a violation of EERA section 3543.5(a).

The Board has reviewed the entire record in this matter, including the unfair practice charge, the complaint, the District's answer to the complaint, the parties' briefs, the ALJ's proposed decision, Thomas' appeal, and the District's response to Thomas' appeal. In light of our review, the Board adopts the ALJ's proposed decision as a decision of the Board itself.

¹EERA is codified at Government Code section 3540, et seq.

ORDER

The complaint and underlying unfair practice charge in Case No. LA-CE-4522-E are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Shek joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



ALETHEA J. THOMAS,

Charging Party,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT,

Respondent.

UNFAIR PRACTICE
CASE NO. LA-CE-4522-E

PROPOSED DECISION
(2/18/04)

Appearances: Alethea J. Thomas, in pro per; Office of the General Counsel, by Lisa Berman-Lench, Assistant General Counsel, for Los Angeles Unified School District.

Before Ann L. Weinman, Administrative Law Judge.

PROCEDURAL HISTORY

Alethea J. Thomas (Thomas) filed an unfair practice charge on May 27, 2003,¹ alleging that the Los Angeles Unified School District (District) took adverse action against her by, inter alia, releasing her from assignment with the District, in retaliation for her protected activities.

On June 26, the Office of General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint alleging that the District retaliated against Thomas by releasing her from assignment in violation of the Educational Employment Relations Act (EERA) section 3543.5(a).² In its answer to the complaint, the District denied any wrongdoing. Informal conferences were held on August 14 and 25 at the Los Angeles offices of PERB, and on September 8 by telephone, but the matter was not resolved.

¹ All dates refer to the year 2003 unless otherwise specified.

² The EERA is codified at Government Code section 3540 et seq. Section 3543.5(a) prohibits the employer from discriminating against employees because of their protected activities.

On September 23, the District filed a Motion for Judgment on the Pleadings, which was denied by the undersigned by order dated October 23. By letter dated November 4, Thomas requested that her charge be amended to include an award of attorney fees. On November 6, the undersigned notified the parties that the request was deferred until after the conclusion of the hearing.³

Formal hearing was held before the undersigned on December 2 and 3. After the filing of post hearing briefs, the matter was submitted for decision on February 2, 2004.

FINDINGS OF FACT

The District is a public school employer within the meaning of EERA section 3540.1(k). Thomas is a public school employee within the meaning of section 3540.1(j). United Teachers of Los Angeles (UTLA) is an exclusive representative within the meaning of section 3540.1(e). UTLA and the District are parties to a collective bargaining agreement (Agreement) effective at all times herein, covering a Unit of teachers in which Thomas was employed.⁴ The Agreement contains provisions for leaves of absence due to work-related injuries.

Prior to 2001, California school districts could enter into one-year contracts with "provisional" teachers, i.e., those who did not possess a California teaching credential, under a variety of programs: special education waiver (for those teaching special education classes); emergency permit (requiring enrollment in an approved university credentialing program); pre-intern (requiring pedagogy course work, enrollment in a credentialing program, and taking the California Subject Examination for Teachers (CSET)); and district or university intern

³ Thomas had been represented by an attorney, but that relationship was severed prior to the hearing.

⁴ On May 19, Thomas also filed an unfair practice charge against UTLA based on the same factual setting, which was subsequently settled and withdrawn.

(requiring passing the CSET and enrollment in a credentialing program). However, the federal "No Child Left Behind Act of 2001" (NCLB) mandates that by the school year 2005-2006, all public elementary and secondary school teachers of "core academic subjects" be "highly qualified," i.e., be licensed by the state, hold at least a bachelor's degree, and "demonstrate competence in the subjects they teach." The District, to bring itself into compliance with the new law, sent a memo dated March 24 to all school principals urging them to select provisional teachers for release at the end of the school year "if a highly qualified teacher can fill the position." The principals' discretion was to be based on "such factors as adequate progress toward obtaining a credential and/or effectiveness or lack thereof of an individual's teaching skills." The memo also stated that "[i]f a provisional teacher . . . receives a satisfactory evaluation and meets continuing employment standards, the teacher will remain unless the principal selects a teacher with a regular credential or university/District intern certificate. . . ."

In May, UTLA held an informational meeting for all provisional teachers to inform them of their potential non-renewal. In June, the California State Board of Education declared that teachers in the following categories were not highly qualified under the NCLB: those with emergency permits or subject waivers; those with local authorization based on a minor degree in the subject taught; and pre-interns. Therefore, teachers currently in those categories were given until the end of the 2005-2006 school year to meet NCLB qualifications in order to remain with the District.

Thomas was first hired by the District in November 1997 on an emergency permit and began working as a mathematics teacher at Henry Clay Middle School (HCMS) in September 1998. Thereafter, she enrolled in credentialing courses at California State University, Dominguez Hills and took the CSET, which she did not pass. On April 21, 2003, she received a certificate of qualification to the District's pre-intern program for the school year 2002-2003,

which states that it may be renewed for one year, even if she does not pass the exam, if she continues to "participate successfully in the pre-intern program." Thomas' employment contract, for the same school year, states, inter alia, that it may be terminated at any time by the Board of Education, or may be renewed "at the sole discretion of the District." During her tenure at HCMS, she had never received an annual performance evaluation below the "satisfactory" level. She was elected by her peers as chairperson of the math department and was appointed vice president of the school improvement committee and coordinator of the math department by Assistant Principal Marion Wesley (Wesley). As math chairman, Thomas met with Marion Hogue (Hogue), HCMS assistant principal, in March to plan the math department matrix, or teaching schedule, for the 2003-2004 school year. Thomas testified that Hogue informed her that certain teachers would be released from assignment at the end of the current school year. Thomas contends that Hogue's statement, plus the completed matrix, which included her own schedule, were firm indications that her contract for the next school year would be renewed.⁵

On March 28, a student injured Thomas' thumb during an altercation. She reported the incident to Ziegel and to Assistant Principal Darren Earley (Earley), who was in Ziegel's office.⁶ Thomas said she wanted to go to Kaiser for treatment, but Dr. Ziegel said she could only see the District's doctor. Thomas also said she was unhappy that a dean and a school counselor who had witnessed the incident did not intercede. Thomas claims that she also told

⁵ Dr. Christopher Ziegel (Ziegel), HCMS principal, testified that the matrix is merely an advance "scheduling tool" and many teachers on the schedule do not return for the next year.

⁶ The police were not called to investigate this incident, which Thomas claims is a violation of the Agreement.

Ziegel and Earley she would talk to UTLA about filing a grievance,⁷ but that Earley said she could not file against the dean or the counselor, as they were members of the Unit. Ziegel testified that he did not recall whether or not she said she wanted to file a grievance, while Earley testified that she had complained about the student and about the dean's and counselor's behavior, but did not say she wanted to file a "formal complaint." Earley was not asked whether he said Thomas could not file a grievance against the dean or the counselor as they were Unit members. On April 3, another student re-injured Thomas' thumb, which she reported to Earley by phone.⁸ In her direct testimony, Thomas did not claim that she said anything to Earley in the April 3 conversation about a grievance, nor is it alleged in the complaint, but on cross-examination of her rebuttal testimony on the second day of the hearing, she testified that she "restated [to Earley her] intentions to file a grievance." Earley was not recalled as a witness to rebut this testimony.

Thus, I must make a credibility resolution as to whether Thomas threatened to go to UTLA or to file a grievance on March 28 or on April 3. As to March 28, Thomas was clear and unequivocal not only as to what she said but also as to how Earley responded. By contrast, Ziegel did not recall whether or not she made such a threat, and while Earley testified that she did not threaten to file a "formal complaint," he did not deny that she threatened to talk to UTLA about a grievance, nor did he testify as to whether he made a response. Accordingly, I

⁷ In conflict with Thomas' testimony, the complaint alleges that Thomas said she planned to file a grievance, rather than talking to UTLA about the possibility; further, the complaint alleges that she made that statement only to Earley, not also to Ziegel.

⁸ According to Thomas, when she asked Earley who would call the police, he said she could, so she made the call. When the police arrived, Earley and other District personnel spoke with them but no one "offered" for her to speak with them. She claims that a Hispanic officer told her that proper procedure had not been followed, as it was the site administrator's responsibility to call the police. Thomas claims that Earley's failure to call the police himself is another violation of the Agreement.

find that on March 28, Thomas did tell Ziegel and Earley that she intended to speak to UTLA about filing a grievance. However, as Thomas did not claim that she restated her intention to Early on April 3 until cross-examination of her rebuttal testimony, I discredit her testimony that she said anything about a grievance on April 3.

On April 4, Thomas visited a doctor who, in her presence, phoned Earley and informed him Thomas would not return to work until further notice. On April 5, Thomas submitted documents to the District in support of her medical leave. On April 14, she visited the UTLA office and spoke with agent Bill Whittaker (Whittaker), who asked if she had filled out a Special Physical Injury (Alleged Act of Violence) Report (AOV). When he showed her a blank AOV form, she noted that it was supposed to be filled out by the principal, whereupon Whittaker told her she should instead obtain Employee Report of Incident or Work Related Injury/Illness On-The-Job forms (WRI). She then picked up two WRI forms at the District office, filled them out and forwarded them on April 17 via certified mail to Ziegel, who signed them on April 23.⁹ On April 24, Thomas picked up the signed WRI forms from Ziegel's office, and asked his secretary, Ms. Simmons (Simmons), about the AOV forms. Simmons said she didn't know what Thomas was talking about, so Thomas left a note in Ziegel's box. Thereafter, Thomas phoned Ziegel's office three times and asked Simmons about the AOV forms; Simmons told her that Earley was handling it. On May 13, Simmons phoned Thomas and told her to pick up the signed AOV forms, which she did. The forms, signed by Ziegel on May 12, approved the March 28 incident as an AOV and rejected the April 3 incident.¹⁰

⁹ Thomas complains that, according to the Agreement, she should have been given the WRI forms on the days of the two injury incidents, March 28 and April 3.

¹⁰ Thomas also complains that the District violated the Agreement by not filling out AOV forms immediately after the two incidents, and that Ziegel's rejection of the April 3 AOV was discriminatory. Ziegel admitted that the delays in providing the forms were contrary to District practice, but contends that he rejected the April 3 AOV because the police who

On May 15, Thomas again went to Ziegel's office to turn in additional medical documentation. Assistant Principal Wesley came out of Ziegel's office and asked Thomas if she wanted a transfer. Thomas claims that she did not know what Wesley was talking about,¹¹ and when she asked, Wesley replied that she was "just wondering." Nothing was said to Thomas about not being renewed for the next school year.

On May 17, Thomas received by certified mail a letter from Ziegel dated May 13, informing her that she was being released from her teaching position at the close of the 2002-2003 school year, in compliance with the NCLB. Thomas claims she was so upset by the letter that she could not concentrate on the CSET exam which was scheduled for that day, causing her to fail it again; she suggests that Ziegel postponed sending the letter from May 13 until May 17 in order to interfere with her performance on the exam.

Thomas points to two other mistakes made by the District: (1) By letter of June 20 from Teri Lyons (Lyons), director of human resources, Thomas was informed that, as she did not report for work on April 4 and did not "have an approved leave on file," she was therefore considered "Absent Without Leave," which if uncorrected could result in her "separation from the District."¹² (2) By letter of August 26 from Lillian Utsumi (Utsumi), coordinator of the

investigated the incident found no criminal activity. In settlement of Thomas' unfair practice charge against UTLA, noted above, UTLA filed a grievance on her behalf against the District for its rejection of the April 3 AOV. No other grievances were filed regarding the March 28 or April 3 incidents.

¹¹ Thomas claims she later learned that an approved AOV would entitle her to a transfer.

¹² This apparently mistaken letter was not explained by the District. In an exchange of correspondence, Thomas' medical leave was finally approved on July 10.

pre-intern program, Thomas was welcomed into the pre-intern program and invited to attend a start-of-school-year orientation session on September 15.¹³

Thomas thereafter contacted Matthew Greco (Greco), District personnel specialist, seeking reinstatement. Greco is responsible for qualifying the status of teachers in District G, which includes HCMS. He told her that she could not return to HCMS as they did not want her, and she was not qualified under NCLB to be hired at another school, but she could become a substitute teacher for the District. Greco testified that if he had known at that time that the March 28 AOV had been approved, Thomas would have been eligible to transfer to another school.¹⁴

As a result of NCLB, the District released over 500 provisional teachers at the end of the 2002-2003 school year, four of them at HCMS. Ziegel had chosen these four from a list of 43 provisional teachers provided by Greco who were deemed not highly qualified. Ziegel testified that his decisions, made in consultation with the various department heads, including Earley regarding the math department, were based on the extent of teacher knowledge and skill in their core subject. In this regard, he reviewed their performance evaluations, academic degrees, course work completed during their tenure as teachers, and reports of classroom observations. Although he regularly signs approval for teachers to receive wage increases after completing college course work, he does not know whether the courses are credential-preparatory. Greco keeps track of this information but does not usually share it with the principals, and it was not provided to Ziegel with the list of the 43 provisional teachers. Thus,

¹³ Lyons testified that Utsumi works from a different data base than the human resources department and would not have known that Thomas' contract was not renewed for the coming school year.

¹⁴ Subsequent to the close of the hearing, Greco arranged for Thomas' transfer to another school in District G for the current school year, which Thomas accepted.

notwithstanding the District's March 24 letter authorizing school principals to consider, inter alia, a teacher's "adequate progress toward obtaining a credential," Ziegel claims he could not use this as a factor in his decisions as he did not have the relevant information.

Thomas was the only provisional math teacher released from HCMS. Of the four remaining provisional math teachers at HCMS, all had passed the CSET subject matter exam; two had bachelor degrees in math, one in engineering and one in finance. Thomas' bachelor degree was in communications, and her undergraduate transcript reveals that she received a failing grade in two upper-level math courses. Ziegel testified that he made his final decision on April 24, but did not send out the release letters until May 13 because the school was in the midst of student testing.

The District hired approximately 3000 new teachers at the beginning of the 2003-2004 school year, including 40 math teachers in District G, five of them at HCMS. Of these five, four are highly qualified: Dora B is certified; Jonathan O has passed the CSET exam and is close to qualifying for certification; and Patience N and Richard G (hired in August as Thomas' replacement) are university interns. Lawrence A, also newly hired, is a pre-intern; he is not highly qualified under the NCLB, but has passed his CSET subject matter exam. Greco testified that as the new school year approached, and even early in the school year when some teachers resigned, District G became short of math teachers, thus the school principals at their discretion could rehire provisional math teachers who had been released. However, there is no evidence that HCMS was short of math teachers.

Thomas contends that her threats to file a grievance and her filing of the WRI forms were protected activity for which she was retaliated against by the District. She argues that she was fulfilling all the requirements of the pre-intern program and that her status allowed for a third-year renewal. She also argues that the District's failure to timely provide AOV or WRI

forms, the rejection of the April 3'AOV, Ziegel's failure to follow the District's March 24 guidelines by not considering her progress toward certification and by releasing her three months before hiring her replacement,¹⁵ and her receipt of the release notice on the day of the CSET exam, are all evidence that her release was unlawfully motivated.

ISSUE

Was Thomas released from her assignment with the District in retaliation for her protected activities?

CONCLUSIONS OF LAW

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 (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), 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

¹⁵ Ziegel testified that he could not hire Thomas' replacement until after her position became vacant at the end of the school year.

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 School District, supra, PERB Decision No. 264.) 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.)

Here, I find that Thomas engaged in protected activity on March 28 when she told Ziegel and Earley that she intended to speak to UTLA about filing a grievance. I also find that Thomas engaged in protected activity on April 17 when she mailed to Ziegel the WRI forms reporting the March 28 and April 3 injuries. I also find that the District was aware of these activities. Thus, the first two Novato factors have been satisfied.

I do not find, however, that the District retaliated against Thomas for these activities. On March 28, when Thomas said she would talk to UTLA about filing a grievance, Earley responded that she could not file against the dean or the counselor, as they were members of the Unit. I agree with the District's argument, in its post-hearing brief, that Earley's response shows he did not expect or fear a grievance, as he did not believe one could be filed. Thus, he would not have been motivated by Thomas' speaking to the union. Nor was a grievance ever filed, except for one complaining about the District's rejection of the April 3 AOV, filed after

she received her release notice. As to the WRI forms, they were available to all of the District's employees, and I find no evidence to indicate that the District might retaliate against an employee for filing them. Nor is there any evidence of anti-union animus on the part of the District.

In conformance with the NCLB, the District was urged to release provisional teachers to make room for highly qualified teachers. Ziegel chose four to be released from HCMS, making his decision on all four at the same time using the same factors, and notified all four of their release on the same date. Notwithstanding that Thomas was elected math chair by her peers and appointed to committees by the assistant principal, never received a below-satisfactory performance evaluation, and was fulfilling all aspects of her pre-intern program including the required progress toward certification, she was arguably the farthest from the NCLB's definition of "highly qualified" in the math department. And notwithstanding that neither Thomas' pre-intern certificate nor her contract of employment with the District mandated her release, nothing in those documents prevented it. I am not impressed with Ziegel's excuse for failing to consider the teachers' progress toward certification, as he could easily have obtained this information from Greco. However, as this failure applied to all of the provisional teachers, I do not find it evidence of retaliation toward Thomas. I also note the District's delay in providing Thomas with WRI forms, Ziegel's delay in signing the AOV forms, Lyons' letter of June 20 informing Thomas that she was absent without leave, and Utsumi's letter of August 26 welcoming Thomas to the pre-intern program. However, these were admitted mistakes which I do not find to be evidence of unlawful motivation.

Accordingly, based on all the above, I do not find sufficient evidence that Ziegel's decision to release Thomas was in retaliation for her protected activities, in violation of EERA.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaint and underlying unfair practice charge in Case No. LA-CE-4522-E, Alethea J. Thomas v. Los Angeles Unified School District, are hereby DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174

FAX: (916) 327-7960

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, sec. 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Cal. Code Regs., tit. 8, secs. 32135(a) and 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 California Code of Regulations, title 8, section 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, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served

on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

Ann L. Weinman
Administrative Law Judge