STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JOHN KAHN, Charging Party, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-4837-E PERB Decision No. 1791 December 29, 2005

Appearances: John Kahn, on his own behalf; Kathleen E. Collins, Associate General Counsel, for Los Angeles Unified School District.

Before Whitehead, Shek and Neuwald, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by John Kahn (Kahn) of a Board agent's dismissal of his unfair practice charge (attached). The unfair practice charge alleged that the Los Angeles Unified School District (District) violated the Educational Employment Relations Act (EERA) [1] by discriminating and retaliating against Kahn and interfering with his rights.

The Board has reviewed the entire file in this matter, including but not limited to, the unfair practice charge, the amended unfair practice charge, the District's response to the charge, the declaration of Bruce Rose, the Board agent's warning and dismissal letters, Kahn's appeal, and the District's response to Kahn's appeal. In light of our review, the Board dismisses Kahn's appeal and adopts the Board agent's dismissal as a final decision of the Board itself.

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

DISCUSSION

As a preliminary matter, the District alleges that Kahn's appeal, filed July 28, 2005, was not timely and should be dismissed. Under PERB Regulation 32136[2], "[a] late filing may be excused in the discretion of the Board for good cause only." The Board agent's dismissal letter was issued and served by mail on June 30, 2005. PERB Regulation 32635(a) provides:

> Within 20 days of the date of service of a dismissal, the charging party may appeal the dismissal to the Board itself. The original appeal and five copies shall be filed in writing with the Board itself in the headquarters office, and shall be signed by the charging party or its agent. Service and proof of service of the appeal on the respondent pursuant to Section 32140 are required.

Twenty days from June 30 is July 20, 2005. However, under PERB Regulation 32130(c), filings mailed from within California made in response to documents served by mail, such as the dismissal filed and served by mail on June 30, are accorded a five-day extension. Consequently, the appeal was due on July 25, 2005. As stated, Kahn filed his appeal on July 28, 2005; and therefore, the appeal was filed 3 days late. There is no evidence in the record that Kahn requested an extension of time from the Appeals Office[3] nor did Kahn provide any information in his appeal that would demonstrate good cause for his late filing.

We therefore conclude that there was no good cause to excuse Kahn's late filing under PERB Regulation 32136. On this basis alone, the Board dismisses the appeal and adopts the Board agent's dismissal.

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[2]PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq.

[3]See PERB Regulation 32132 for rules involving requests for an extension of time.

ORDER

The unfair practice charge in Case No. LA-CE-4837-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Shek and Neuwald joined in this Decision.

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Blvd., Suite 1435
Los Angeles, CA 90010-2334
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June 30, 2005

John Kahn

Re: John Kahn v. Los Angeles Unified School District
Unfair Practice Charge No. LA-CE-4837-E
DISMISSAL LETTER

Dear Mr. Kahn:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 2, 2005. You allege that the Los Angeles Unified School District (LAUSD) violated the Educational Employment Relations Act (EERA)[1] by discriminating and retaliating against you and interfering with your rights.

I indicated to you in my attached letter dated June 17, 2005, 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 June 24, 2005, the charge would be dismissed. I granted you an extension and you filed a First Amended Charge on June 29, 2005.

In your amended charge you again assert that the District gives logbooks to employees as gifts. You state that your Supervisor Mr. Rose's declaration, provided to me on June 10, 2005, should be inadmissible because it is not credible, violates the best evidence rule, and is parol evidence since the CBA does not contain a logbook policy. You also complain that the union has not had the opportunity to negotiate with the District over logbooks. Finally, you contend the District's actions were adverse because you were "imprisoned" in the electrical shop which is dirty, cramped and cluttered with electrical items and you had to sit on top of wire reels doing nothing but worrying about your fate.

Although you believe you were imprisoned in the electrical shop, you acknowledge that you were free to make phone calls. In fact, you placed several phone calls while you were in the electrical shop, including calls to Rose to ask for phone numbers for the EEOC Office and the Superintendent and calls to request and make a Report of Injury and to obtain medical help. Moreover, you acknowledge that you could have left the room but chose not to because you

[1] EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

believed Rose could be waiting or watching by video camera and you didn't want to give him grounds to write you up for insubordination.

In order to show that the District's actions were adverse you have to show that the actions were adverse to your employment. (Palo Verde Unified School District (1988) PERB Decision No. 689.) In Palo Verde Unified School District, the Board held that the District's relocation of a teacher was not an adverse act because the teacher's duties and compensation remained the same and his hours were shortened. In comparison, the Board in Compton Unified School District (2003) PERB Decision No. 1518, a case you cite in your amended charge, held that a School Principal's removal of a teacher from a prestigious assignment on the school's leadership team was an adverse act. In your case, however, you were not removed from a prestigious assignment, nor was your compensation or position impacted by your being told to bring your logbook and wait in the electrical room. Thus, the facts, as you have alleged, fail to show that Rose's actions had an adverse impact on your employment.

Even if you could demonstrate Rose's actions were adverse, you have not demonstrated a nexus between his actions and your protected activity. You assert that your refusal to hand over the logbook because you believe it was an unlawful order was protected activity. However, refusing to comply with your supervisor's directive, under these circumstances, is not protected activity. (Healdsburg Union High School District (1997) PERB Decision No. 1185, pp. 68-69.) Your next most recent protected activity occurred in August of 2004. You have not demonstrated that Rose's actions occurred because of the August 2004 protected activity, involving a vacation time dispute, or any other alleged protected activity. Moreover, the District asserts that Rose had you remain in the electrical room because of your refusal to provide the logbook despite his directive, given to you four days prior, to bring it to the meeting.

For these reasons and those contained in my June 17, 2005, letter, I am dismissing the charge.

Right to Appeal

Pursuant to PERB Regulations,[2] 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. (Regulation 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. (Regulations 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 Regulation 32135(d), provided the filing party also places the original,

[2] PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

together with the required number of copies and proof of service, in the U.S. mail. (Regulations 32135(b), (c) and (d); see also Regulations 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. (Regulation 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 Regulation 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. (Regulation 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. (Regulation 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
General Counsel

By
Mary Creith
Regional Attorney

Attachment

cc: Albert C. Nicholson, Asst. General Counsel

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Blvd., Suite 1435
Los Angeles, CA 90010-2334
Telephone: (213) 736-3008
Fax: (213) 736-4901

June 17, 2005

John Kahn

Re: John Kahn v. Los Angeles Unified School District
Unfair Practice Charge No. LA-CE-4837-E
WARNING LETTER

Dear Mr. Kahn:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 2, 2005. You allege that the Los Angeles Unified School District (LAUSD) violated the Educational Employment Relations Act (EERA)[1] by discriminating and retaliating against you and interfering with your rights.

You are a member and steward of the International Brotherhood of Electrical Workers (IBEW) Local 11.

On September 3, 2004, at about 9:10 a.m., Area Electrical Supervisor Bruce Rose phoned you and he asked you to tell him where you were on August 12, 2004. You stated that you did not recall and told Rose he could check the database since you already signed a completed time card for the day in question. Rose responded that he wanted you to tell him where you were. You stated the time card was accurate. Rose then demanded that you refer to your logbook and check where you were on the date. You then told Rose you didn't have the logbook. Rose stated that LAUSD gave you the logbook and instructed you to use it. He then ordered you to come into the office on Tuesday, September 7, 2004, at 7:00 a.m. and to bring your logbook. You told him you did not think that it was official LAUSD policy for him to request your logbook because it contains personal and private information. Rose restated his orders and hung up abruptly.

Fifteen minutes later, you phoned Rose and told him you had high levels of anxiety, apprehension and stomach pains as a result of Rose's harsh treatment and in connection with the meeting on Tuesday and you requested that he fill out a Supervisor's Report of Injury. Rose refused and recommended that you quit your job if you cannot talk to your Supervisor. He then hung up abruptly.

On September 7, 2004, at 7:00 a.m., you were in the electrical cubicle and Rose asked you if you brought your logbook. You told him you did not believe it was a lawful order. Rose left

[1] EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

and returned ten minutes later and ordered you to go the Electrical Shop to "sit down and do nothing until I figure out what to do with you." You told him it was not a very efficient use of your time. Rose told you not to tell him how to be efficient. You then made several calls to Rose from the Electrical Shop to ask for the numbers to the EEOC Office and the Superintendent's Office. At 8:00 a.m., you called Rose again and told him you were becoming ill and you asked him to make a Report of Injury. Rose refused but asked if you wanted medical help. You declined. Rose transferred you to Mr. Griggs who made a Supervisors Report of Injury which was completed at 8:15 a.m. At 8:50 a.m., you called the Electrical Office and Griggs answered. You told him to call 911 and you were taken by ambulance to the Emergency Room. You state that you have suffered physiological and emotional trauma because of these events and have been under a doctor's care since September 2004.

You also provided details regarding ten allegedly discriminatory incidents occurring between April 2001 and January 2004. You provided this information to show that there has been an ongoing hostile environment at your workplace. The incidents included, for example, the District's denial of a grievance, denial of assistance to you to help complete a job, discipline of you and not another person involved with failing to complete a job, denial of a transfer request, disciplinary actions against you, negative comments and the District's telling employees that the early start program was terminated because you threatened to file a grievance in your capacity as union steward.

During a phone conversation with me on June 6, 2005, you stated that you believe the detention was an adverse action because it was highly stressful and caused you to have an emotional breakdown. You also said the request to see your log book was an adverse action since the book is given each year as a Christmas gift and nobody else has ever been required to provide their log book.

On June 10, 2005, the District provided a declaration signed by Mr. Rose under penalty of perjury that stated the District routinely purchased log books for each employee in the electrical department to record information about their daily work assignments. He also stated that the District does not give gifts to employees and the log books are issued for the specific purpose of keeping track and logs of employees daily assignments.

Discussion

Statute of Limitations

EERA section 3541.5(a)(1) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.) The charging party bears the burden of demonstrating that the charge is timely filed. (cf. Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.)

The ten allegedly discriminatory incidents between April 2001 and January 2004 occurred more than six months prior to March 2, 2005, the date you filed this unfair practice charge. Thus, your unfair practice charge is untimely as to any of those alleged events.

Retaliation

You allege that Rose retaliated against you by requiring you to bring him your logbook and by placing you in the Electrical Shop to wait while he figured out what to do.

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 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.) 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 Unified School District (1991) PERB Decision No. 864; emphasis added; footnote omitted.]

You contend that Rose's requesting you to bring your logbook to a meeting and his placing you in the Electrical Shop to wait until he figured out what to do was an adverse action because nobody else has had to provide their logbook and because the detention was highly stressful and caused you to have an emotional breakdown. However, the test is not whether you found the action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on their employment. (Los Angeles Unified School District (2005) PERB Decision No. 1746.) A reasonable person under the same circumstances would not consider the request to bring their District issued logbook to a meeting, or, being required to remain in the Electrical Shop while the supervisor figured out what to do, to be an adverse action. Without evidence of an adverse action you cannot demonstrate a prima facie case of retaliation.

Interference

You allege Rose interfered with your rights by telling you to bring your logbook and telling you to sit and wait while he figured out what to do with you.

To demonstrate a prima facie case of interference, the charging party must show that the respondent's conduct tends to or does result in some harm to employee rights guaranteed by the EERA. (Carlsbad Unified School District (1979) PERB Decision No. 89 at p. 10.) In Chula Vista City School District (1990) PERB Decision No. 834, at pp. 10 - 13, the Board reviewed and quoted from its decision in Rio Hondo Community College District (1980) PERB Decision No. 128, stating:

> As more fully explained below, employer speech causes no cognizable harm to employee rights granted under EERA unless it contains "threats of reprisal or force or promise of a benefit." Therefore, a prima facie case of interference cannot be based on speech that contains no "threats of reprisal or force or promise of a benefit."
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> * * * * * * * *
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> In Rio Hondo Community College District (1980) PERB Decision No. 128, pages 18-20, this Board looked to the National Labor Relations Act (NLRA) for guidance in formulating a test for determining when employer communications will be considered violative of the provisions of EERA. Specifically, the Board examined section 8(c) of the NLRA which provides:
>
> > The expressing of any views, argument, or opinion, or the dissemination thereof, whether in

> written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

Noting that EERA contains no provision parallel to section 8(c), the Board nevertheless found that "a public school employer is entitled to express its views on employment-related matters over which it has legitimate concerns in order to facilitate full and knowledgeable debate" and set forth the test to be applied as follows:

> [T]he Board finds that an employer's speech which contains a threat of reprisal or force or promise of benefit will be perceived as a means of violating the Act and will, therefore, lose its protection and constitute strong evidence of conduct which is prohibited by section 3543.5 of the EERA. (Id. at p. 20.)

Whether the employer's speech is protected or constitutes a proscribed threat or promise is determined by applying an objective rather than a subjective standard. (California State University (1989) PERB Decision No. 777-H, P.D., p. 8.) Thus, "the charging party must show that the employer's communications would tend to coerce or interfere with a reasonable employee in the exercise of protected rights." The fact, "That [sic] employees may interpret statements, which are otherwise protected, as coercive does not necessarily render those statements unlawful." (Regents of the University of California (1983) PERB Decision No. 366-H, fn. 9, pp. 15-16; BMC Manufacturing Corporation (1955) 113 NLRB 823 [36 LRRM 1397].)

The Board has also held that statements made by an employer are to be viewed in their overall context (i.e., in light of surrounding circumstances) to determine if they have a coercive meaning. (Los Angeles Unified School District (1988) PERB Decision No. 659, p. 9, and cases cited therein.)

Additionally, the Board has placed considerable weight on the accuracy of the content of the speech in determining whether the communication constitutes an unfair labor practice. (Alhambra City and High School Districts (1986) PERB Decision No. 560,

> p. 16; Muroc Unified School District (1978) PERB Decision No. 80, pp. 19-20.) Thus, where employer speech accurately describes an event, and does not on its face carry the threat of reprisal or force, or promise of benefit, the Board will not find the speech unlawful.

Here, Mr. Rose told you to bring in your logbook and told you to sit and wait while he figured out what to do with you. He also recommended you quit if you cannot talk to your supervisor. There is no threat contained in these statements so the charge fails to demonstrate a prima facie case of interference.

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 that 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 June 24, 2005, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Mary Creith
Regional Attorney

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