

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**

KATHLEEN M. TURNEY,

Charging Party,

v.

FREMONT UNIFIED SCHOOL DISTRICT,

Respondent.

Case No. SF-CE-2150-E

PERB Decision No. 1442

June 7, 2001

Appearance: Kathleen M. Turney on her own behalf.

Before Amador, Baker and Whitehead, Members.

DECISION

BAKER, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Kathleen M. Turney (Turney) of a Board agent's partial dismissal (attached) of her unfair practice charge.

The charge was evaluated as having alleged that the Fremont Unified School District (District) violated Section 3543.5(a) of the Educational Employment Relations Act (EERA)¹

¹ EERA is codified at Government Code section 3540 et seq. Section 3543.5 provides, in pertinent part:

It shall be unlawful for a public school employer to do any of the following:

- (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

by engaging in discrimination and retaliation because of Turney's protected activities, making threats, and engaging in collusion with Turney's exclusive representative.

The Board has reviewed the entire record in this case, including the unfair practice charge, the partial warning and partial dismissal letters and Turney's appeal.² The Board finds the partial dismissal letter to be free from prejudicial error and adopts it as the decision of the Board itself.

ORDER

The partial dismissal of the unfair practice charge in Case No. SF-CE-2150-E is hereby AFFIRMED.

Members Amador and Whitehead joined in this Decision.

² Turney has provided the Board with copies of two of her previous PERB charges from 1986 which she offers as "evidence of previous collusion" between the District and the Fremont Unified District Teachers Association. The 15 year old charges, which were settled, concerned distribution of contract ratification materials, which is unrelated to the instant charge of collusion regarding the parties' grievance procedure, except that the parties allegedly engaging in collusion are the same. Although the Board takes official notice of these documents, the documents do not sufficiently assist Turney in establishing a prima facie violation of EERA by the District.

Partial Dismissal Letter

January 22, 2001

Kathleen M. Turney
6655 Aitken Drive
Oakland, California 94611

Re: PARTIAL DISMISSAL OF UNFAIR PRACTICE CHARGE/REFUSAL TO ISSUE COMPLAINT

Kathleen M. Turney v. Fremont Unified School District Teachers
Unfair Practice Charge No. SF-CE-2150

Dear Ms. Turney:

The above-referenced unfair practice charge, filed on July 24, 2000 and amended on November 21, 2000 and January 22, 2001, alleges that the Fremont Unified School District (District) engaged in discrimination and retaliation because of Charging Party's protected activities, made threats, and engaged in collusion with her exclusive representative, the Fremont Unified District Teachers Association (Association). This conduct is alleged to violate Government Code section 3543.5 of the Educational Employment Relations Act (EERA).

I indicated to you, in my attached letter dated January 8, 2001, that certain allegations contained in the 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 these allegations to state a prima facie case or withdrew them prior to January 19, 2001, the allegations would be dismissed. These allegations included the claims that the District (1) interfered with the processing of grievances, (2) engaged in harassment in April 2000, (3) threatened school board action in June 2000, and (4) engaged in collusion with the Association.

On January 19, 2001, I received an amended charge. With respect to the grievance processing allegation, the amended charge alleges that the District gave deceptive answers in its responses to Charging Party's grievances. In its responses to the grievances, the District misquoted Charging Party and the District's discipline policy. The effect of the District's various actions, Charging Party claims, was to deny Charging Party her right to appeal the issues she had raised.

The new allegations fail to cure the deficiencies noted in the January 8, 2001 letter. Charging Party has noted previously that, although delayed somewhat, her grievances were processed

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through all steps of the grievance procedure short of arbitration. The allegations do not support Charging Party's assertion that she was denied the right to appeal her issues.

There are no allegations in the amended charge specifically referring to alleged harassment in April 2000. There is some evidence of what might be construed as harassment in the documentation attached to the amended charge. However, such references are insufficient to state a prima facie violation for interference or retaliation. (Carlsbad Unified School District (1979) PERB Decision No. 89; Novato Unified School District (1982) PERB Decision No. 210.)

There is an allegation referring to threatened school board action in June 2000. Sandra Prairie allegedly threatened board action concerning the failing grade Charging Party had given to the cheating student. No other details are provided. The allegation in the amended charge refers to an April 20, 2000 letter but that letter has not been provided. Therefore, this allegation fails to state a prima facie violations for the reasons set forth in the January 8, 2001 letter.

With regard to the collusion allegation, the charge as amended also fails to cure the deficiencies identified in the January 8, 2001 letter. The District's and Association's "insistence" on the filing of a grievance on the proper form does not demonstrate an attempt to engage in collusion with the Association. Charging Party has not demonstrated that the procedural hurdles she may have encountered before having her grievances heard caused her any harm that justifies issuance of a complaint. That harm was principally delay and not the inability to obtain a forum for her claims.¹

Therefore, I am dismissing the allegations that the District (1) interfered with the processing of grievances, (2) engaged in harassment in April 2000, (3) threatened school board action in June 2000, and (4) engaged in collusion with the Association based on the facts and reasons set forth above and in my January 8, 2001 letter.

¹Charging Party alleges that an earlier PERB matter in 1986 includes evidence of a history of collusion but her amended charge fails to provide any information that would permit an identification of that case. The undersigned has found no reported PERB decision in 1986 involving these parties that discusses collusion.

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Right to Appeal

Pursuant to Public Employment Relations Board regulations, you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code Regs., tit. 8, sec. 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, sec. 32135(a); see also Cal. Code Regs., tit. 8, sec. 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Cal. Code Regs., tit. 8, sec. 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, secs. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

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

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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
DONN GINOZA
Regional Attorney

Attachment

cc: Melissa M. Tucker

Partial Warning Letter

January 8, 2001

Kathleen M. Turney
6655 Aitken Drive
Oakland, California 94611

Re: PARTIAL WARNING LETTER
Kathleen M. Turney v. Fremont Unified School District Teachers
Unfair Practice Charge No. SF-CE-2150

Dear Ms. Turney:

The above-referenced unfair practice charge, filed on July 24, 2000 and amended on November 21, 2000, alleges that the Fremont Unified School District (District) engaged in discrimination and retaliation because of Charging Party's protected activities, made threats, and engaged in collusion with her exclusive representative, the Fremont Unified District Teachers Association (Association). This conduct is alleged to violate Government Code section 3543.5 of the Educational Employment Relations Act (EERA).

Investigation of the charge revealed the following. Kathleen M. Turney is a certificated employee, employed by the District. She is a member of a bargaining unit exclusively represented by the Association (Association).

Turney's dispute with the District began in February 2000 when she took disciplinary action against a student in her class for cheating. Because the offense was not the student's first, Turney suspended the student and recommended his transfer to a continuation school. Sandra Prairie, Mission San Jose High School Assistant Principal, determined that the cheating in question warranted a different suspension than the one given and that the transfer would not be appropriate. Turney believed that management's refusal to support her disciplinary action violated her rights as a classroom teacher.

In April 2000, Principal Stuart Kew issued teaching assignments for the 2000-2001 school year. Turney was assigned classes she asked not be assigned to her. They included three ninth grade English classes. Turney believed that this assignment was made in retaliation for her earlier complaints against the vice principal.

Beginning in February 2000, Turney filed grievances over both matters. The District initially treated these grievances as complaints under the District's complaint procedure, which

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differs from the collective bargaining agreement's grievance procedure. Turney objected to this action on the District's part because it caused a delay in the processing of the grievances. When the grievances were elevated to the intermediate level, the District administrator delayed his investigation allegedly causing the grievances to further languish. Additional scheduling and other procedural delays followed. Turney believes that if these grievances, particularly the one involving the class assignment, had been addressed in a timely manner she might have obtained a more suitable teaching assignment for the 2000-2001 school year.

The charge alleges that on April 11, 13, 17, 2000, Kew and Prairie harassed her in front of students, faculty and staff and on June 21, 2000 "threatened school board action." No specifics are given.

Turney complained about the matters involving Prairie and Kew to the Association. She also raised issues concerning additional acts of harassment by Kew and Prairie. Turney met with an Association representative in May shortly after filing her grievances. The Association recommended that she pursue the two issues separately. The Association advised Turney that the complaint about the class assignment issue could not be addressed in the grievance procedure because the contract afforded the administrators wide discretion in making such assignments. Also, while Turney claimed that the assignment violated seniority rules, the Association advised her that seniority need only be considered in involuntary transfers between school sites and that Kew's action did not involve such a decision. In this regard, it is noted that Article 21, section 21.3.5 states that seniority applies to a "right" or "benefit" under the agreement. But the contract does not clearly establish that a particular teaching assignment is such an entitlement. The Association told Turney to pursue the matter through the complaint procedure.

After Turney pursued the grievance on her own, she submitted to the Association a request to pursue the class assignment grievance to arbitration. This matter was held in abeyance by the Association for some unspecified period of time.

With regard to the issue involving the lack of support for her disciplinary action, the Association agreed that the matter could be addressed through the collective bargaining agreement. The Association represented Turney at the Level II grievance meeting. The District denied the grievance. Turney then requested that the Association arbitrate the grievance. The Association grievance chair was unable to make a decision within a time frame satisfactory to Turney, and so she filed the instant unfair

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practice charge. The Association denied the request in September 2000. The grievance involving Prairie was partially resolved when the District agreed to assign a different evaluator to her. However, the new evaluator was unfair to her and rejected her proposed teaching goals three different times. In her 31 years of teaching, Turney's teaching goals have never been questioned, let alone rejected. Her teaching competency has never been questioned.

Following the Association's rejection of the arbitration request regarding the Prairie matter, Prairie came to Turney's classroom on September 29, 2000. She said

You lost the grievance. PERB is settled. That's all over. You lost! Now you will change the "F" you assigned [the cheating student] last year. I want to see all the assignments, the dates, the grades -- all of it for all your classes. Your computer grade sheets are not enough. You can't bring up any of those old issues. You lost! Uh-huh!"

In the fall of 2000, Kew engaged in further acts of retaliation by assigning Turney to an unsafe and unhealthy classroom and issuing her a letter of reprimand that was without justification. Turney was unable to attend a Back-to-School night function and meet with parents due to illness. Turney had already voluntarily donated over seven hours beyond the regular day to meet with parents.

Turney further alleges that the Association promised to file an unfair practice charge on her behalf with the Public Employment Relations Board (PERB) to address the District's alleged retaliation, but later reneged on the agreement.

Finally, Turney alleges that in the spring of 2000 the District and the Association delayed distribution of the newly ratified collective bargaining agreement and that this caused her grievance processing to suffer. Turney claims that this conduct demonstrates collusion between the Association and the District.

Based on the facts stated above, the allegations that the District (1) interfered with the processing of grievances, (2) engaged in harassment in April 2000, (3) threatened school board action in June 2000, and (4) engaged in collusion with the Association, as presently written fail to state a prima facie violation of the EERA for the reasons that follow.

In Regents of the University of California (1983) PERB Decision No. 308-H, the Public Employment Relations Board (PERB) held that in order to state a prima facie violation of interference with the grievance procedure the charging party must allege how and in what manner the employer effectively denied the employee her right to process a grievance. Simply rejecting a grievance on procedural grounds has been held not to constitute a violation in a number of different contexts. (See Regents of the University of California (1988) PERB Decision No. 699-H, Regents of the University of California (1988) PERB Decision No. 700-H and Regents of the University of California (1988) PERB Decision No. 707-H.) One of the underlying assumptions of grievance processing is that the contractually provided procedures typically allow the grievant to elevate the grievance to the next level if the employer fails or refuses to respond. The District's grievance procedure in this case is no different.

In this case, the charge fails to explain how the delays, failures to respond, and treatment of the grievances as complaints denied Turney her right to effectively process her grievances. It is noted that the matters involving Prairie's harassment and Kew's class assignments were eventually processed through all steps of the grievance procedure except arbitration. While there is the contention that if the grievance on class assignments had been processed more expeditiously, Turney might have been granted a different teaching assignment for the 2000-2001 year, this harm is insufficient to carry her allegation over the threshold. If the case had gone to arbitration it is unlikely that she would have received a decision prior to the beginning of the school year. Moreover, arbitrators are typically granted the power to "make whole" the aggrieved party.¹

The allegations with respect to harassment by Prairie and Kew in front of students, faculty and administrators in April 2000 and the threat to initiate board action fail to contain any supporting information. The charging party is required to provide a "clear and concise statement of the facts conduct alleged to constitute an unfair practice" (Cal. Code of Regs, tit. 8, sec. 32615(a)(5)) in order to permit PERB to determine whether a prima facie case has been stated (Cal. Code of Regs., tit. 8, sec. 32620, 32640).

¹Although the arbitrator would not have been able to place Turney in her desired classes for the 2000-2001 year, the arbitrator could have done so at the earliest practicable moment and provided some other relief -- monetary perhaps -- to achieve a reasonable make whole remedy.

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Finally, Charging Party's claims of collusion appear to be without merit. More is required to demonstrate collusion than the mere coincidence of actions which leave the charging party unsatisfied or unfulfilled. For example, if District caused or attempted to cause the District to violate Turney's rights under the EERA, the charge must demonstrate how and why the District's conduct led to this result. (See Tustin Unified School District (1987) PERB Decision No. 626; see also American Federation of State County and Municipal Employees (Waters) (1988) PERB Decision No. 697-H [failure to distribute contract to all bargaining unit employees not a violation].) The charge fails to do so.

For these reasons the allegations that the District (1) interfered with the processing of grievances, (2) engaged in harassment in April 2000, (3) threatened school board action in June 2000, and (4) engaged in collusion with the Association, as presently written, do 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 January 19, 2001, I shall dismiss the above-described allegation from your charge. If you have any questions, please call me at (510) 622-1024.

Sincerely,

DONN GINOZA
Regional Attorney