

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

UNITED TEACHERS OF LOS ANGELES,

Charging Party,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT,

Respondent.

Case No. LA-CE-4389-E

PERB Decision No. 1532

June 23, 2003

Appearances: Geffner & Bush by Steven K. Ury, Attorney, for United Teachers of Los Angeles; Jones, Day, Reavis & Pogue by Holger G. Besch, Attorney, for Los Angeles Unified School District.

Before Baker, Whitehead and Neima, Members.

DECISION

BAKER, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by United Teachers of Los Angeles (UTLA) of a Board agent's dismissal of its unfair practice charge. The charge alleged that the Los Angeles Unified School District (District) violated section 3543.5(a) and (b) of the Educational Employment Relations Act (EERA)<sup>1</sup> by retaliating against Jay Winters (Winters). Specifically, UTLA alleges that the

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<sup>1</sup> EERA is codified at Government Code section 3540 et seq. EERA section 3543.5 states, 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

District refused to rehire Winters as a teacher, because of Winters' participation in union activities.

After reviewing the record in this matter, including UTLA's appeal and the District's response, the Board reverses the Board agent's dismissal for the reasons set forth below.

### BACKGROUND

Winters was employed as a teacher for the District from 1986 through 1998. Winters received satisfactory performance evaluations in 1994, 1996 and 1998. During his employment with the District, Winters was at some point UTLA chapter chair and a member of the UTLA Board of Directors. In 1998, Winters took a leave of absence from the District to work for UTLA. Winters later resigned his employment with the District and continued working for UTLA until 2001. As a UTLA employee, Winters' duties included representing District employees in grievances against the District. After 1998, Winters' only interaction with the District was in his capacity as an UTLA employee.

In December 2001 or January 2002, Winters applied for a teaching position with the District. As part of the application process, Winters requested that his former principal, Phil Saldivar (Saldivar), submit a recommendation/reference to the District. Winters' performance evaluations for 1994, 1996, and 1998 all appear to have been signed by Saldivar. As noted above, all three of those evaluations rated Winters' performance as satisfactory. Winters never saw Saldivar's recommendation/reference letter, because it was sent directly to

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purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

the District. UTLA further alleges that sometime after 1998, Saldivar became the staff relations officer for the District and dealt directly with UTLA grievances.

On February 1, 2002, Winters received a letter from the District rejecting his employment application. The letter stated that an evaluation committee had reviewed Winters' application and determined that it did not meet District standards in the following area:

Personal qualifications – based on your references  
(quality/recency/appropriateness).

The letter provided no other explanation.

Finally, the charge alleges that Winters is a credentialed teacher while more than one-third of the District's teachers are not.

#### BOARD AGENT'S DECISION

UTLA alleges that the District retaliated against Winters in violation of EERA section 3543.5(a) and (b). The Board agent analyzed UTLA's charge using the familiar framework set forth in Novato Unified School District (1982) PERB Decision No. 210 (Novato). There was no dispute that Winters had engaged in protected activity and had been subject to an adverse action. However, the Board agent dismissed the charge on the grounds that UTLA failed to demonstrate the required nexus.

The Board agent noted that the charge does not allege that the District made any anti-union statements. The Board agent further noted that the District provided Winters an explanation of why his application was rejected and that there is no evidence the District's explanations are inconsistent or contradictory. Finally, the Board agent held that the charge did not demonstrate that the District departed from established procedures or engaged in disparate treatment of Winters.

UTLA argued that it had established a prima face case because the District's rejection of Winters' employment application is inconsistent with the District's evaluations of Winters. (Los Angeles Unified School District (2001) PERB Decision No. 1469 (LAUSD); Livingston Union School District (1992) PERB Decision No. 965 (Livingston).) In the dismissal letter, the Board agent distinguished the two cases cited by UTLA. The Board agent noted that in Livingston, the District rejected two probationary teachers with satisfactory evaluations. The Board explained in Livingston that the employees suffered disparate treatment because only three other teachers had not gained tenure during the past six years and each of them had received negative evaluations. The Board agent concluded that here, the charge did not allege Winters was the only applicant with satisfactory evaluations who was rejected. The Board agent also distinguished LAUSD by noting that in that case, unlike this case, the employer departed from established procedures in evaluating the employee; gave the employee assurances of a new evaluation when she ceased protected activity; and contradicted itself by justifying the employee's termination by stating the employee's program was in trouble, but that the employee's work was valuable. Accordingly, the Board agent dismissed UTLA's charge.

#### UTLA'S APPEAL

On appeal, UTLA argues that the Board agent refused to accept the "considerable circumstantial evidence" establishing a nexus between Winters' protected activity and the District's rejection of his employment application. UTLA argues that the Board agent's application of the third prong of the Novato standard makes it all but impossible to show an unlawful refusal to hire without direct evidence of discrimination.

UTLA claims that in this case, a clear inference of unlawful motivation can be made. It claims that since Winters left the District with a series of positive evaluations, the only possible interpretation of the District's actions is that something happened between 1998, when Winters left the District and 2001 when he reapplied. The only interaction that Winters had with the District during that period was as a union representative pursuing grievances for UTLA. UTLA argues the positive evaluations provide ample evidence to draw an inference that the real reason the District did not hire him is because of his past union activity. UTLA reiterates the two cases (LAUSD and Livingston) it argued before the Board agent in support of its position.

UTLA also argues that the reasons given for the District's failure to hire Winters were vague and ambiguous. Finally, UTLA argues that because the District's application process is a closed process in which applicants do not have access to the decision making mechanism, there is simply no way to provide direct evidence regarding the District's actions. Accordingly, UTLA argues that it is unfair to require it to produce further evidence of discriminatory intent at this stage of the proceedings.

#### DISTRICT'S RESPONSE

The District argues that UTLA has provided absolutely no evidence sufficient to support a prima facie case of discrimination or retaliation. The District argues that despite being asked by the Board agent, UTLA did not present a shred of direct evidence of anti-union animus, such as any statements or conduct hostile to Winters' UTLA affiliation; no evidence of inconsistent explanations for denying the application; no evidence of departure from its standard procedure in considering Winters' application; and no evidence of disparate treatment of similarly situated applicants.

The District further implies that Winters' submission of Saldivar's reference letter was inappropriate because Winters had not worked for Saldivar in over four years. The District argues that since Winters voluntarily requested that Saldivar write a reference letter, Winters has only himself to blame if the reference letter fails to meet District criteria. The District asserts that its letter rejecting Winters' application was not vague, but clearly informed Winters that his references were not acceptable for reasons of quality, recency, and appropriateness.

### DISCUSSION

#### Nexus

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; Carlsbad Unified School District (1979) PERB Decision No. 89.) There is no dispute that the charge here satisfies the first and second prongs of Novato. The only issue in this matter is whether the third prong of Novato is satisfied.

The third prong of Novato requires that the charging party prove a nexus between the protected activity and the adverse action. In other words, the charging party must prove that the employer acted with discriminatory intent. PERB has long recognized that direct evidence of discriminatory intent – the proverbial “smoking gun” – is rarely possible. (See Oakdale Union Elementary School District (1998) PERB Decision No. 1246.) Accordingly, the Board has held that circumstantial evidence of discriminatory intent may be sufficient to establish the required nexus.

In many cases, circumstantial evidence of discrimination will include evidence that the adverse action occurred in close temporal proximity to the protected activity. (North Sacramento School District (1982) PERB Decision No. 264 (North Sacramento)).) However, evidence of “timing” is not required in every case. The charging party may establish a prima facie case based solely on the existence of other factors demonstrating the necessary connection or "nexus" between the adverse action and the protected conduct. These factors can include: (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.)

#### Employer’s Inconsistent or Contrary Justifications

UTLA argues that the District’s rejection of Winters is inconsistent with the satisfactory performance evaluations conferred on Winters by the District. This inconsistency is circumstantial evidence of animus, argues UTLA. The Board agrees. Winters was informed that his reference letter failed as to “quality.” It is only logical to assume that this means Saldivar did not give Winters a favorable reference. However, the record establishes that

Saldivar authored all three of Winters' performance evaluations from 1993 to 1998. Each of these evaluations rated Winters' performance as satisfactory. To the extent the Saldivar's reference letter was unfavorable to Winters, it is inconsistent with Saldivar's previous performance evaluations of Winters. Accordingly, the Board finds that the District's explanation that Winters' reference letter from Saldivar failed as to "quality" is inconsistent with the District's evaluations of Winters' performance, and thus, is circumstantial evidence that Winters was not rehired because of his protected activities.

The District rejects this conclusion by arguing that the District's decision was based on Winters' references, not his performance evaluations. The District asserts that Winters' performance evaluations were considered separately. However, there is nothing in the record to support such a contention. Further, this contention does not aid the District since if Saldivar's reference letter was not based on Winters' performance, what was it based on? The District does not answer this question. UTLA's answer is that Saldivar's reference must have been based on his interaction with Winters in his capacity as a union activist.

The District also implies that Winters did not "fare well" in his initial assignment as a junior high teacher prior to 1994. The District makes this argument solely on the basis that Winters did not submit any performance evaluations in his charge from when he was a junior high teacher. The District assumes too much. If the District had evidence to submit, it should have done so in the record below. Since the District chose not to submit its evidence in the record, the Board will not entertain attempts by the District to submit evidence in its brief. (PERB Reg. 32635(b).)<sup>2</sup>

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<sup>2</sup> PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. Regulation 32635(b) provides:

### Exaggerated, Vague, or Ambiguous Employer Explanations

UTLA also argues that Winters was provided exaggerated, vague, and/or ambiguous explanations for his application rejection. The District counters that Winters was plainly told that his application was rejected because his reference letter failed as to “quality/recency/appropriateness.” The Board agrees with UTLA that the explanation provided by the District was exaggerated, vague, and/or ambiguous.

The District has provided no explanation to Winters as to how his reference letter failed as to quality, recency, and/or appropriateness. Saldivar was the last principal that Winters worked under before he left the District’s employment. The record indicates that Winters worked under Saldivar from 1993 to 1998. Saldivar was also the last principal that Winters worked under before he left the District’s employment. Since Saldivar was Winters’ most recent educational employer, it seems proper to assume that he was the most appropriate person to submit a reference letter. Thus, the facts appear to contradict any claim that Winters’ reference letter was faulty as to recency and/or appropriateness. At a minimum it appears that the District’s explanation was exaggerated. The Board finds that the District’s inadequate explanation in this matter is further circumstantial evidence that the District acted with discriminatory animus. This is especially true given that the District could have provided Winters with more of an explanation but chose not to.

### Other Facts Demonstrating Unlawful Motive

As already set forth, the record establishes that Winters received satisfactory performance evaluations from 1993 until his departure from the District in 1998. All these

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(b) Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence.

performance evaluations were authored by Saldivar. After Winters left the District he went to work for UTLA. At some point, Saldivar became a Staff Relations Officer for the District and played a role in responding to UTLA grievances. In 2001, Winters' application for reemployment with the District was rejected based on a reference letter from Saldivar.

Under these facts, the Board finds that UTLA has met its burden to establish a prima facie case of retaliation. Winters did not work for the District after 1998. Since Saldivar was satisfied with Winters' performance up to 1998, Winters should have received a positive recommendation from Saldivar. Further, Winters' only interaction with the District after 1998 was in his capacity as a UTLA employee. These facts constitute circumstantial evidence that Saldivar's reference letter must have been motivated by anti-union animus. The Board holds that when combined with the District's inadequate and inconsistent explanations, these facts are sufficient to establish the required nexus under Novato.

Based on the above discussion, the Board reverses the Board agent's dismissal and remands this case to the General Counsel's office for issuance of a complaint.

#### ORDER

The unfair practice charge in Case No. LA-CE-4389-E is hereby REMANDED to the Office of the General Counsel with instructions to issue a complaint in this matter.

Members Whitehead and Neima joined in this Decision.