

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



FORREST FYKES,

Charging Party,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT,

Respondent.

Case No. LA-CE-4788-E

PERB Decision No. 1746

February 1, 2005

Appearances: Forrest Fykes, on his own behalf; Albert C. Nicholson, 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 appeal by Forrest Fykes (Fykes) of a Board agent's dismissal (attached) of his unfair practice charge. The unfair practice charge alleged that the Los Angeles Unified School District (District) violated the Educational Employment Relations Act (EERA)¹ by retaliating against Fykes for filing unfair practice charges, by conducting an unprecedented audit to justify his termination and issuing Fykes a notice of recommended discipline. Fykes 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 amended unfair practice charge, the District's responses to the unfair practice charge and amended unfair practice charge, the Board agent's warning and dismissal letters, Fykes' appeal, and the District's response to Fykes' appeal. The Board consequently finds the

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

warning and dismissal letters to be without prejudicial error² and adopts them as a decision of the Board itself.

ORDER

The unfair practice charge in Case No. LA-CE-4788-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Shek joined in this Decision.

²The dismissal letter on page 1 mistakenly characterizes the Board's standard for determining adverse action as a "subjective test." Rather, the test for finding adverse action is an objective test, i.e., "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.) This test was properly enunciated on page 3 of the warning letter. Applying that test, the Board agent correctly found that there was no evidence that the audit instituted by the District comprised an adverse action.

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



September 30, 2004

Forrest Fykes

Re: Forrest Fykes v. Los Angeles Unified School District
Unfair Practice Charge No. LA-CE-4788-E
DISMISSAL LETTER

Dear Mr. Fykes:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on August 6, 2004. You allege that the Los Angeles Unified School District (LAUSD) violated the Educational Employment Relations Act (EERA)¹ by conducting an unprecedented audit to justify your discharge in retaliation for your filing unfair practice charges.

I indicated to you in my attached letter dated September 22, 2004, 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 filed a First Amended Charge on September 29, 2004.

In the Amended Charge you assert that you did not cause the deficiencies attributed to you in the audit. You then state that a lack of causal connection between your actions and the deficiencies revealed by the audit means the audit was somehow a pretext to justify LAUSD's discipline against you. However, the Board uses a subjective rather than objective test to determine whether an action is indeed adverse. A reasonable person under the same circumstances would not consider a system wide audit to be an adverse action. Thus, you fail to show how the audit was an adverse action. Furthermore, you fail to provide any facts that establish any of the additional factors, besides timing, that are needed to find nexus between the protected activity and adverse action. Therefore, I am dismissing the charge based on the facts and reasons contained in this letter and my September 22, 2004, letter.

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.

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, 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

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

LA-CE-4788-E
September 30, 2004
Page 3

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: Marcia Degl'Innocenti, HR Branch Manager, Los Angeles Unified School District

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



September 22, 2004

Forrest Fykes

Re: Forrest Fykes v. Los Angeles Unified School District
Unfair Practice Charge No. LA-CE-4788-E
WARNING LETTER

Dear Mr. Fykes:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on August 6, 2004. You allege that the Los Angeles Unified School District (LAUSD) violated the Educational Employment Relations Act (EERA)¹ by conducting an unprecedented audit to justify your discharge in retaliation for your filing unfair practice charges.

On June 27, 2003, the Laborers International Union of North America, Local 300 filed on your behalf a First Amended Charge in Unfair Labor Practice Case Number LA-CE-4521-E against LAUSD. That charge led to a complaint alleging that the LAUSD issued you a letter of reprimand in retaliation for your filing two grievances against LAUSD.

On September 29, 2003, Local 300 filed on your behalf Unfair Labor Practice Case Number LA-CE-4665-E against LAUSD. That charge led to a complaint alleging that the LAUSD docked your pay by thirty minutes in retaliation for the filing and amending of Unfair Labor Practice Case Number LA-CE-4521-E against LAUSD.

On November 21, 2003, you and Local 300 representative Francisco Arrizon met with Deputy Director of Maintenance and Operations J. Douglas Dunivan, Assistant Director of Central Shops John Rosell, Senior Fire Extinguisher Servicer and supervisor, Draco Adkins and Senior Human Resources Representative Kevin Ralph. The meeting's purpose was to clarify your responsibilities and rights as a Fire Equipment Servicer Technician, discuss operational guidelines and to resolve remaining issues between you and management. At the meeting you indicated that you felt you were being held to a higher standard than others with whom you worked. Mr. Dunivan then offered to authorize an independent audit of the work performed by you and other Fire Extinguisher Servicer Technicians. You agreed with the proposed action.

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.

On January 9, 2004, you, Local 300 and LAUSD attended an informal conference. Although the matter was not settled at this meeting, negotiations continued.

On January 12, 2004, Mr. Dunivan sent you a letter indicating the Audit of all workers in the unit was underway and would be completed within the next few weeks.

In February 2004, you, Local 300 and LAUSD entered into a settlement agreement covering both Unfair Labor Practice charges. Under the agreement you withdrew your charges with prejudice, the complaints were dismissed and LAUSD removed a letter of reprimand from your personnel file.

On July 14, 2004, LAUSD issued a Notification of Recommended Discipline that recommended your dismissal. The recommendation was based upon the findings of the Audit of the entire Fire Extinguisher Servicing Technician unit and other performance issues. Causes cited in the recommendation are willful disobedience, inattention to or dereliction of duty, willful or persistent violation of the provisions of the Education Code or of written rules, regulations or procedures adopted or established by the Board of Education, Personnel Commission, or the administration and willful or persistent violation of, or failure to enforce, regulations or procedures pertaining to health and safety.

On August 19, 2004, you were given an opportunity to address the charges in a Skelly meeting and you responded in writing. The matter is still pending the recommendation of the Administrative Review Officer.

Discussion

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 LAUSD wrongfully used the Audit to justify your discharge in retaliation for your participation in the previous unfair practice charges. Even though it is clear that you exercised rights under EERA when Local 300 filed unfair practice charges on your behalf and the employer had knowledge of the exercise of those rights, it is not clear that LAUSD implemented its Audit or issued the Notification of Recommended Discipline because of the exercise of those rights.

LAUSD instigated the Audit in January while the previous unfair practice charges were being settled. Thus, the Audit was in close temporal proximity to your protected conduct. However, there is no evidence that the Audit was adverse. To the contrary, it focused on the work of all workers in the unit as it was prompted in response to your concern that you were being held to a higher standard than others in the unit. Moreover, even if the Audit was somehow an adverse action, timing alone, without more, does not demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. None of the alleged facts establish any of the additional factors needed to establish nexus. Furthermore, the fact that the audit was unprecedented does not represent a departure from established procedures. Rather, it represents an additional method to investigate misconduct.

You also cite to Woodland Joint Unified School District (1987) PERB Dec. No. 628 [11 PERC 18121] in support of your statement that "[t]he Notification contained numerous allegations which lack a causal connection to Fykes or his work performance, but which, nevertheless, are alleged to be misconduct by Fykes in the Notification." You then describe Woodland parenthetically: "purported bases for poor evaluation, letters of reprimand and other derogatory materials found pretextual; no employee misconduct; school district retaliated against employee because employee engaged in protected activity." While it is true that the Board

LA-CE-4788-E
September 22, 2004
Page 4

found that the District in Woodland retaliated against its employee, you fail to show how the facts of your case also establish a case of retaliation.

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 September 29, 2004, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Mary Crèith
Regional Attorney

MC