

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



JOHN BUSSMAN,

Charging Party,

v.

ALVORD UNIFIED SCHOOL DISTRICT,

Respondent.

Case No. LA-CE-5158-E

PERB Decision No. 2021

April 30, 2009

Appearances: John Bussman, on his own behalf; Thompson & Colegate by Kurt E. Yaeger, Attorney, for Alvord Unified School District.

Before McKeag, Wesley and Dowdin Calvillo, Members.

DECISION

WESLEY, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by John Bussman (Bussman) of a Board agent's dismissal (attached) of his unfair practice charge. The charge alleged that the Alvord Unified School District (District) violated the Educational Employment Relations Act (EERA)¹ by changing his teaching assignment and failing to provide him with the teacher's edition textbook for his new class. The charge alleged that this conduct constituted reprisal for protected activity and interference with the rights of employees in violation of EERA section 3543.5(a).

The Board has reviewed the entire record in this matter, including but not limited to the unfair practice charge, the Board agent's warning and dismissal letters, Bussman's appeal and the District's response. Based on this review, the Board finds the Board agent's warning and

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

dismissal letters to be a correct statement of the law and well reasoned, and therefore adopts them as the decision of the Board itself, as supplemented by the discussion below.

DISCUSSION

In his appeal, Bussman, for the first time, cites several new communications between the District and the Alvord Educators' Association which he claims demonstrate that the District had knowledge of his protected activity. Bussman also provides additional details regarding the impact of the new class assignment.

Pursuant to PERB Regulation 32635(b),² "Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." It is clear from the appeal that Bussman was aware of the newly provided information prior to filing his charge. Bussman asserts that his former legal representative advised him not to submit all of his documentation during the charge investigation stage. However, the warning letter expressly directs a charging party to submit "all the facts and allegations you wish to make." (Emphasis in original.) Bussman's knowing failure to provide all the information he had to the Board agent for consideration, does not demonstrate good cause. Accordingly, the Board did not consider the new evidence submitted on appeal.

ORDER

The unfair practice charge in Case No. LA-CE-5158-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Dowdin Calvillo joined in this Decision.

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

contract. In early October 2006, AEA announced that a contract had been reached between the parties, but did not provide details of the contract to its members.

Prior to the ratification vote by the AEA membership, Bussman learned some details of the contract. According to the charge, part of the contract was that teachers "with 3-14 years of experience would have their salaries step level brought back two notches while those with 19 or more years or more of experience would be unaffected. Additionally, AEA members with two or less years would be shifted back to level one."

On or about October 11, 2006, Bussman questioned AEA representative Meg Decker (Decker) about the contract. At all relevant times herein, Decker was a teacher at Norte Vista High School, Department Chair of Social Studies at Norte Vista High School, Union official for AEA and a bargaining spokesperson for AEA. Allegedly, Decker stated that Bussman "should not worry about the inequity of the contract as it was this or just minimal increases." Decker stated that "it was a good deal."

On or about October 12, 2006, Bussman met with Decker and other AEA representatives. During the meeting, "it was discovered that new employees under the contract would receive positioning based on their years of experience while those working for the District would be two steps behind."

On or about October 23, 2006, Bussman forwarded a letter to Decker and another AEA Representative, Craig Adams (Adams), expressing his concerns about the contract.

After receiving no response from AEA, Bussman contacted the California Teacher's Association (CTA) and forwarded his October 23rd letter to CTA Representatives Karen Kyne (Kyne) and Bruce Matlock (Matlock). Bussman was then "referred to Barbara Kerr with CTA."

On December 7, 2006, Kerr informed Bussman that "[CTA] could not intervene."

During the week of December 17, 2006, Kyne told Bussman that "the local association has to first be approached before CTA can step in."

On or about January 30, 2007, Bussman contacted Decker about having AEA represent him on the violations in the contract. According to the charge, "[AEA] declined to represent [Bussman] and in fact [was] very hostile towards him."

In or about March 2007, AEA advised Bussman and other AEA members "that a new contract had been reached."

On or about March 16, 2007, Bussman again raised his concerns about violations of the Education Code and "other inequities contained in the contract" but was "shouted down" by AEA representatives.

On or about March 21, 2007, Bussman was initially denied access to a meeting and “Adams attempted to give [sic] [Bussman] out.” Afterwards, a CTA representative advised AEA of the “illegalities of both contracts” but AEA “continued to deny such violations and stated the vote would continue.”

On or about March 26, 2007, new District hires were advised by AEA and the District that they would have to “pay back a portion of their current salary.” In addition, the charge alleges that Adams then “improperly and illegally laid blame on [Bussman] to teachers who had to pay back their salary.”

On or about April 13, 2007, CTA agreed to provide Bussman with legal counsel and provided him with the requisite authorization forms.

On or about April 20, 2007, Bussman was “advised of further disparaging remarks by Respondents Adams and Decker.”

In or about May 2007, Bussman met with CTA legal counsel Marianne Reinhold (Reinhold) and was advised that she would be filing a lawsuit later in the month on his behalf.

On or about June 19, 2007, Bussman was advised by CTA that they were “awaiting approval of legal assistance even though such was given on April 13, 2007.”

Between June 2007 and August 2007, Bussman attempted to reach CTA and specifically Reinhold, however, CTA allegedly failed to respond.

On or about August 10, 2007, Bussman received a letter sent by AEA to the District requesting that the District “meet with AEA members to fix the contracts.”

On or about August 16, 2007, Bussman received a welcome letter from District Principle Santos Campos advising him that if he had not yet received a notice of a schedule change, then his schedule would remain the same. At the time Bussman received the August 16 letter, he had not received any notice of a schedule change.

According to the amended charge, Social Science department members typically were told by Decker prior to the end of the prior school year that they could expect the same class assignments for the upcoming school year.

On or about August 23, 2007, Bussman received notice of a schedule change from the District. According to the amended charge, Bussman had taught three sections of American Government and two sections of AP US History for the past three years. His revised schedule contained two sections of American Government, two sections of AP US History and one section of US History. The amended charge states that “[a]lthough A.P. U.S. History and U.S. History both contain similar terms, they are completely different courses. There are different textbooks, pacing guides, assignments, and tests for each of these classes.”

The amended charge further states that although Bussman's "new" schedule was not beyond his capabilities, his new schedule required three classes to prepare for daily and "could have easily been remedied to everyone's satisfaction."

On or about August 27, 2007, Bussman met with AEA officials regarding the "tardy assignment change but to no avail."

In addition, the amended charge states that during the months of August, September, and October 2007, "Campos and Decker failed to provide basic class resources, such as a teacher's edition textbook, for Bussman's newly assigned course." According to the amended charge, Bussman made a direct request to Campos for resources at the September 2007 Social Science Department meeting. Bussman made a second request for the resources to Decker at the October 2007 Social Science Department meeting. On October 30, 2007, Bussman made a third request for the resources to Superintendent Kathy Wright.

In September 2007, CTA and their legal counsel Reinhold responded to and advised Bussman that "they are refusing to properly represent [him] as required."

Discussion

1. Charging Party's Burden of Proof

As previously stated in the attached Warning Letter, PERB Regulation 32615(a)(5)² requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." The charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (State of California (Department of Food and Agriculture) (1994) PERB Decision No. 1071-S, citing United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (Ibid.; Charter Oak Unified School District (1991) PERB Decision No. 873.)

2. Discrimination/Retaliation

To demonstrate that an employer discriminated or retaliated against an employee in 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; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210 (Novato); Campbell Municipal Employees Assn. v. City of Campbell (1982) 131 Cal.App.3d 416 (Campbell); San Leandro Police Officers Assn. v. City of San Leandro (1976) 55 Cal.App.3d 553 (San Leandro).) In determining whether evidence of adverse action is established, the Board uses an objective test and will not rely upon the subjective reactions

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

of the employee. (Palo Verde Unified School District (1988) PERB Decision No. 689.) 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.)

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; Campbell, supra, 131 Cal.App.3d 416); (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; San Leandro, supra, 55 Cal.App.3d 553); (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; San Leandro, supra, 55 Cal.App.3d 553); (4) the employer's cursory investigation of the employee's misconduct (City of Torrance (2008) PERB Decision No. 1971-M; Coast Community College District (2003) PERB Decision No. 1560); (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 (County of San Joaquin (Health Care Service) (2001) PERB Order No. IR-55-M); (6) employer animosity towards union activists (Jurupa Community Services District (2007) PERB Decision No. 1920-M; Cupertino Union Elementary School District (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive. (North Sacramento School District, supra, PERB Decision No. 264; Novato, supra, PERB Decision No. 210.)

a. Protected Activity

In the instant case, Charging Party appears to have engaged in protected activity by raising concerns about the contract negotiations between the District and AEA. (See Los Angeles Unified School District (2003) PERB Decision No. 1552 [an employee's complaint concerning an issue impacting employees generally was protected].)

b. Knowledge of the Employer

Charging Party still does not allege any facts showing that an agent of the District had actual knowledge of Charging Party's alleged protected activities sufficient to meet his burden as

stated in Ragsdale, supra, PERB Decision 944. The amended charge appears to allege that Decker, who had knowledge of Bussman's activity, was an agent of the District since she was also the Department Chair of Social Studies at Norte Vista High School. Specifically, Charging Party states that he questioned Decker about the contract between AEA and the District on October 11, 2006, was involved in meetings with AEA and Decker on October 12, 2006, and sent a letter to Adams and Decker expressing his concerns about the contract on October 23, 2006. Bussman then directed his concerns to CTA until he contacted Decker again on January 30, 2007.

The Board has held that an employer may be held responsible for acts of even a rank-and-file employee, acting as its agent where: the employer instigated, encouraged, ratified, or condoned such activity; where the employee had actual or apparent authority to act for his/her principal; where the employer held him/her out to other employees as being "clothed with supervisory authority," and where other employees could reasonably believe that he/she was speaking and acting on behalf of management. (Moreland Elementary School District (1982) PERB Decision No. 227 citing Rexart Color Chemical Co. (1979) 246 NLRB No. 40 and NLRB v. American Thread Co. (1953) 204 F.2d 161; Los Angeles Community College District (1982) PERB Decision No. 252; and Amerace Corporation. Esna Division (1976) 225 NLRB No. 159, at pp. 1096.)

Here, however, Charging Party has provided no evidence to establish that Decker was serving as an agent or representative of the District. Rather, Charging Party specifically stated that Decker was an AEA official and bargaining spokesman. Therefore, such communications between Charging Party and Decker cannot, without more, establish employer knowledge for purposes of establishing a prima facie case of discrimination.

The first communication between Bussman and Campos or any other District representative, according to the amended charge, occurred on August 16, 2007 when Campos sent a welcome letter to Bussman. Subsequently, Bussman communicated with Campos when he made a direct request for resources to Campos at the September 2007 Social Science Department meeting. However, neither the August 16 nor the September exchange between Bussman and Campos amount to employer knowledge since the amended charge does not allege that Bussman expressed any concerns about the contract negotiations between the District and AEA during these exchanges.

b. Adverse Action

Furthermore, the amended charge fails to provide any facts demonstrating that any adverse action was taken against Charging Party.

As evidence of adverse action, the amended charge first states that on or about August 23, 2007, Bussman received notice of a schedule change from the District. According to the amended charge, Bussman had taught three sections of American Government and two sections of AP US History for the past three years. His revised schedule contained two

sections of American Government, two sections of AP US History and one section of US History and required three classes to prepare for daily instead of two.

As stated above, the Board must use an objective reasonable person standard in evaluating whether there was adverse action. Where an employee's duties and compensation are the same in transfer situations, the employee must present facts demonstrating that a reasonable employee would consider the transfer an adverse action. (Compton Unified School District (2003) PERB Decision No. 1518.) It appears that even though no "transfer" occurred, Bussman continues to be paid the same salary and to teach the same number of classes he was previously assigned despite his schedule change. Moreover, the Board has held that increased preparation time accompanying an involuntary transfer is also not necessarily supportive of finding of adverse action. (Newark Unified School District (1991) PERB Decision No. 864.) There is no information provided as to the reasons this different class should be considered an adverse action. Therefore, Charging Party has not established a prima facie case that the District acted adversely when it changed his schedule.

Also as evidence of adverse action, the amended charge states that during the months of August, September, October 2007, "Campos and Decker failed to provide basic class resources, such as a teacher's edition textbook, for Bussman's newly assigned course." According to the amended charge, Bussman made three requests for the resources to Campos, Decker and Superintendent Kathy Wright. However, this allegation, without more, is insufficient to establish a prima facie case that the District acted adversely by failing to provide a teacher's edition textbook. It is not clear how a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment in the same circumstances. Therefore, Charging Party has not established that the District acted adversely when it failed to provide him with the resources he requested.

c. Nexus

Yet, even if it is assumed for the sake of argument that the change in schedule or the failure to provide resources constitutes an adverse action, Charging Party has still not provided information demonstrating that the District took such action because he voiced concerns to his Union about the provision in the contract. Charging Party does not present any information demonstrating disparate treatment of Charging Party; the District's departure from established procedures and standards; inconsistent or contradictory justifications for the District's actions; or that the District conducted an inadequate investigation. Thus, this allegation fails to allege a prima facie case of discrimination and/or retaliation under EERA and will be dismissed.

2. Interference

The test for whether a respondent has interfered with the rights of employees under the EERA does not require that unlawful motive be established, only that at least slight harm to employee rights results from the conduct. In State of California (Department of Developmental Services) (1983) PERB Decision No. 344-S, citing Carlsbad Unified School District (1979) PERB

Decision No. 89 and Service Employees International Union, Local 99 (Kimmett) (1979)
PERB Decision No. 106, the Board described the standard as follows:

[I]n order to establish a prima facie case of unlawful interference, the charging party must establish that the respondent's conduct tends to or does result in some harm to employee rights granted under EERA.

Under the above-described test, a violation may only be found if EERA provides the claimed rights. In Clovis Unified School District (1984) PERB Decision No. 389, the Board held that a finding of coercion does not require evidence that the employee actually felt threatened or intimidated or was in fact discouraged from participating in protected activity.

Charging Party has also failed to meet his burden of proving that the District's actions harmed employee rights, constituting unlawful interference.

Bussman is a bargaining unit employee represented by AEA, and a public school employee covered by the EERA. Bussman also engaged in possible protected activity by raising concerns about the contract negotiations between the District and AEA. While it seems that Charging Party might be alleging that the District's schedule change and/or failure to provide educational resources created a chilling effect on his participation in protected activity, Charging Party has provided no evidence that such action in any way inhibited, or would tend to inhibit, his expression of concern over the negotiations between AEA and the District. Accordingly, the charge must be dismissed as it fails to demonstrate that the District's action resulted in any harm to employee rights under the EERA.

Right to Appeal

Pursuant to PERB Regulations, Charging Party 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 during a regular PERB business day. (Cal. Code Regs, tit. 8, secs. 32135(a) and 32130; see also Gov. Code, sec. 11020(a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB 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. (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 95811-4124
(916) 322-8231
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.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also 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.)

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Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

TAMI R. BOGERT
General Counsel


By

Katharine Nyman
Regional Attorney

Attachment

cc: Kurt E. Yaeger

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8386
Fax: (916) 327-6377



November 25, 2008

Nandita Murthy, Attorney
Kodam & Associates Law Office
41880 Kalmia Street, Suite 115
Murrieta, CA 92562

Re: John Bussman v. Alvord Unified School District
Unfair Practice Charge No. LA-CE-5158-E
WARNING LETTER

Dear Ms. Murthy:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on January 22, 2008. John Bussman (Bussman or Charging Party) alleges that the Alvord Unified School District (District or Respondent) violated the Educational Employment Relations Act (EERA or Act)¹ by: (1) retaliating against an employee based on his union membership and (2) interfering with an employee's protected rights.

Factual Background

Bussman has been employed with the District as a high school history/government teacher since 2001.

The Alvord Educator's Association (AEA) is, and at all times relevant to this charge has been, the recognized employee organization and exclusive representative for the certificated employees of the District. In 2005-2006, the District and AEA were in negotiations for a new contract. In early October 2006, AEA announced that a contract had been reached between the parties, but did not provide details of the contract to its members.

Prior to the ratification vote by the AEA membership, Bussman learned some details of the contract. According to the charge, part of the contract was that teachers "with 3-14 years of experience would have their salaries step level brought back two notches while those with 19 or more years or more of experience would be unaffected. Additionally, AEA members with two or less years would be shifted back to level one."

On or about October 11, 2006, Bussman questioned AEA representative Meg Decker (Decker) about the contract. Allegedly, Decker stated that Bussman "should not worry about the

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inequity of the contract as it was this or just minimal increases.” Decker stated that “it was a good deal.”

On or about October 12, 2006, Bussman met with Decker and other AEA representatives. During the meeting, “it was discovered that new employees under the contract would receive positioning based on their years of experience while those working for the District would be two steps behind.”

On or about October 23, 2006, Bussman forwarded a letter to Decker and another AEA Representative, Craig Adams (Adams), expressing his concerns about the contract.

After receiving no response from AEA, Bussman contacted the California Teacher’s Association (CTA) and forwarded his October 23rd letter to CTA Representatives Karen Kyne (Kyne) and Bruce Matlock (Matlock). Bussman was then “referred to Barbara Kerr with CTA.”

On December 7, 2006, Kerr informed Bussman that “[CTA] could not intervene.”

During the week of December 17, 2006, Kyne told Bussman that “the local association has to first be approached before CTA can step in.”

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On or about March 21, 2007, Bussman was initially denied access to a meeting and “Adams attempted to give [sic] [Bussman] out.” Afterwards, a CTA representative advised AEA of the “illegalities of both contracts” but AEA “continued to deny such violations and stated the vote would continue.”

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On or about April 13, 2007, CTA agreed to provide Bussman with legal counsel and provided him with the requisite authorization forms.

On or about April 20, 2007, Bussman was “advised of further disparaging remarks by Respondents Adams and Decker.”

In or about May 2007, Bussman met with CTA legal counsel Marianne Reinhold (Reinhold) and was advised that she would be filing a lawsuit later in the month on his behalf.

On or about June 19, 2007, Bussman was advised by CTA that they were “awaiting approval of legal assistance even though such was given on April 13, 2007.”

Between June 2007 and August 2007, Bussman attempted to reach CTA and specifically Reinhold, however, CTA allegedly failed to respond.

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On or about August 16, 2007, Bussman received a welcome letter from District Principle Santos Campos advising him that if he had not yet received a notice of a schedule change, then his schedule would remain the same. At the time Bussman received the August 16 letter, he had not received any notice of a schedule change.

On or about August 23, 2007, Bussman received notice of a schedule change from the District.

On or about August 26, 2007, Bussman demanded that CTA file a “suit on his behalf due to the contracts to Respondent CTA but [received] no response.”

On or about August 27, 2007, Bussman met with AEA officials regarding the “tardy assignment change which obviously is in retaliation as it breaches the logical mind on assignments considering other teacher’s schedules.” The charge further alleges that the District “failed and continues to fail to give [Bussman] all the tools he needs to effectively teach” all three of his classes.

In September 2007, CTA and their legal counsel Reinhold, responded to and advised Bussman that “they are refusing to properly represent [him] as required.”

Discussion

1. Charging Party’s Burden of Proof

PERB Regulation 32615(a)(5)² requires, inter alia, that an unfair practice charge include a “clear and concise statement of the facts and conduct alleged to constitute an unfair practice.” The charging party’s burden includes alleging the “who, what, when, where and how” of an

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unfair practice. (State of California (Department of Food and Agriculture) (1994) PERB Decision No. 1071-S, citing United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (Ibid.; Charter Oak Unified School District (1991) PERB Decision No. 873.)

The charging party's burden also includes alleging facts showing that the unfair practice charge was timely filed; i.e., that the alleged unfair practice occurred no more than six months prior to the filing of the charge. (Los Angeles Unified School District (2007) PERB Decision No. 1929; City of Santa Barbara (2004) PERB Decision No. 1628-M.) PERB is prohibited 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. (Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board (2005) 35 Cal.4th 1072.) 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.)

2. Discrimination/Retaliation

To demonstrate that an employer discriminated or retaliated against an employee in 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; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210 (Novato); Campbell Municipal Employees Assn. v. City of Campbell (1982) 131 Cal.App.3d 416 (Campbell); San Leandro Police Officers Assn. v. City of San Leandro (1976) 55 Cal.App.3d 553 (San Leandro)). In determining whether evidence of adverse action is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (Palo Verde Unified School District (1988) PERB Decision No. 689.) 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.)

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; Campbell, supra, 131 Cal.App.3d 416); (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; San Leandro, supra, 55 Cal.App.3d 553); (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; San Leandro, supra, 55 Cal.App.3d 553); (4) the employer's cursory investigation of the employee's misconduct (City of Torrance (2008) PERB Decision No. 1971-M; Coast Community College District (2003) PERB Decision No. 1560); (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 (County of San Joaquin (Health Care Service) (2001) PERB Order No. IR-55-M); (6) employer animosity towards union activists (Jurupa Community Services District (2007) PERB Decision No. 1920-M; Cupertino Union Elementary School District (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive. (North Sacramento School District, supra, PERB Decision No. 264; Novato, supra, PERB Decision No. 210.)

a. Protected Activity/Knowledge of the Employer

In the instant case, Charging Party appears to have engaged in protected activity by raising concerns about the contract negotiations between the District and AEA. (See Los Angeles Unified School District (2003) PERB Decision No. 1552 [an employee's complaint concerning an issue impacting employees generally was protected].) However, Charging Party does not allege any facts showing that an agent of the District had actual knowledge of Charging Party's alleged protected activities sufficient to meet his burden as stated in Ragsdale, supra, PERB Decision 944. Specifically, Charging Party has failed to set forth any facts establishing "who" at the District was aware of Charging Party's concerns and "when" they became aware of such concerns.

b. Adverse Action

Furthermore, the charge fails to provide any facts demonstrating that any adverse action was taken against Charging Party. While Charging Party states that the District's schedule change and failure to give Charging Party "all the tools necessary to effectively teach" constitute adverse action; these allegations, without more, are conclusory. Again, Charging Party has not provided any information to meet his burden as stated in Ragsdale, supra, PERB Decision 944. For example, Charging Party has failed to show: (1) what Charging Party's original schedule was; (2) how Charging Party's schedule was changed; (3) what tools Charging Party required; (4) which tools were not provided; (5) when the District refused to provide the requested tools; (6) or who at the District failed to provide the requested tools. Therefore, Charging Party has not established that the District acted adversely when it "changed his schedule" or failed to provide him with tools he requested.

c. Nexus

Yet, even if it is assumed for the sake of argument that the change in schedule constitutes adverse action, Charging Party has offered no information demonstrating that Charging Party's schedule was changed because he voiced concerns to his Union about the contract. Charging Party does not present any information demonstrating disparate treatment of Charging Party; the District's departure from established procedures and standards; inconsistent or contradictory justifications for the District's actions; or that the District conducted an inadequate investigation. Thus, this allegation fails to allege a prima facie case of discrimination and/or retaliation under EERA.

2. Interference

The test for whether a respondent has interfered with the rights of employees under the EERA does not require that unlawful motive be established, only that at least slight harm to employee rights results from the conduct. In State of California (Department of Developmental Services) (1983) PERB Decision No. 344-S, citing Carlsbad Unified School District (1979) PERB Decision No. 89 and Service Employees International Union, Local 99 (Kimmitt) (1979) PERB Decision No. 106, the Board described the standard as follows:

[I]n order to establish a prima facie case of unlawful interference, the charging party must establish that the respondent's conduct tends to or does result in some harm to employee rights granted under EERA.

Under the above-described test, a violation may only be found if EERA provides the claimed rights. In Clovis Unified School District (1984) PERB Decision No. 389, the Board held that a finding of coercion does not require evidence that the employee actually felt threatened or intimidated or was in fact discouraged from participating in protected activity.

Charging Party has failed to meet his burden of proving that the District's actions harmed employee rights, constituting unlawful interference.

Bussman is a bargaining unit employee represented by AEA, and a public employee covered by the EERA. Bussman also engaged in possible protected activity by raising concerns about the contract negotiations between the District and AEA. While it seems that Charging Party might be alleging that the District's schedule change and/or failure to provide educational tools created a chilling effect on his participation in protected activity, Charging Party has provided no evidence that such action in any way inhibited his expression of concern over the negotiations between AEA and the District. Accordingly, the charge must be dismissed as it fails to demonstrate that the District's action resulted in any harm to employee rights under the EERA.

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, Charging Party may 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 an authorized agent of 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 an amended charge or withdrawal is not filed on or before December 2, 2008, PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,


Katharine Nymann
Regional Attorney

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