STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

FALLBROOK ELEMENTARY TEACHERS ASSOCIATION, Charging Party, v. FALLBROOK UNION ELEMENTARY SCHOOL DISTRICT, Respondent.	Case No. LA-CE-5271-E PERB Decision No. 2171 March 1, 2011

Appearances: California Teachers Association by Rosalind D. Wolf, Staff Attorney, for Fallbrook Elementary Teachers Association; Stutz, Artiano, Shinoff & Holtz by Daniel R. Shinoff and Michelle K. Meek, Attorneys, for Fallbrook Union Elementary School District.

Before Dowdin Calvillo, Chair; McKeag and Wesley, Members.

DECISION

McKEAG, Member: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Fallbrook Union Elementary School District (District) to the proposed decision of an administrative law judge (ALJ). The ALJ found that the District violated the Educational Employment Relations Act (EERA)[1] by deciding not to reemploy teacher Tabitha Stillman (Stillman) in retaliation for her protected activity as a site representative for the Fallbrook Elementary Teachers Association (Association).

[1] EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

The Board has reviewed the proposed decision and the record in light of the District's exceptions, the Association's opposition to the exceptions, and the relevant law.[2] Accordingly, for the reasons set forth below, the Board reverses the ALJ's proposed decision that the District unlawfully retaliated against Stillman and dismisses the unfair practice charge.[3]

FACTUAL BACKGROUND

Beginning in December 2005, Stillman was employed by the District to teach second grade under a series of temporary contracts. The initial contract ran from December 2005 to June 2006. In September 2006, Stillman was offered and accepted a second contract that ran through June 2007. In February 2007, the District sent her a letter stating that the "final day of service under your employment contract is June 14, 2007." However, on June 21, 2007, the District offered and Stillman accepted a third temporary contract that ran through June 13,

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[2] The District filed a reply brief to the Association's opposition. The Association then filed an objection to the District' reply brief, asserting that "the Reply Brief raises no new issues, new case law, or new defenses."

PERB regulations do not expressly provide for or preclude the filing of reply or rebuttal briefs on appeal. (*Los Angeles Unified School District/Los Angeles Community College District* (1984) PERB Decision No. 408.) Consequently, the Board has ruled that it has discretion to allow the filing of a reply brief.

The parties' respective reply briefs do not provide new analysis. Rather the briefs simply restate issues previously presented, adding argument and record citations to bolster the arguments. Accordingly, the Board declines to exercise its discretion to consider either brief.

[3] The District requested oral argument in this matter. Historically, the Board has denied requests for oral argument when an adequate record has been prepared, the parties had ample opportunity to present briefs and have availed themselves of that opportunity, and the issues before the Board are sufficiently clear to make oral argument unnecessary. (*United Teachers of Los Angeles (Valadez, et al.)* (2001) PERB Decision No. 1453; *Monterey County Office of Education* (1991) PERB Decision No. 913.) Based on the Board's review of the record, all of the above criteria are met in this case. Therefore, the District's request for oral argument is denied.

2008. On March 4, 2008, the District sent Stillman a similar letter stating that the "final day of service under your employment contract is June 13, 2008."

From August 2007 to June 2008, Stillman was a junior site representative for the Association. As a representative, she involved herself in activities including monthly meetings with Principal Leonard Rodriguez (Rodriguez), delivering "good news" updates at the Association meetings, and conducting the Association's survey of the administration on the Fallbrook campus during the 2007-2008 school year. Another Association site representative presented the survey results to Rodriguez. Stillman was not present at that meeting.

In both 2007 and 2008, Rodriguez completed forms ranking the temporary contract teachers on the Fallbrook campus on a scale of 1 to 5 to assess experience, evaluation, professionalism, relations, and overall performance. A ranking of 4 meant that the teacher was "highly recommended for reemployment." In June 2007, he gave Stillman a 4 for experience, a 4 for evaluation, a 5 for professionalism, a 5 for relations and a 4 for overall performance. In February 2008, Rodriguez gave Stillman a 3 for experience, a 3 for evaluation, a 4 for professionalism, a 3 for relations, and a 3 for overall performance, which meant that she was no longer "highly recommended for reemployment." According to District testimony, without being "highly recommended for reemployment," a temporary teacher is not likely to be reemployed by the District.

The District uses an evaluation system to rate its teachers based on four categories, unsatisfactory, developing, maturing or exemplary. In her evaluations during the 2005-2006, 2006-2007, and 2007-2008 school years, Stillman received all "Maturing" ratings. Retired District Superintendent Janice Schultz (Schultz) testified that she was concerned about Stillman's classroom management in early 2006, but in Stillman's 2006-2007 evaluation,

Rodriguez commented that Stillman "manages her classroom well." There were no negative comments in any of Stillman's evaluations. Schultz also testified that a rank of "Maturing would be a 4," not a 3.

According to the memorandum of understanding (MOU) between the District and the Association, the evaluation procedures for temporary teachers is set forth in Article 5.4.5, which states:

> **5.4.5.1 Initial Observation.** Non-permanent teachers shall be observed at least once during the first nine (9) weeks of service and twice within the first eighteen (18) weeks of service.
>
> **5.4.5.2 Post Observation Conference.** Each formal observation conducted pursuant to this section shall be followed by a conference; except in unusual circumstances, said conference shall be conducted within five (5) working days of the observation.
>
> **5.4.5.3 Observation Report.** The non-permanent classroom teacher shall be provided a written observation report following each formal observation. The employee shall be timely advised of deficiencies and area for improvement. The employee shall be provided written recommendations for improvement and assistance. The responsibility for improvement shall rest with the employee.

Article 5.4.6 of the MOU provides the deadline governing the evaluation procedure as follows:

> **Evaluation Deadline.** he evaluation process shall include a written evaluation, a copy of which shall be provided the employee not later than thirty (30) days before the last school day of the school year in which the evaluation is conducted.

According to Stillman, she was observed once during the 2006-07 and once during the 2007-08 school year. With regard to the 2007-08 observation, Stillman was observed in or around October 2007. Stillman did not have a post observation conference within five business days and she did not receive an observation report at least thirty days before the end

of the school year. Stillman had her post observation conference with Rodriguez on May 21, 2008, for the observation session he conducted in October 2007.

Rodriguez testified that sometime between February 12 and March 15, 2008, he had a meeting with Stillman to inform her that she would not be asked return for the next school year. Rodriquez did not recall the exact date of the meeting, where the meeting took place, how the meeting was scheduled, or what he exactly told her. Stillman testified that no such conversation took place. She stated that the first time she understood she would not be reemployed for the 2008-2009 school year was in May 2008.

When Rodriguez met with Stillman on May 21, 2008, he told Stillman that she would not be re-employed for the 2008-2009 school year. He also provided her with a copy of the observation report from her October 2007 observation session. Stillman testified at the hearing that, after she signed the report to acknowledge receipt, Rodriguez said to her, "On a side bar, off the record, I believe that your Union activities have gotten in the way of your teaching objectives this year. . . ." In his testimony, Rodriguez denied making the exact statement, but admitted to making an unsolicited comment to Stillman about her union activities and the amount of time they were taking, in the context of her professional development.

On May 22, 2008, the day after Stillman met with Rodriguez and he informed her that she would not be reemployed, she sent an e-mail to the vice president of the Association describing what Rodriguez said to her, writing in part: "As we were almost done, he said, 'On a sidebar, I feel that your union responsibilities have taken priority over other things this year.'"

With Rodriguez's input, the District decided not to reemploy Stillman, and her employment ended June 13, 2008. Rodriguez and Schultz testified that the District's decision

was made in February or March of 2008. Rodriguez denied that his decision not to recommend Stillman for reemployment was a result of her union activity. On August 20, 2008, the District hired a new teacher on a temporary contract to fill Stillman's position.

DISCUSSION

Jurisdiction

EERA section 3541.5(a)(1) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." Generally, 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.) However, in cases involving termination of employment, the Board has held that the six-month limitations period begins to run on the actual date of the termination. (*Regents of the University of California* (2004) PERB Decision No. 1585-H (*Regents*).)

On appeal, the District contends that Stillman's charge was untimely filed. The District argues that its March 4, 2008 letter to Stillman, reminding her that her contract ended on June 13, 2008, started the six-month limitations period. However, consistent with the Board's holding in *Regents*, the date of Stillman's termination of employment, June 13, 2008, started the clock on the six-month limitations period. Stillman filed her charge on November 6, 2008, which is within the six-month limitations period. Therefore, the charge was timely filed and jurisdiction is proper.

Retaliation

Prima Facie Case

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*).)

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 (*North Sacramento*)), 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 (*Santa Clara*)); (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 (*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 (*Oakland Unified School District* (2003) PERB Decision

No. 1529) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M (*Jurupa*)); *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*; *Novato*.)

Protected Activity

Representing members of an employee organization and participating in organization activities constitutes protected activity. (*City & County of San Francisco* (2004) PERB Decision No. 1664-M.) The District contends that Stillman's protected activity was insufficient to sustain the charge. However, its reliance on *Chula Vista Elementary School District* (1997) PERB Decision No. 1232, to argue that Stillman merely maintained an office in the Association without participating in representational activities is misplaced. The evidence shows that Stillman participated in Association activities while serving as the junior site representative. Her activities were on-going and included monthly meetings with Rodriguez, delivering updates from the principal to members at the Association meetings, and conducting the Association's survey on the Fallbrook campus. The District, through Rodriguez, was aware that Stillman was an Association representative. Accordingly, Stillman served in an Association position and was also engaged in on-going activities on behalf of the Association.

Adverse Action

There is no more adverse action than termination. Based on Rodriguez's recommendation, the District took adverse action by electing to not reemploy her for the 2008-2009 academic year.

Nexus

To prove its retaliation claim, the Association must meet the *Novato* standard, by demonstrating a "nexus" between Stillman's protected activity and the District's adverse action. Because direct evidence of discriminatory intent is rarely possible, the Board has held that "unlawful motive can be established by circumstantial evidence and inferred from the record as a whole." (*Novato.*)

Timing

In the instant case, the timing of the adverse action supports an inference of unlawful motive and the finding of nexus. Stillman was reemployed in both 2006-2007 and 2007-2008, but she was not reemployed for the 2008-2009 academic year.

Departure from Established Procedures

As indicated above, an employer's departure from established procedures and standards when dealing with an employee may support an inference of unlawful motivation. (*Santa Clara.*) In the instant case, the evaluation procedure in the MOU obligated Rodriguez to observe Stillman in the classroom at least once during the first nine weeks of the 2007-2008 academic year and twice within the first eighteen weeks of the year. Further, each observation session should have been followed by a conference, to be conducted within five working days of the observation, and Stillman should have received a written evaluation containing recommendations for improvement and assistance, to be provided to her no later than thirty days before the last day of school for that academic year. However, during the 2007-2008 school year, Rodriguez observed Stillman one time, he did not follow the observation session with a conference within five days of the session, and he did not give Stillman a timely written evaluation.

Based on these facts, we find Rodriguez failed to comply with the evaluation requirements in the MOU. It is noteworthy, however, that Rodriguez similarly failed to comply with the evaluation requirements in the MOU when he only observed Stillman one time during the 2006-07 school year. We find this fact significant because it occurred prior to Stillman's protected conduct. Under these circumstances, it is unlikely that Rodriquez' conduct is the product of a discriminatory motive. Accordingly, we find that when an employer fails to comply with an MOU provision both before the employee engaged in protected conduct and after the employee engaged in such conduct, the later failure to comply with the MOU is not a reliable predictor of discriminatory intent. Accordingly, looking at the record as a whole, we find Rodriguez' failure to comply with the evaluation requirements in the MOU does not support a finding of unlawful motive in this case.

Union Animus

Evidence of employer animosity towards union activists also supports an inference of unlawful motivation in the nexus analysis. (*Jurupa.*) In this case, Rodriguez admitted he made an unsolicited statement to Stillman about her union activities during the May 21, 2008 meeting. According to Stillman, Rodriguez told her "your Union duties have gotten in the way of your teaching objectives this year."

This statement, on its face, is a relatively benign statement that does not convey union animosity. Although the statement appears harmless, it may support a finding of union animus when coupled with other facts suggesting enmity towards the union. There are, however, no other such factors in the record. Accordingly, under these circumstances, we find Rodriguez' statement, standing alone, is insufficient to support an inference of unlawful motivation based on Rodriguez' animosity towards union activists.

Based on the foregoing, we find the Association failed to establish a prima facie case of retaliation against Stillman, because it failed to establish a nexus between Stillman's protected activity and the District's decision to not reemploy her for the 2008-2009 academic year. [4]

ORDER

The complaint and underlying unfair practice charge in Case No. LA-CE-5271-E are hereby DISMISSED.

Chair Dowdin Calvillo joined in this Decision.

Member Wesley's dissent begins on page 12.

[4] The record does not establish that the District was required by law or policy to give Stillman a reason for its decision to not reemploy her, or that it had a past practice of doing so with temporary contract employees. Accordingly, the Board finds that the District's failure to give Stillman a clear reason for her termination does not support an inference of unlawful motive. (*Sacramento City Unified School District* (2010) PERB Decision No. 2129.)

WESLEY, Member, dissenting: I disagree with the majority's ruling that the Fallbrook Elementary Teachers Association (Association) did not establish a prima facie case of retaliation against Tabitha Stillman (Stillman) by the Fallbrook Union Elementary School District (District). I dissent for the reasons set forth below.

To state a prima facie case of retaliation, a charging party must establish a connection, or nexus, between an employee's participation in protected activity and the employer's adverse action. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).)

Departure from Established Procedures

As a basis for finding a nexus, the administrative law judge (ALJ) correctly considered the District's departure from the standard evaluation process with respect to Stillman. The employer's departure from established procedures and standards when dealing with the employee supports an inference of unlawful motivation. (*Santa Clara Unified School District* (1979) PERB Decision No. 104.) According to the standard evaluation procedure in the parties' collective bargaining agreement, Principal Leonard Rodriguez (Rodriguez) should have observed Stillman in the classroom at least once during the first nine weeks of the 2007-2008 academic year and twice within the first eighteen weeks of the year. Each observation session should have been followed by a conference, to be conducted within five working days of the observation, and Stillman should have received a written evaluation containing recommendations for improvement and assistance, to be provided to her no later than thirty days before the last day of school for that academic year. However, during the 2007-2008 school year, Rodriguez observed Stillman one time, he did not follow the observation session with a conference within five days of the session, and he did not give Stillman a timely written evaluation.

Approximately six months after the observation session, Rodriguez did provide Stillman a written evaluation in which she again received a "Maturing" rank. However, the District's failure to follow the established evaluation procedure goes beyond its failure to adhere to the timing and frequency requirements for observation and feedback sessions. The collective bargaining agreement in section 5.4.5(3) requires that temporary teachers be "timely advised of deficiencies and area[s] for improvement." The evidence shows that Stillman never received negative feedback, was never informed of deficient areas or told to improve in any way. Based on her positive evaluations, Stillman had no way of knowing she was at risk of not being reemployed and she was not given the opportunity to improve as required in the evaluation procedure.[1]

Union Animus

Evidence of employer animosity towards union activists also supports an inference of unlawful motivation in the nexus analysis. (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M.) According to the record, Rodriguez admitted he made an unsolicited statement to Stillman about her union activities during the May 21, 2008 meeting. At the hearing, the ALJ found credible Stillman's testimony that Rodriguez told her "your Union duties have gotten in the way of your teaching objectives this year." I agree with the ALJ's finding that Rodriguez's statement, while not expressing blatant anti-union animosity, does imply that union activity is inconsistent with professional achievement and further supports the inference that the District's actions were unlawfully motivated.

[1] The District excepted to the ALJ's finding that it departed from established procedure with respect to Stillman, and argued that the Association did not present evidence that other teachers were observed more frequently than Stillman. However, the evidence shows that the District failed to follow the procedures as set out in the collective bargaining agreement.

In sum, I find the Association established a prima facie case of retaliation against Stillman because it demonstrated a nexus between Stillman's protected activity and the District's decision to not reemploy her for the 2008-2009 academic year based on the timing of the decision, the District's departure from established procedures and standards in her evaluation process, and Rodriguez's statement about Stillman's involvement with the Association.

District's Affirmative Defense

Once the charging party establishes a prima facie case of retaliation, as the Association has done here, the respondent then bears the burden of proving that it would have taken the adverse action even if the employee had not engaged in the protected activity. (*Novato*; *Martori Brothers Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721, 729-730 (*Martori Brothers*); *Wright Line* (1980) 251 NLRB 1083.) Where, as in the present case, it appears that the employer's adverse action was motivated by both valid and invalid reasons, "the question becomes whether the [adverse action] would not have occurred 'but for' the protected activity." (*Martori Brothers*.) The "but for" test is an "affirmative defense which the employer must establish by a preponderance of the evidence." (*McPherson v. Public Employment Relations Bd.* (1987) 189 Cal.App.3d 293, 304.)

The District put forth various reasons for its actions, all of which the ALJ characterized as "dubious." The District claimed that it decided to not reemploy Stillman because she was an "average" teacher. However, on the District's evaluation form, which utilizes a five category scale, Stillman was consistently rated as "Maturing" which is the second highest category possible. There are clear inconsistencies between the District's claim of Stillman's "average" skill and the evaluations generated over her three years as a teacher for the District.

The District's own witnesses provided contradictory testimony that does not support its position: Superintendent Janice Schultz (Superintendent Schultz) testified that in early 2006, she was concerned about Stillman's classroom management, however, in Stillman's 2006-2007 evaluation Rodriguez specifically noted that Stillman "manages her classroom well." The evidence shows that Stillman did not receive negative comments or suggestions for improvement on any of her evaluations during her three years as a teacher for the District.

The District also relied on the ranking forms Rodriguez completed for the temporary contract teachers in 2007 and 2008. The forms were based on a scale of 1 to 5, and a ranking of 4 meant that the teacher was "highly recommended for reemployment." In June 2007, Rodriguez gave Stillman a 4 for experience, a 4 for evaluation, a 5 for professionalism, a 5 for relations and a 4 for overall performance. Then, in February 2008, Rodriguez gave Stillman a 3 for experience, a 3 for evaluation, a 4 for professionalism, a 3 for relations, and a 3 for overall performance, which meant that she was no longer "highly recommended for reemployment." I agree with the ALJ's statement that, "There is no apparent objective reason for Rodriguez's change in his assessment of Stillman between June 2007 and February 2008. Stillman obviously had more experience, not less, by the latter date."

Relating the ranking forms and the evaluations, Superintendent Schultz testified that according to the District's evaluation procedure, "'Maturing' would be a 4," not a 3. However, although Stillman received a "Maturing" on her evaluations form all three years, Rodriguez ranked Stillman as a 3 for the 2007-2008 school year, which meant that she was no longer "highly recommended for reemployment," and thereby, based on his recommendation, Stillman was not reemployed by the District. The discrepancies between Stillman's

evaluations and rankings are irreconcilable and the District has not met its burden of persuasion.

Based on the evidence presented, I find that the District has failed to establish a defense to the retaliation charge. Therefore, I would find that the District unlawfully retaliated against Stillman for her protected activity.