CLIENT NEWS BRIEF

PERB Expands the Definition of "Protected Activity" Under the EERA

March 2015
Number 13

The Public Employment Relations Board (PERB) recently expanded the definition of "protected activity" under the Educational Employment Relations Act (EERA), holding that the term is to be broadly construed to include activities related to both an employee's professional and employment relationships. Specifically, PERB held that the protections for employees under the EERA are intended to "protect the right of certificated employees to be 'afforded a voice in the formulation of educational policy.'"

In the case at issue, PERB Dec. No. 2411, Brian Crowell, a certificated employee of the Berkeley Unified School District (District) engaged in several activities that PERB found to be "protected activities" under the EERA. Specifically, Mr. Crowell filed a complaint with the District regarding the content of the 9th grade curriculum, its compliance with state standards, and the viability of the 9th grade history textbook. In his complaint, which was submitted to the District as an email that contained references to the California State Standards for History curriculum, Mr. Crowell stated that it was being filed both for him and on behalf of two other colleagues who were unwilling to bring a complaint forward for fear of retaliation, and for purposes of providing a better education for students. As evidence of another protected activity, Mr. Crowell alleged that he, along with two other employees, had been conducting an investigation of Berkeley Peer Assistance and Review (BPAR) since 2011 related to alleged discriminatory practices associated with assignment of teachers and administrators to that program.

Mr. Crowell alleged that following his filing of the complaint, the District engaged in a series of retaliatory actions against him, including raising issues about his grading and attendance practices and issuing him a Notice of Unprofessional Conduct and Unsatisfactory Performance and an unsatisfactory performance evaluation. Mr. Crowell alleged that the evaluation was based on several observations of his performance, one of which was conducted on a day when he told the evaluator he was feeling ill and may go home. According to Mr. Crowell, it was highly unusual for the District to conduct an observation of a teacher who had told the observing administrator that he or she was feeling under the weather.

Mr. Crowell filed an unfair practice charge against the District alleging that the District retaliated against him in issuing him an unsatisfactory evaluation, referring him to BPAR, and issuing the notice. PERB's Office of General Counsel, which conducts an initial review of unfair practice charges, dismissed the charge on the basis that Mr. Crowell had not engaged in a protected activity under the EERA because his complaints pertained to educational objectives, not allegations regarding the District's conduct as an employer.

On review, PERB adopted an expansive definition of "protected activity" under the EERA, determining that the EERA's protections allowing educational employees to consult on the definition of educational objectives, determination of course content and curriculum and the selection of textbooks was evidence that these employees are protected when engaging in activities to enforce professional and/or academic standards, not simply rights under a collective

Dulcinea Grantham
Partner and Labor & Employment
Practice Group Co-Chair
Walnut Creek Office
dgrantham@lozanosmith.com

Lozano Smith
ATTORNEYS AT LAW

bargaining agreement or pertaining to workplace violations.

In considering whether Mr. Crowell's complaint about the curriculum was a protected activity, PERB found that the right to file complaints on such matters is of a legitimate concern to educational employees so as to come within the scope of representation under the EERA. PERB found that the EERA protects not only an employee's right to representation in their employment relationship with the District, but also in their professional relationship including their right to "have a voice in the formulation of educational policy."

On Mr. Crowell's activities related to BPAR, PERB disagreed with the Office of General Counsel's determination that Mr. Crowell's investigation activities were not protected under the EERA. PERB found that the investigation of BPAR was made on behalf of a group of employees and referenced a specific provision of the collective bargaining agreement in support of his requests to the administration to make modifications to the BPAR program.

PERB also considered whether the circumstances surrounding Mr. Crowell's evaluation and the issuance of the Notice satisfied the other elements necessary to establish a prima facie case of an unfair practice by the District. Here, PERB found that the District was aware of Mr. Crowell's protected activities because District administrators were copied on the complaints he made prior to the issuance of the evaluation and notice. PERB also found that the issuance of the notice and the unsatisfactory marks on the performance evaluation constituted adverse action under the EERA. Finally, PERB found that there was a nexus between Mr. Crowell's protected activity and the District's adverse employment actions. In making this last determination, PERB considered both the timing and alleged inconsistency of the District's actions as significant. PERB found that the protected activities and adverse action all occurred within a 5 month period. PERB also found that because the District issued the notice 15 days after it was dated, the action could be proof of an unlawful motive on the part of the District. Finally, PERB found that because the District's actions were inconsistent, initially telling Mr. Crowell that he would not be referred to BPAR, then six days later telling him he could be referred to BPAR and finally making the referral eight days later.

Because PERB found that Mr. Crowell had provided sufficient evidence to raise a question of whether the District's actions violated his rights under the EERA, PERB ordered its General Counsel to issue a complaint in the case.

This case is significant in that it is the first time that PERB has directly interpreted the meaning of the term "protected activity" under the EERA. Because PERB has taken a very broad interpretation of this term, employers should be mindful of an employee's right to comment on educational policies, and to carefully avoid taking actions in a manner that could be misconstrued as retaliation for protected activity.

If you have any questions regarding this case, please contact one of our nine offices located statewide. You can also visit our website, follow us on Facebook or Twitter, or download our Client News Brief App.