



STATE OF CALIFORNIA
 DECISION OF THE
 PUBLIC EMPLOYMENT RELATIONS BOARD

MUROC EDUCATION ASSOCIATION, CTA/NEA,)	
)	
Charging Party,)	
)	PERB Decision No. 80
V.)	
)	LA-CE-42
MUROC UNIFIED SCHOOL DISTRICT,)	
)	
Respondent.))	December 15, 1978

Appearances: Charles R. Gustafson, Attorney for the Muroc Education Association, CTA/NEA; John L. Bukey, Attorney (Biddle, Walters & Bukey) for Muroc Unified School District.

Before Gluck, Chairperson; Cossack Twohey and Gonzales, Members.

OPINION

On November 17, 1976, the Muroc Education Association, CTA/NEA (hereafter Association) filed an unfair practice charge against the Muroc Unified School District (hereafter District) contending that the District had violated sections 3543.5 and 3543.1(c)¹ of the Educational Employment Relations Act² (hereafter EERA). The charge rests on the District's alleged refusal to provide released time for more than four Association negotiators thus allegedly denying rights guaranteed to

¹The Association charged only violation of sections 3541.3(c) and 3543.5. We have construed the charge as alleging violation of section 3543.5(b) by denying rights guaranteed in section 3543.1(c), and violation of section 3543.5 (c) by refusing to negotiate in good faith.

²The EERA is codified at sections 3540 et seq. of the Government Code. All statutory citations are to the Government Code unless otherwise specified.

employee organizations. The charge also rests upon the District's alleged refusals to negotiate in the presence of an operating tape recorder, delays of meetings, attempts to limit the number of Association negotiators, frequent changes of negotiators, withdrawal of tentative agreements, conditioning of negotiations, and communications with employees. These acts, the Association alleges, amount to a course of conduct constituting a refusal to negotiate in good faith. The hearing officer issued a recommended decision on November 2, 1977, dismissing the charges. The Association took timely exception to the recommended decision in its entirety. We sustain the findings and conclusions of the recommended decision to the extent consistent with this decision.

FACTS

The District has nine schools grouped into seven building units. Five of these units are clustered on Edwards Air Force Base. The certificated staff number 165 living as much as 100 miles apart.

On June 15, 1976, prior to recognition, the Association presented its proposed contract to the District. The District voluntarily recognized the Association on September 29, 1976, and on October 5, 1976. The counterproposal was one page in length proposing no change on District policies except for a management rights clause, salary and benefits clause, and that the contract be for three years. The negotiators for the parties met for the first time on October 15, 1976.

Representing the District was Robert Latchaw of the California School Boards Association (CSBA) along with the Assistant Superintendent of the District and the District Business Manager. Present for the Association on released time were Mr. Paul Oglesby, Head Negotiator, Sir Lisle Babcock, Association President, Mr. George Lewis, Mr. Ken Kerr, Mr. Roland Ford, Ms. Madelyn McNeil and Ms. Marge Nelson. At the beginning of the session the Association turned on a tape recorder and it remained on throughout.

The District's negotiator presented proposed ground rules as follows:

GROUND RULES FOR NEGOTIATIONS

Ground rules for negotiations between MUROC EDUCATION ASSOCIATION and the MUROC UNIFIED SCHOOL DISTRICT:

1. The district and association will each be permitted three (3) at the table negotiators for the duration of contract negotiations.
2. Neither side will issue press releases until settlement is reached or impasse is declared and the E.E.R.B. concurs.
3. The district will allow a reasonable amount of release time without loss of pay for three (3) teachers for the purposes of attending negotiations.
4. The district and association may

provide their own secretarial assistance for note taking purposes but in no event will tape recordings be allowed.

5. Contract will be divided into monetary and non-monetary items. Settlement will be reached on non-monetary items prior to negotiating monetary items.

The Association desired released time for seven negotiators and desired to tape record the sessions. The Association requested released time for seven negotiators so that each of the seven school units would have a representative at the table. The Association also notes that the Certificated Employee Council (CEC) under the Winton Act³ contained nine members. Each member of the original Association team represented the unit he or she worked at except for Mr. Kerr who worked at Branch School (represented by Ms. McNeil), but who represented the Forbes Avenue School. Prior to the hearing Oglesby resigned from the negotiating team and was replaced by a person also working at Branch School. The Association has also divided areas of expertise among the various members of the team. The Association testified that should a member not attend a negotiating session, negotiations could not proceed in that person's area of expertise. However, the Association team

³The Winton Act, former Education Code sections 13080 et seq., was repealed effective July 1, 1976, by the EERA.

has two primary spokespersons; the other members speak only occasionally. The Association testified that its primary reason for wishing to tape record sessions was that they could not afford a secretary. Both parties had tape recorded meet and confer sessions under the Winton Act and the District had never objected to that practice.

Negotiations proceeded with the District moving from its initial proposal of released time for three negotiators to released time for four negotiators but no limit on the number of Association negotiators, and the Association moving to a proposal for released time for five negotiators, but there was no movement on the tape recording issue. The meeting was unilaterally ended by District spokesman Latchaw but the record has conflicting evidence on what Latchaw said as he ended the meeting. He declared that until the Association agreed to released time for four negotiators and did not tape record sessions either there would be no further meetings or there would be no negotiations on substantive matters. Resolution of this evidentiary conflict does not affect our disposition of the case.

The parties next met on November 3, 1976, at which time the spokesperson for the District was Robert Milling, Executive Director of the Negotiations Division of CSBA, along with the Assistant Superintendent of the District and the District Business Manager. Once again seven Association negotiators were given released time by the District. Ground rules were again discussed but there is no evidence that the

District insisted that the ground rules be discussed before substantive matters or that the Association objected to their prior discussion. The Association had a tape recorder in operation for the first few minutes of the session but turned it off as, in the words of the head Association negotiator, "we caucused and decided that we would leave the tape recorder off when we felt that good faith negotiations were taking place...." This decision of the Association was announced to the District's negotiators. Milling informed the Association that they were negotiating from scratch and proposed the District provide released time for one negotiator. During the following discussions both parties returned to their final positions of October 15: the District proposed released time for four negotiators; the Association sought released time for five. Toward the end of the meeting the Association turned on the tape recorder, and the District spokesperson declared he would declare an impasse and a recess, left the meeting and did not return.

On November 5, 1976, the Association requested in writing that five of its negotiators meet with the District on November 10 with a tape recorder present. The Assistant Superintendent of the District responded on November 8, 1976, proposing instead that they meet on November 11, 1976, with the District providing released time for four Association negotiators, the Association paying for any others it desired, and no tape recording of the session.

The Association declined, and no meeting was held on November 10 or 11.

The third meeting was on November 17, 1976, at which time Pete Ford of CSBA was the District spokesperson with the Assistant Superintendent and the Business Manager once again in attendance. The Association negotiators began to record the session, Ford insisted they stop, they refused, and Ford walked out. The meeting had lasted approximately two minutes.

On November 17, 1976, the Association filed the charge in this case. The next day, November 18, the Association requested in writing a meeting with the District on November 23. The letter did not mention tape recordings. The District negotiator did not respond until 3:00 p.m. on November 23 at which time the Association was told there would be no meeting. On November 19, 1976, a "Press Release" from District spokesperson Ford was placed in all teachers' boxes asserting that the Association's charge was groundless, would prolong negotiations, and that use of a tape recorder was improper. This was followed on November 30, 1976, by a letter from Milling, District spokesperson on November 3, to the Association's head negotiator conditioning further negotiations on "a written letter from your group agreeing to remove the tape recorder, only until such time as EERB has had a chance to hear both our arguments...." That same day, November 30, 1976, Association representatives attended a public school board meeting and for approximately half an hour expressed the

Association's dissatisfaction with the conduct of the negotiations under CSBA spokespersons.

The next day, December 1, 1976, the Assistant Superintendent of the District sent the Association a letter requesting a negotiating session within ten days and proposing unrestricted recording of negotiation sessions, public negotiation sessions, a one-item contract (salary) for 1976-1977 with negotiations commencing February 21, 1977, for the 1977-1978 contract.

The parties met on December 8, 1976, for negotiations. The District was represented in this and all subsequent sessions by the Assistant superintendent and the Business Manager. Both parties recorded the session and a newspaper reporter, invited by the District, was present. The Association initially objected to the presence of the reporter but then acquiesced. At this session the District refused to negotiate on any matters until the Association agreed to limit negotiations to salaries.

A memorandum was distributed by the District to all certificated employees on December 10, 1976, which reported the December 8 session with the "comment":

The District wants the new salaries in the hands of the teachers as early as possible. It would seem that this could best be accomplished by holding talks on the total contract in abeyance for this short time indicated above [February 21, 1977].

In the past both parties had distributed memoranda to teachers concerning meet and confer sessions under the Winton Act. As

the Association assumed such memoranda were proper, there is no evidence that the Association protested the memorandum.

During the negotiations subsequent to December 10, 1976, the District dropped its demand that only salaries be discussed, and every item of the contract sought by the Association was discussed. Between December 10, 1976, and the unfair practice hearing on February 17, 1977, the parties met on December 15, January 19 and 28, February 2, 9, 10, 14 and 16. February 15 was designated a day for preparation of negotiations and released time was given the Association's negotiators. Seven Association negotiators were released on January 28. The parties agreed to concentrated negotiations on February 9, 10, 14 and 16 with four Association negotiators released for those sessions.

The District presented uncontested estimates that 300 hours of release time had been given Association negotiators, and 65 hours had been contributed by Association negotiators in meetings after school hours.

Although the parties admittedly negotiated without an agreement to sign off sections of the contract on which agreement had been reached, an Association negotiator testified that on one occasion, apparently in January, the District reneged on an agreement reached on a grievance article in the previous session. The article was renegotiated with some changes. Conversely, the District negotiator contended that after February 2, 1977, the Association negotiators had refused to negotiate any particular item in depth but shifted from one

item to another in order to avoid agreement prior to the hearing and a pending school board election.

DISCUSSION

Number of Negotiators Released

Section 3543.1 (c) provides:

A reasonable number of representatives of an exclusive representative shall have the right to receive reasonable periods of released time without loss of compensation when meeting and negotiating and for the processing of grievances.

In Magnolia Educators Association⁴ the Board held that a failure to provide reasonable Board released time violated section 3543.5(b),⁵ and stated:

"Reasonable released time" means, at least, that the District has exhibited an open attitude in its consideration of the amount of released time to be allowed so that the amount is appropriate to the circumstances of the negotiations. The District may have to readjust its allotment of released time based upon the reasonable needs of the district, the number of hours spent in negotiations, the number of employees on the employee organization's negotiating team, the progress of the negotiations and other relevant factors. A district's policy does not provide for reasonable periods of released time if the policy is unyielding to changing circumstances.

The same considerations which determine the reasonableness of the amount of released time granted likewise influence the

⁴(6/27/77) EERB Decision No. 19.

⁵Section 3543.5(b) provides:

It shall be unlawful for a public school employer to:...[d]eny to employee organizations rights guaranteed to them by this chapter.

reasonableness of the number of employees released for negotiations. In both cases it is essential that the District exhibit an open attitude in consideration of the amount of time and number of negotiators conducive to productive negotiations. This does not imply that the District must accede to the demands of the employee organization. But, just as the public school employer must remain flexible and responsive to the changing needs arising in negotiations, so must the employer demonstrate a willingness to accommodate the legitimate needs of the employee organization. Among the factors which contribute to a determination of a reasonable number of released negotiators are the complexity of the negotiations requiring sharing of responsibilities, the reasonable needs of the employee organization to include representatives of various groups on their negotiating team, and the number of hours spent in negotiations.

In the present case the Association contends that the size of the District militates for a separate representative for each of the seven building units of the District. The argument, though not clearly expressed, seems to be that a representative from each geographically isolated location is needed for prompt communications with all unit members. However, this argument is inconsistent with the Association's own requests since the Association's original negotiating committee lacked a representative from one building unit, and their committee at the time of the hearing lacked representatives from two building units. In addition, five of

the building units are clustered on Edwards Air Force Base, and the Association offered no explanation why one or two members of the negotiating team could not maintain adequate contact with the employees in those building units. Even if we agree that the size of the District calls for a representative from each geographically isolated location of employment, which we do not today hold, the Association, by its own apportioning of members of its negotiating team, lacked representatives from two building units, and demonstrated the existence of, at most, three geographically isolated employment areas.

Nor is the Association's contention that the division of responsibilities among members of their negotiating team requires five or more released members persuasive. The record is singularly devoid of evidence that a division of responsibilities requiring more than four team members, the number to which the District agreed, was either necessary for adequate Association preparations or conducive to more productive negotiations.

While the District generally contended that released time for four negotiators was adequate, that position was not adopted without consideration of the Association's views. Nor was it inflexibly applied. At the first negotiating session the District changed its position to allow released time for four rather than three Association negotiators. More importantly, for almost a third of the negotiating sessions, the District released seven Association negotiators.

It is apparent from the record that the District was open to the Association's views on an adequate number of released negotiators. Moreover, the District frequently sought to accommodate the desires of the Association even when convinced those desires were unreasonable. It is clear in these circumstances that the District thereby complied with the right guaranteed the Association in section 3543.1(c), and that no violation of section 3543.5(b) has been demonstrated.

Refusal to Negotiate in Good Faith

This is the first case in which the Board itself is asked to rule on a charge of surface bargaining. It is the essence of surface bargaining that a party goes through the motions of negotiations, but in fact is weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent agreement.⁶ Specific conduct of the charged party, which when viewed in isolation may be wholly proper, may, when placed in the narrative history of the negotiations, support a conclusion that the charged party was not negotiating with the requisite subjective intent to reach agreement.⁷ Such behavior is the antithesis of negotiating in good faith.

In the instant case the Association contends that the District evidenced its lack of good faith in negotiations by

⁶Inter-Polymer Industries (1972) 196 NLRB 729, 759-60 [80 LRRM 1509, 1512], pet. for rev. den. (9th Cir. 1973) 480 F.2d 631 [83 LRRM 2735].

⁷See West Coast Casket Co. (1971) 192 NLRB 624 [78 LRRM 1026, 1030] (concurring opinion of Chairman Miller), enfd, in part, (9th Cir. 1972) 469 F.2d 871 [81 LRRM 2857].

initially refusing to negotiate with a tape recorder present, delaying meetings, attempting to limit the number of Association negotiators, changing District negotiators, withdrawing tentative agreements, conditioning negotiations, and communicating with employees.

As to the refusal to negotiate with a tape recorder present, while there is support for those who prefer sessions to be recorded,⁸ the contention of the District that such recordings are not conducive to productive negotiations is widely accepted.⁹ In reversing a 27-year policy, the National Labor Relations Board (hereafter NLRB) recently held that insistence to impasse on the presence of a stenographic reporter in negotiations is a per se refusal to bargain, and deliberately disapproved the practice of having a reporter in negotiation sessions.¹⁰ We share the concern that the advantage of a precise record of negotiations may be outweighed by the inhibition of the free flow of frank discussion essential to collective negotiations. Among the disadvantages of a verbatim record, as is demonstrated in this

⁸See Gorman, Basic Text on Labor Law (West 1976) p. 406; St. Louis Typographical Union (1964) 149 NLRB 750, 758 [57 LRRM 1370].

⁹St. Louis Typographical Union, supra, 149 NLRB at 754, fns. 11, 12, and 13. [57 LRRM at 1373, fns. 11, 12, and 13.]

¹⁰Bartlett-Collins Co. (1978) 237 NLRB No. 106 [99 LRRM 1034, 1036 fn. 9], reversing Reed & Prince (1951) 96 NLRB 850 [28 LRRM 1608], enfd, on other grounds (1st Cir. 1953) 205 F.2d 131 [32 LRRM 2225], cert. den. (1953) 346 U.S. 887 [33 LRRM 2133].

case, negotiators tend to "play to" the record and make points for use at an anticipated unfair practice hearing rather than to strive for agreement. Moreover, the use of a tape recorder, as opposed to other recording techniques, has, in our view, peculiar potential to inhibit lively and genuine expression of conflicting viewpoints. Accordingly, we do not consider the District's position against recording of sessions to be, in itself, evidence of bad faith. Moreover, after three sessions the District caved-in to the Association's demand for tape recording. For approximately two and a half months prior to the hearing all sessions were recorded by both parties. The agreement of the District to allow tape recording is all the more remarkable as the Association negotiator announced at the second session that the recorder would be on when the Association felt it could gather evidence supporting an unfair practice charge against the District and shut off otherwise.¹¹

The Association has vigorously argued that in the past the parties have recorded CEC sessions and that for the District to deviate from that practice is evidence of bad faith. We cannot accept that view. The practice the Association points to took place under the now repealed Winton Act. Under that Act a council composed of from five to nine representatives of every employee organization having members who were certificated

¹¹It is just such a use of tape recorders which the NLRB has disapproved. See Reed & Prince, supra, at 1610, overruled on other grounds Bartlett-Collins, supra.

employees of the District were authorized to meet and confer with the District on employment conditions.¹² There was no provision for selection of an exclusive representative,¹³ nor did the obligation to meet and confer encompass the ability to enter binding agreements.¹⁴ We cannot equate the pressures and needs of the parties engaged in non-exclusive meet and confer sessions with those faced by the parties with an exclusive employee representative in full blooded negotiations in which the parties are empowered and obliged to attempt to achieve a binding agreement.¹⁵ Accordingly, the fact that the District ceased agreeing to tape recordings with the demise of the Winton Act is not, in itself, evidence of bad faith.

Indeed, where, as here, the parties are at the inception of their relationship under the EERA, and the practices established will likely endure, it is particularly understandable that the District would refuse to acquiesce in the use of tape recorders.

Viewed in the circumstances of this case, as the District went through the first negotiating session with the tape recorder on, walked out of the second session after the

¹²~~Former~~ Education Code section 13085.

¹³Former Education Code section 13085.

¹⁴Former Education Code section 13081 (d); San Francisco v. Cooper (1975) 13 Cal.3d 898, 925-927 [89 LRRM 2262]; Grasko v. Los Angeles City Bd. of Ed. (1973) 31 Cal.App.3d 290, [82 LRRM 3098].

¹⁵Sections 3540.1 (h), 3543.3.

Association had virtually announced that the tape recordings would be used simply to prepare for an unfair practice charge, and eventually conceded and allowed tape recording of all sessions, we do not find that the District's refusal to attend negotiating sessions being tape recorded was in bad faith.¹⁶

On the charge of delaying negotiations, the Association requested sessions on November 10 and 23. The District proposed that the parties meet November 11 rather than on November 10, and, as the latter date was unacceptable to the Association, no meeting was held. It is true that the District did refuse to meet on November 23 as requested by the Association. However, the District initiated the next meeting which was held on December 8. This single instance of delay attributable to the District does not, in these circumstances, establish a design to frustrate negotiations.

As for the District's attempts to limit the total number of Association negotiators, from the first negotiating session the District was willing for the Association to have as large a negotiating team as it wished. As previously discussed, the District demonstrated an open, flexible, and accommodating approach to the number of negotiators receiving released time. The fact that under the Winton Act there were nine members of the CEC is unpersuasive. Under the Winton Act the CEC could not have been composed of any less than five representatives, and was composed of representatives of all employee

¹⁶See St. Louis Typographical Union, supra.

organizations with certificated members employed by the District.¹⁷ However, the EERA provides for exclusive representation by one employee organization. Thus the very circumstances which may have determined the number of negotiators necessary under the Winton Act no longer exist.

The Association complained that the District changed negotiators frequently. This complaint applies only to the changes from Latchaw to Milling to Ford, as the change from these CSBA negotiators to the Assistant Superintendent and Business Manager was sought by the Association. It is conceivable that too frequent a turnover in negotiators may delay and frustrate agreement particularly where each negotiator is ignorant of the prior negotiations. But, in this case, the Assistant Superintendent and Business Manager of the District were present at every session, and no evidence was presented that continuity in the negotiations was lost by the complained of changes.

We find it difficult to credit the contention that on one occasion the District reneged on a tentative agreement as it is conceded that the parties had no agreed method for designating tentative agreements. Moreover, the Association testified that agreement was once again reached at the following session.

Assuming that the District's negotiators on December 8 improperly conditioned negotiations on the Association's acceptance of the concept of a one-item contract for

¹⁷Former Education Code section 13085.

1976-1977,¹⁸ we note that negotiations from that point on were conducted with full discussion of all items presented by the Association. A technical violation, with no discernible impact, and which is immediately retracted is scant evidence of a refusal to negotiate.

The Association charges that the District improperly communicated with the unit members in two memoranda. The EERA imposes on the public school employer an obligation to meet and negotiate with the exclusive representative, and embodies the principle enunciated in federal decisions that the employer is subject to the concomitant obligation to meet and negotiate with no others, including the employees themselves.¹⁹ Consequently, as in federal jurisdiction, actions of a public school employer which are in derogation of the authority of the exclusive representative are evidence of a refusal to negotiate in good faith.²⁰ This is not to say that public school employers are precluded, under the EERA, from freely expressing their views.²¹ They are precluded from using direct

¹⁸See NLRB v. Katz (1962) 369 U.S. 736, 743 [50 LRRM 2177, 2180] (Held: a refusal to negotiate in fact on any mandatory subject the union presents violates the NLRA).

¹⁹Section 3543.3; See Medo Photo Supply Corp. v. NLRB (1944) 321 U.S. 678, 14 LRRM 581.

²⁰See NLRB v. Goodyear Aerospace Corp. (6th Cir. 1974) 497 F.2d 747 [86 LRRM 2763], enforcing in part (1973) 204 NLRB 831 [83 LRRM 1461].

²¹While the EERA does not contain a provision parallel to section 8(c) of the National Labor Relations Act expressly guaranteeing the right of the employer to free expression of its "views, argument or opinion," such a guarantee is implicit in the fact that only a refusal to limit negotiations to the exclusive representative is prohibited by the EERA.

communications with their employees to bypass the exclusive representative and undermine that representative's exclusive authority to represent the unit members and negotiate with their employer. In each case, the touchstone for determining the propriety of public school employers' direct communications with their employees is the effect on the authority of the exclusive representative.²²

In the instant case, the employer is charged with distributing two memoranda to its certificated employees. The first, that on November 19, 1976, accused the Association of delaying negotiations by filing the charge in this case, asserted that the District would "try to reopen negotiations, without a tape recorder," and urged that the "[Association] leadership...recognize the foolishness of unnecessarily prolonging the negotiations process and commence sincere dialogues." The second memorandum, of December 10, 1976, urged that a one-item contract (salary) be signed for the current year, and informed unit members that at the December 8 meeting their exclusive representative would not agree to discuss the one-item contract without first seeing the District's salary proposal. The Association does not contend that this memorandum misrepresented the positions of the parties at the December 8, 1976, meeting. The District, on the other hand, contends that the custom of the parties in allowing issuance of memoranda concerning CEC meetings under the Winton Act

²²See Goodyear Aerospace, supra.

establishes a past practice for conduct surrounding negotiations under the EERA. Once again, customs indulged under the limited rights and obligations of the Winton Act are unpersuasive in the context of negotiations pursuant to the EERA. As discussed above, it is to protect the authority of the exclusive representative established pursuant to the EERA that public school employers are prohibited from certain direct communications with their employees; the Winton Act, as we have discussed, took pains to ensure that there was no exclusive representative.

The requirement that the public school employer negotiate in good faith with the exclusive representative does not per se preclude the employer from communicating, in a noncoercive fashion, with employees during negotiations.²³ Of course, an employer must refrain from a campaign of communications to sway the views of the employees while maintaining an inflexible position at the negotiating table. Such conduct bypasses and undermines the exclusive representative by negotiating with the union through the employees instead of negotiating with the employees through the union.²⁴ But, this is not to say that an employer is precluded from accurately reporting the status

²³See NLRB v. General Electric Co. (2nd Cir. 1969) 418 F.2d 736, 762 [72 LRRM 2530, 2551], cert. den. (1970) 397 U.S. 965, [73 LRRM 2600]; Proctor & Gamble Mfg. Co. (1966) 160 NLRB 334, 340 [32 LRRM 1617, 1620].

²⁴See General Electric Mfg. Co., supra, 418 F.2d at 759 [72 LRRM at 2548].

of negotiations or the nature of proposals previously made to the exclusive representative.²⁵

In this case, the public school employer twice communicated with its employees on the status of negotiations. There is no contention that the communications inaccurately reported the negotiations or misrepresented the positions of the parties. Nor can we find that the District engaged in a campaign of communications to sway the views of its employees while its own position at the negotiating table remained inflexible: only two communications over four months are in issue, and immediately after each disputed communication the District conceded the very points it had contested in the prior negotiations and in the communications.

Viewing the circumstances of the case as a whole we find that the Association has not demonstrated by a preponderance of the evidence that the District was engaged in a five months course of conduct amounting to a refusal to negotiate in good faith.

²⁵Proctor & Gamble, supra, 160 NLRB at 340 [62 LRRM at 1620].

ORDER

Upon the foregoing decision and the entire record in this case, the Public Employment Relations Board ORDERS that:

The unfair practice charge filed by the Muroc Education Association, CTA/NEA against the Muroc Unified School District is dismissed.

By: Jerilou Cossack Twohey, Member

Harry Gluck Chairperson

Raymond J. Gonzales, Member

EDUCATIONAL EMPLOYMENT RELATIONS BOARD
OF THE STATE OF CALIFORNIA

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)	
MUROC EDUCATION ASSOCIATION,)	
CTA/NEA,)	
)	Case No. LA-CE-42
Charging Party,)	
)	
vs.)	<u>RECOMMENDED DECISION</u>
)	
MUROC UNIFIED SCHOOL DISTRICT,)	November 2, 1977
)	
Respondent.)	
)	
)	

Appearances: Charles R. Gustafson, Attorney for the Muroc Education Association, CTA/NEA; John L. Bukey, Attorney (Biddle, Walters & Bukey) and Robert A. Milling, Executive Director, Negotiations Division, California School Boards Association, for Muroc Unified School District.

Before Kenneth A. Perea, Hearing Officer.

INTRODUCTION

On November 17, 1976, the Muroc Education Association, CTA/NEA (hereinafter referred to as MEA) filed an unfair practice charge against the Muroc Unified School District (hereinafter referred to as MUSD) with the Educational Employment Relations Board, State of California (hereinafter referred to as EERB), alleging a violation of Government Code Sections 3543.1(e) and 3543.5.¹

On November 29, 1976, MUSD filed with EERB an answer to the unfair practice charge. On December 1, 1976, MUSD filed an amendment to its answer. On December 22, 1976, MEA filed an amended unfair practice charge. On January 14, 1977,

¹All section references are to the Government Code unless otherwise specified.

MUSD filed an answer to the amended charge and motion for dismissal. A hearing in the matter was held in Los Angeles, California, before a hearing officer of the EERB on February 17, 1977.

The essence of the unfair practice charge is that MUSD allegedly failed to meet and negotiate in good faith with MEA, the exclusive representative; dominated and interfered with the administration of MEA; and interfered with, restrained and coerced certificated employees of MUSD because of their exercise of rights guaranteed by the Educational Employment Relations Act (Sections 3540 et seq., hereinafter referred to as EERA).

FINDINGS OF FACT

There are nine schools in the MUSD which employ approximately 165 certificated employees.

Pursuant to the Winton Act, Education Code Sections 13080 et seq., repealed by the EERA effective July 1, 1976, the Certificated Employees Council (CEC) for MUSD had nine members. Both parties tape recorded all meet and confer sessions under the Winton Act and MUSD never objected to MEA's use of a tape recorder during said sessions.

MEA presented its initial contract proposal to MUSD pursuant to the EERA on June 25, 1976. MEA was officially recognized as the exclusive representative for certificated employees in the MUSD on September 29, 1976. On October 5, 1976, at a regular meeting of MUSD's Board of Education, MUSD presented to MEA its initial proposal regarding a contract for the school year 1976-77.

On October 15, 1976, negotiators for MEA and MUSD met for the purpose of establishing a schedule for negotiations regarding a contract for the school year 1976-77. MUSD gave to MEA a list of proposed "ground rules for negotiations." The list of "ground rules" is set forth in whole as follows:

Ground Rules for Negotiations

Ground rules for negotiations between MUROC EDUCATION ASSOCIATION and the MUROC UNIFIED SCHOOL DISTRICT:

1. The district and association will each be permitted three (3) at the table negotiations (sic) for the duration of contract negotiations.
2. Neither side will issue press releases until settlement is reached or impasse is declared and the E.E.R.B. concurs.
3. The district will allow a reasonable amount of release time without loss of pay for three (3) teachers for the purposes of attending negotiations.
4. The district and association may provide their own secretarial assistance for note taking purposes but in no event will tape recordings be allowed.
5. Contract will be divided into monetary and non-monetary items prior to negotiating monetary items.

MEA and MUSD then proceeded to negotiate regarding the above-specified "ground rules for negotiations" but were unable to reach agreement regarding said rules.

On November 3, 1976, MEA and MUSD again met to negotiate. When MEA turned on a tape recorder towards the end of the meet and negotiate session, the negotiating team for MUSD stated that they were going to declare an impasse and a recess, left the session, and did not return.

On November 5, 1976, MEA requested in writing that five of its negotiators meet and negotiate with MUSD on November 10, 1976 from 8:30 a.m. to 4:30 p.m. Said request indicated that MEA would once again be using a tape recorder. Dr. J. Carson Wilcox, Assistant Superintendent, MUSD, responded in a letter dated November 8, 1976 that the negotiators for MUSD would be unable to meet on November 10, 1976 but would be available on November 11, 1976. Dr. Wilcox further responded:

" . . . the session will be conducted only if there is not any recording equipment in operation at the session. . ."

Dr. Wilcox agreed that MUSD would provide release time without loss of compensation for four negotiators from the certificated negotiating unit and that MEA would have to pay for any additional negotiators. MEA declined MUSD's offer and no meet and negotiate session was held on either November 10 or November 11, 1976.

The next negotiating session was held on November 17, 1976. The session lasted approximately two minutes when MUSD's negotiators walked out after MEA refused to turn off its tape recorder.

On November 18, 1976, MEA requested in writing that a meeting be held on November 23, 1976 for the purpose of negotiations between MEA and MUSD. On November 23, 1976, MEA telephoned MUSD to confirm whether MEA and MUSD would be meeting on November 23, 1976. Although there is no direct evidence as to why, no meeting was held on November 23, 1976.

On November 19, 1976, MUSD issued a "press release" which was placed in all teachers' mailboxes and which stated that the filing of MEA's unfair practice charge is "foolishness of unnecessarily prolonging negotiations" and further alleged that MEA's use of a tape recorder is "improper conduct".

On December 1, 1976, MUSD sent to MEA a letter proposing unrestricted recording of all negotiation sessions and that said sessions be open to the public.

On December 8, 1976, the parties met and negotiated. Both parties tape recorded the session which was open to the public. MUSD invited a reporter from a local newspaper. Although MEA initially objected to the presence of the press, MEA agreed to allow the reporter to stay.

On December 10, 1976, MUSD distributed a memorandum to all certificated employees indicating agreement between MEA and MUSD that all negotiation sessions could be recorded and were open to the public. Both MEA and MUSD had distributed memoranda to teachers in the past regarding the status of the meet and confer sessions pursuant to the Winton Act.

The parties have, up until the date of the hearing, continued to meet and negotiate on a regular basis, both parties tape recording the negotiating sessions.

ISSUES

(1) Whether MUSD refused to meet and negotiate in good faith in violation of Section 3543.5(c) by attempting to precondition further negotiations upon agreement with MEA on "Ground Rules for Negotiations" which included prohibiting tape recording of the negotiating sessions.

(2) Whether MUSD dominated and interfered with the administration of MEA in violation of Section 3543.5(b) or denied to MEA rights guaranteed to it by the EERB in violation of Section 3543.5(d) by refusing to grant release time without loss of compensation pursuant to Section 3543.1(c) for more than four MEA negotiators

(3) Whether MUSD interfered with, restrained or coerced employees of MUSD because of their exercise of rights guaranteed by the EERA by issuing a "press release" regarding MEA's conduct during negotiations and by issuing a "memorandum" to all certificated employees summarizing the negotiation session on December 8, 1976 in violation of Section 3543.5(a).

CONCLUSIONS OF LAW

I

The Allegation that MUSD Refused and Failed to Meet and Negotiate in Good Faith

A. The Tape Recording of Negotiating Sessions

MUSD took the initial position during negotiations that it was not legally obligated to meet and negotiate with MEA so long as MEA unilaterally insisted, over MUSD's objection, on tape recording negotiating sessions. The record is clear, however, that MUSD agreed to continue negotiations with MEA and to allow MEA to in fact tape record negotiating sessions pending disposition of this unfair practice charge by the EERB. While not bound by federal precedent,² this hearing officer has

²Firefighters' Union, Local 1186, IAFF v. City of Vallejo, 12 Cal. 3d 608, 617, 87 LRRM 2453, 2457 (1974).

found the National Labor Relations Board's (NLRB) discussions on recording negotiating sessions in various fact situations persuasive.

The NLRB considered the employer's insistence on having a stenotypist take down a verbatim transcript of bargaining sessions, over the union's strenuous objection, in Reed & Prince Manufacturing Co. and United Steelworkers of America, CIO, 96 NLRB 850, 28 LRRM 1608 (1951). The NLRB held:

The presence of a stenographer at such negotiations is not conducive to the friendly atmosphere so necessary for the successful termination of the negotiations, and it is a practice condemned by experienced persons in the industrial relations field. Indeed, the business world itself frowns upon the practice in any delicate negotiations where it is so necessary for the parties to express themselves freely. The insistence by the Respondent in this case upon the presence of a stenotypist at the bargaining meetings is, in our opinion, further evidence of its bad faith. 96 NLRB at 854 [Emphasis added.]

The NLRB again considered the propriety of insistence on recording negotiations in Allis-Chalmers Manufacturing Co. and Office Employees International Union, Local No. 19, AFL, 106 NLRB 939, 32 LRRM 1585 (1953). The NLRB affirmed the portion of the Trial Examiner's Intermediate Report holding:

In the Reed and Prince case the Board found that insistence upon stenographic recording of the negotiations, in the circumstances there presented, constituted evidence of bad faith. In that situation, however, the demand occurred in a context indicating that it was advanced in order to impede effective negotiation. I see no reason to infer the operation of such a motive here. The Reed and Prince case is further distinguishable on the following grounds: There, the employer insisted upon a stenographic transcription at each negotiating session; refused to meet without it; refused to provide copies for the Union; and the proceedings were fully recorded. Finally, the Board found the insistence in the Reed case "not in itself conclusive evidence of bad faith bargaining," but only when viewed as part of a total pattern evidencing general bad faith. I find no such pattern here and regard the Reed case as inapplicable. 106 NLRB at 950

The NLRB further considered the legality of an employer's insistence on recording negotiating sessions in East Texas Steel Castings Co., Inc. and United States Steel Workers of America, CIO, 108 NLRB 1078, 34 LRRM 1152 (1954), affirming the portion of the Trial Examiner's Intermediate Report which held:

But bearing in mind that insistence upon a stenographic record to the extent which was noted in Reed and Prince is not "in itself conclusive evidence of bad-faith bargaining", it is not altogether clear that the events in that connection in the instant case would prompt a finding of bad faith "when the entire bargaining pattern of the Respondent is viewed in its totality."

As noted, the Union at the meetings, cited the Board's decision in the Reed and Prince case; since when, the court, enforcing the Board's order, declared itself "not inclined to agree" on this factor. Not assuming that the Board will modify its position in that respect, but noting the distinction which may be found in the circumstances of this case, I find no evidence of bad faith in this connection, basing such finding on two grounds, either of which is sufficient: the Respondent acted in good faith, using a stenographer as a precaution which might prove unnecessary (hence no transcription); and the Respondent's entire bargaining pattern viewed in its totality in no wise militated against a friendly atmosphere or free expression by the parties. No intensive study of the Reed and Prince case is necessary to point up the marked differences between the attitudes and atmosphere there and in the instant case. 108 NLRB at 950.

Perhaps one of the best discussions regarding the recording of negotiations, however, appears in St. Louis Typographical Union No. 8, 149 NLRB 750, 57 LRRM 1370 (1964), where the NLRB held:

As indicated by the Trial Examiner, the Board's language in Reed and Prince regarding the effect of the presence of a stenographer must be read in the context of other evidence of bad faith which was present in that case. In subsequent decisions, the legality of insisting upon a stenographic transcript at bargaining sessions has been determined in the light of the entire bargaining context rather than on a per se basis.

Similarly, in cases dealing with charges of a refusal to bargain arising from an adamant insistence on other conditions preliminary to actual bargaining, such as the determination of the time or place of bargaining, the Board has avoided establishing rigid standards favoring any particular proposal, but has, rather, attempted to examine each case in terms of whether or not the positions were taken to avoid or frustrate the legal obligation to bargain.

In the instant case, as noted by the Trial Examiner, it is clear that respected authorities differ in their opinion of the effect of making a stenographic transcript in collective-bargaining sessions. It is not our intention here either to endorse or condemn the practice of utilizing a stenographer during bargaining negotiations. Rather, in this matter we shall undertake to determine only whether, in assuming its position, the Respondent acted in a manner consistent with the principles of good-faith bargaining required by the Act. 149 NLRB at 751-752³

3

In accord with the approach taken in St. Louis Typographical Union, supra, is Architectural Fiberglass, 165 NLRB 238, 65 LRRM 1331 (1967) in which the NLRB held:

Whether or not Mrs. Selvin specifically conditioned bargaining on the use of the tape recorder, the record clearly establishes that she adamantly insisted on using it throughout the negotiations, over the vigorous objections of the Union. We find, in all the circumstances, that the Respondent by insisting on using the tape recorder over the Union's objections, was not acting in good faith. Rather, when the Respondent's insistence is viewed in the context of the Respondent's entire course of conduct, as found herein, it is manifest, and we find, that the Respondent had as its purpose to avoid, delay and frustrate meaningful bargaining with the Union. Accordingly, we find that the Respondent's insistence on the use of the tape recorder over the objection of the Union, further evidenced its bad-faith bargaining as discussed below, and further violated Section 8(a)(5) and (1) of the Act. 165 NLRB at 239

Thus, in approaching the question of whether it is proper to utilize a stenographer during negotiating sessions, the NLRB, while refraining from either endorsing or condemning the practice, has consistently held that the legality of insistence on a stenographic transcript at bargaining sessions must be determined in light of the entire bargaining context rather than on a per se basis in order to determine whether the positions of the parties were taken to avoid or frustrate the legal obligation to bargain.

The hearing officer, like the NLRB, believes that in cases dealing with charges of refusal to negotiate arising from an insistence on conditions preliminary to actual negotiating, policy considerations dictate the avoidance of establishing rigid standards favoring any particular proposal. Rather, the hearing officer believes that each case should be examined in terms of whether or not the positions were taken to avoid or frustrate the legal obligation to negotiate. St. Louis Typographical Union No. 8, ITU, supra.

Based upon the foregoing standard, it is concluded that MUSD did not take the initial position that it would not meet and negotiate so long as MEA unilaterally insisted on tape recording the negotiating session to avoid or frustrate MUSD's legal obligation to negotiate.

Although MUSD objected to MEA's use of a tape recorder, attempted to dissuade MEA from its use during negotiations and on two occasions broke off negotiations when MEA insisted on tape recording negotiations, the simple fact remains that MUSD went back to the negotiating table, agreed that all negotiating sessions could be tape recorded and did indeed negotiate with MEA. It cannot therefore be concluded that MUSD, in taking its initial position that it was not legally required to negotiate with a tape recorder but later agreeing to negotiate with a tape recorder, acted in bad faith.

B. The Attempted Negotiation of "Ground Rules for Negotiations"

The record clearly shows that prior to beginning negotiations with MEA regarding "wages, hours and other terms and conditions of employment," MUSD attempted to reach agreement with MEA regarding certain "ground rules" between the parties while negotiating a collective negotiations agreement including such items as (1) the number of negotiators for each party at the negotiations table, (2) the issuance of press releases during negotiations, (3) the number of MEA negotiators to be given released time pursuant to Section 3543.1(c), (4) the tape recording of negotiation sessions, and (5) the negotiation of and agreement on non-monetary items prior to negotiation on monetary items. The record shows that the parties met and ground rules were discussed but no contract items were negotiated on October 15, 1976 and November 3, 1976. No agreement between the parties regarding ground rules was reached. Subsequent to November 3, 1976, the parties did, nevertheless, continue to meet and negotiate without ground rules.

Examining MUSD's aborted attempt to negotiate ground rules in its total context, it is found that no violation of Section 3543.5(c) occurred.

Like the issue of tape recording discussed above, the hearing officer believes that policy considerations dictate the avoidance of establishing rigid standards favoring any particular proposal dealing with conditions preliminary to actual negotiating. Such matters must be examined in terms of whether positions were taken to avoid or frustrate the legal obligation to negotiate. St. Louis Typographical Union No. 8, ITU, supra.

The record is clear that MUSD did not unilaterally impose ground rules on MEA but actually attempted to negotiate with MEA over ground rules. In fact, the record shows that the purpose of the first meeting on October 15, 1976 was to discuss the preliminary matter of a negotiating schedule and not actual contract provisions.

Most importantly, the record is indisputable that when attempts to negotiate ground rules between MEA and MUSD failed, MUSD tacitly agreed to go back to the table with negotiations open to the public and tape recorded.

Therefore, when viewed in the context of all the facts of this case, MUSD's attempt to negotiate ground rules with MEA was not an attempt to avoid or frustrate MUSD's legal obligation to negotiate.

II

The Allegation that MUSD Dominated and Interfered with the Administration of MEA

A. Refusal to Grant Release Time for More Than Four Negotiators

MEA argues that MUSD's refusal to grant MEA more than four negotiators released time without loss of compensation was a violation of Section 3543.5(b) and (d).

Section 3543.5(b) and (d) state:

It shall be unlawful for a public school employer to: ...

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

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

The right of employee organizations to have a reasonable number of negotiators given released time without loss of compensation is found in Section 3543.1(c) which states:

A reasonable number of representatives of an exclusive representative shall have the right to receive reasonable periods of released time without loss of compensation when meeting and negotiating and for the processing of grievances.

The EERB has considered Section 3543.1(c) in Magnolia Educators Association and Magnolia School District, EERB Decision No. 19, June 27, 1977.

In considering whether the respondent had granted reasonable released time to the charging party in that case, the EERB held:

'Reasonable released time' means, at least, that the District has exhibited an open attitude in its consideration of the amount of released time to be allowed so that the amount is appropriate to the circumstances of the negotiations. The District may have to readjust its allotment of released time based upon the reasonable needs of the District, the number of hours spent in negotiations, the number of employees on the employee organization's negotiating team, the progress of the negotiations and other relevant factors. A district's policy does not provide for reasonable periods of released time if the policy is unyielding to changing circumstances.

The question of what constitutes reasonable periods of released time for a reasonable number of representatives is a question which therefore must be examined in light of the facts of each particular case. MUSD has nine schools and a certificated staff of approximately 165 employees. Under the facts of this case, it cannot be found that four employees being given released time for negotiation sessions is an unreasonable number. MEA argues that under the Winton Act, nine negotiators were used by the certificated employees during meet and confer sessions. However, under the Winton Act, the Certificated Employees Council, which by statute consisted of a representational composite of several certificated employee organizations, was mandatorily set at not less than five nor more than nine members. No similar statutory restrictions are found in the EERA. MEA further argues that four employees is an unreasonably small number of employees to be given released time due to the fact the District is dispersed over a wide area and communication is difficult. MEA therefore argues that it needs seven negotiators on its team so that each school or group of schools would be represented and communication thereby facilitated. Such an argument must fail, however, since MEA clearly testified during the hearing that of its proposed seven members, three worked at the same school. Under the facts of this case, therefore, it is found that four MEA negotiators is a

"reasonable number of representatives" of the exclusive representative to receive released time without loss of compensation when meeting and negotiating and that no violation of Sections 3543.5(b) or 3543.5(d) consequently occurred.

Furthermore, the evidence is clear that MUSD did not restrict the total number of MEA negotiators who could meet and negotiate with the MUSD representative. On the contrary, the only restriction placed upon MEA was the number of negotiators who would receive reasonable periods of release time without loss of compensation. Therefore, there was no domination or interference with the administration of MEA and no violation of Section 3543.5(d) regarding the number of MEA negotiators.

B. The Issuance of November 19, 1976 "Press Release" and December 10, 1976 "Memorandum"

The record is clear that on November 19, 1976 the MUSD issued a "Press Release" to all certificated employees. Said press release was placed in all teachers' mailboxes and appeared in the Antelope Valley Press sometime after November 19, 1976. The press release stated that the filing of MEA's unfair practice charge is "foolishness of unnecessarily prolonging negotiations" and further alleged that MEA's use of a tape recorder during negotiations is "improper conduct".

The record further shows that on December 10, 1976 the MUSD distributed to all certificated employees a "Memorandum" summarizing the negotiating session held on December 8, 1976. MEA apparently contends that said communication constituted a violation of Section 3543.5(a) by interfering with, restraining and coercing members of the unit.

Testimony at the administrative hearing, however, shows it was presumed by MEA that the MUSD and MEA could in fact distribute memoranda regarding the status of negotiations as the parties had previously done during meet and confer sessions under the Winton Act.

Furthermore, MEA has totally failed to present any evidence showing how MUSD's "Press Release" or "Memorandum" in any way interfered with, restrained or coerced employees because of their exercise of rights guaranteed by the EERA. MEA has failed to cite a single case in support of its contention. Absent evidence and authority as to how employees were interfered with, restrained or coerced, the hearing officer cannot find a violation of Section 3543.5(a).

RECOMMENDED ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record of this case, the unfair practice charge filed by Muroc Education Association is hereby DISMISSED.

Pursuant to California Administrative Code, Title 8, Section 35029, this Recommended Decision shall become final on November 14, 1977, unless a party files a timely statement of exceptions. See California Administrative Code, Title 8, Section 35030.

Dated: November 2, 1977

Kenneth A. Perea
Hearing Officer