

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



SERVICE EMPLOYEES INTERNATIONAL )  
UNION, LOCAL 22, )

Charging Party, )

and )

SACRAMENTO CITY UNIFIED SCHOOL )  
DISTRICT, )

Respondent. )

Case No. S-CE-121

PERB Decision No. 100

August 14, 1979

Appearances: Robert J. Bezemek, Attorney (Van Bourg, Allen, Weinberg & Roger) for Service Employees International Union, Local 22; William E. Brown, Attorney (Brown & Conradi) for Sacramento City Unified School District.

Before Gluck, Chairperson; Gonzales and Moore, Members.

DECISION

Service Employees International Union, Local 22 (hereafter Local 22) appeals from a Public Employment Relations Board (hereafter PERB or Board) hearing officer's order dismissing its unfair practice charge against the Sacramento Unified School District (hereafter District). For the reasons discussed below, the Board itself reverses the hearing officer and orders that this matter be remanded to the General Counsel for settlement or hearing.

## FACTS

For the purposes of this appeal, the facts alleged in Local 22's amended charge are deemed to be true. (San Juan Unified School District (3/10/77) EERB Decision No. 12.)

On May 15, 1978, Local 22 filed an unfair practice charge alleging that the District had violated section 3543.5(a) of the Educational Employment Relations Act (hereafter EERA or Act)<sup>1</sup> by refusing to pay personal business necessity leave benefits to employees "because they were allegedly absent from work in support of Local 22." The employee organization also alleged that the District had violated section 3543.5(c) by unilaterally promulgating and retroactively applying emergency regulations affecting its business and necessity leave policy.<sup>2</sup> The District denied that its conduct violated the

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<sup>1</sup>EERA is codified at Government Code section 3540 et seq. Section 3543.5(a) provides:

It shall be unlawful for a public school employer to:

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

All section references herein are to the Government Code unless otherwise noted.

<sup>2</sup>Section 3543.5(c) makes it unlawful for a public school employer to:

Act. In essence, the District takes the position that work stoppages are not protected by EERA, and that conduct taken in response to work stoppages is immune from PERB's unfair practice procedures.

Twice the hearing officer ordered Local 22 to particularize its charge, and twice the employee organization filed supplementary information before the charge in its entirety was dismissed (with leave to amend) on July 17, 1978, for failure to state a prima facie case. At Local 22's request, the hearing officer construed an untimely filed third supplement to the charge as an amendment in response to the July 17 dismissal, and, incorporating the first dismissal by reference, again dismissed the charge for failure to state a cause of action. According to the hearing officer, no basis for a section 3543.5(a) violation was stated because "a work stoppage is not a right guaranteed by the EERA." The section 3543.5(c) charge was dismissed because "the adoption of the emergency policies, even if there was no notice to the charging party, did not cause the harm complained of . . . ."

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(Footnote 2 cont.)

Refuse or fail to meet and negotiate in good faith with an exclusive representative.

## DISCUSSION

### The section 3543.5(a) allegation

Section 3543 of the Act provides employees the right to "form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations." Section 3543.5(a) forbids employers from engaging in conduct that impinges upon or penalizes employees for the exercise of these rights. A prima facie violation of section 3543.5(a) is stated when an employee organization alleges--as Local 22 alleged here--that a District has taken action against employees that it would not have taken but for their actual or presumed connection with the employee organization, since organizational participation is a fundamental right under the Act. (See Carlsbad Unified School District (1/30/79) PERB Decision No. 89.) While the District's answer is irrelevant to our evaluation of Local 22's charge, it is noteworthy that the District did not refute the facts Local 22 alleged; rather, it admitted denying support services employees personal necessity leaves but defended this action because it was taken "because of [their] participation in the work stoppage."

The hearing officer's orders to particularize asked Local 22 to state whether the unit members who were denied personal necessity leave were in fact engaged in a work stoppage. Local 22 responded that some unit members had

withheld their services because they were frustrated "over the Employer's continued unfair practices." The employee organization went on to disavow knowledge of "the motivation of each and every employee who was denied personal business leave because of absence from work on April 26, 1978."

The hearing officer erred in concluding without an evidentiary hearing that every employee who was absent from work on April 26 was absent because of participation in a work stoppage.

The hearing officer's order issued before the California Supreme Court decided San Diego Teachers Assn. v. Superior Court (1979) 24 C.3d 1. That case did not decide that public school employee work stoppages are illegal as a matter of law. Rather, the Court apparently adopted the argument that the Legislature intended section 3549<sup>3</sup> not to outlaw school

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<sup>3</sup>Section 3549 provides:

The enactment of this chapter shall not be construed as making the provisions of section 923 of the Labor Code applicable to public school employees and shall not be construed as prohibiting to all matters specified in section 3543.2.

Nothing in this section shall cause any court or the board to hold invalid any exclusive representative entered into in accordance with the provisions of this chapter.

employee strikes, but to exempt them from the protection Labor Code section 923<sup>4</sup> affords work stoppages in the private sector. This Board has not yet considered the status of work stoppages under EERA, and the recent Supreme Court decision in San Diego, supra, injects new considerations into this issue.

For these reasons, we reverse the hearing officer's dismissal of Local 22's section 3543.5(a) charge.

The section 3543.5(c) violation

Local 22 was certified as the exclusive representative of District operations-support services personnel on

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<sup>4</sup>Labor Code section 923 provides:

In the interpretation and application of this chapter, the public policy of this State is declared as follows: Negotiation of terms and conditions of labor should result from voluntary agreement between employer and employees. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted

November 18, 1977.<sup>5</sup> Accordingly, it has the right to meet and negotiate with the District over matters within the scope of representation (sec. 3543.1(a)), and it is unlawful for the District to fail to do so. (Sec. 3543.5(c).) The scope of representation specifically includes leave policies as a term and condition of employment. (Sec. 3543.2.)

The hearing officer found that no prima facie violation of section 3543.5(c) was stated because the District's failure to meet and negotiate with Local 22 did not cause the injury complained of. Yet the failure and refusal to meet and negotiate is itself the evil the statute seeks to prevent. A refusal to meet and negotiate charge may be based upon an employer's unilateral change of wages, hours, or other terms and conditions of employment. (San Mateo County Community College District (6/8/79) PERB Decision No. 94; Pajaro Valley

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(Footnote 4 cont.)

activities for the purpose of collective bargaining or other mutual aid or protection.

<sup>5</sup>An administrative tribunal may take official notice of information in its own files. See California Administrative Agency Practice (1970) at p. 167, citing Broyles v. Mahon (1925) 72 Cal.App. 484, 491 [237 p. 763] and Anderson v. Board of Dental Examiners (1915) 27 Cal.App. 336, 338 [149 p. 1006]. Also see NLRB v. Seven-Up Bottling Co. (1953) 344 U.S. 344, 348.

Unified School District (5/22/78) PERB Decision No. 51. And see N.L.R.B. v. Katz (1962) 369 U.S. 736 [8 L.Ed.2d 230, 82 S. Ct. 1107, 50 LRRM 2177].) Local 22 charges and the District admits that it unilaterally adopted and implemented emergency regulations. Since a prima facie case is stated, the hearing officer's dismissal of the section 3543.5(c) charge is reversed.

ORDER

The Public Employment Relation Board ORDERS that the hearing officer's dismissal of the unfair practice charge in this case is reversed. The unfair practice charge is remanded to the General Counsel for settlement or hearing.

By:

Barbara D. Moore, Member

Harry Gluck, Chairperson

Raymond J. Gonzales, Member, dissenting in part:

I concur in the majority's decision to reverse the hearing officer's dismissal of the section 3543.5(c) charge and in the discussion supporting it. I dissent from the decision to reverse the dismissal of Local 22's charge that the District violated section 3543.3(a) by its refusal to grant personal necessity leave to employees who were "absent from work in support of Local 22." Local 22's allegations simply do not state a prima facie violation of section 3543.5(a).

For a violation of section 3543.5(a) to exist, the employer's conduct must at a minimum tend to or actually result in some harm to employee rights granted under the EERA.<sup>1</sup>

Therefore, in order to find that Local 22 has stated a prima facie case, we must find that the alleged employer conduct, if deemed true, would tend to or actually harm employee rights.

Local 22 has alleged the following in its unfair practice charge and three particularizations of that charge.

1. Employees in the negotiating unit "withheld their services on April 26, 1978." (Third Supplement to the Charge.)
2. These employees were denied personal necessity leave for that day by the District. (Original Unfair Practice Charge, p. 2.)
3. Each of the employees who was absent from work on April 26, 1978, would have qualified for personal necessity leave. (Third Supplement to Charge, p. 2.)
4. Some employees were absent from work because they were disturbed about the employer's continued unfair labor practices towards the employees, but Local 22 does not know the motivation of every employee who was absent and did not

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<sup>1</sup>Carlsbad Unified School District (1/30/79) PERB Decision No. 89, majority opinion at p. 10, concurring opinion at p. 21. As I argued in my concurring opinion in that case, I would also consider intent to be an essential element of a violation of section 3543.5(a). But even under the majority's test in Carlsbad, Local 22 has not stated a prima facie case.

receive personal necessity leave. (Third Supplement to Charge, p. 2.)

5. The District's regulations governing personal necessity leave, in effect on April 26, 1978, provide that personal necessity leave may be used for six specified activities, and that such leave "may not be used for any of the following: . . . engaging in a strike, demonstration, picketing, lobbying, rally, march, campaign meeting, or any other activities related to work stoppage or political campaigning." (Supplement and Particularization to the Charge, Exhibit "B," p. 3.)

6. The employees were denied personal necessity leave "because they were allegedly absent from work in support of Local 22." (Original Unfair Practice Charge, p. 2.)

I fail to see how the alleged District conduct has harmed any employee rights. Under section 3543, public school employees have the right to form, join, and participate in the activities of employee organizations. They do not have a protected right to engage in work stoppages. Conspicuously absent from section 3543 is any mention of a right to engage in concerted activities;<sup>2</sup> this absence is underscored by

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<sup>2</sup>The term "concerted activities" is commonly used by courts and legislative bodies to refer to strikes. Los Angeles Met. Transit Authority v. Brotherhood of Railroad Trainmen (1960) 54 Cal.2d 684, 689. In that case, the Court found that in the absence of legislative authorization public employees do

section 3549, which states that the provisions of Labor Code section 923<sup>3</sup> are not applicable to public school employees. Read together, these two sections clearly reflect the Legislature's intention that strikes not be protected by the EERA. As the California Supreme Court stated in San Diego Teachers Assn. v. Superior Court (1979) 24 Cal.3d 1, section 3549 "excludes the applicability of Labor Code section 923's protection of concerted activities." Thus, while work stoppages by public school employees may not be illegal, a question left open in San Diego, they are clearly not protected activities, and employees have no statutorily guaranteed right to engage in them.

It is clear, then, that the District's refusal to grant personal necessity leave to employees who were engaged in a work stoppage was not connected with "their exercise of rights guaranteed by [the EERA]. (Sec. 3543.5(a).) The employees' conduct involved no protected right, so the District's conduct, which was admittedly based on the employees' work stoppage, did not interfere with employees because of their exercise of a protected right.

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not have the right to strike. The statute involved in that case, however, gave transit employees the right to "engage in other concerted activities for the purpose of mutual aid or protection." The Court thus found that the Legislature had granted the employees in question the right to strike.

<sup>3</sup>Labor Code section 923 is quoted in full at note 4 of the majority decision.

The absurdity of Local 22's claim becomes clear when one realizes that, as a bottom line, Local 22 is demanding that the District pay employees for engaging in a work stoppage. I cannot believe that the EERA requires or that the majority of the Board should accept such a result.

The majority seems to find it significant that Local 22 denied knowledge of "the motivation of each and every employee who was denied personal business leave because of absence from work on April 26, 1978." Yet Local 22's unfair practice charge is not based on a claim that employees who were absent for some reason other than work stoppage were denied personal necessity leave because of their purported connection with the employee organization. If the charge were based on such a claim, Local 22 should have alleged facts in support. It had at least two opportunities to do so in response to PERB orders to particularize. In the second order to particularize, Local 22 was asked to state: (1) whether every employee who was denied personal necessity leave was in fact absent on April 26, 1978, due to participation in a concerted activity; (2) the identities of employees who were absent for reasons other than the participation in the concerted activity; and (3) the reasons for their absences. Local 22 at first refused to respond, and later denied knowledge of each employee's motivation. Such responses indicate to me that Local 22's

charge is not based on any alleged harm to the EERA rights of employees who did not participate in a work stoppage, but rather on the District's denial of leave to employees who did participate in a work stoppage. Such a charge simply does not state a prima facie case; the District's refusal to pay employees for engaging in a work stoppage harmed no right guaranteed by the EERA. It seems that the majority in this decision is making another effort to condone work stoppages albeit through a back door approach.

~~Raymond J. Gonzales, Member~~

PUBLIC EMPLOYMENT RELATIONS BOARD  
OF THE STATE OF CALIFORNIA

SERVICE EMPLOYEES INTERNATIONAL UNION,	)	
LOCAL 22/SACRAMENTO ASSOCIATION OF	)	
CLASSIFIED EDUCATIONAL EMPLOYEES,	)	Case No. S-CE-121
	)	
Charging Party,	)	
	)	
v.	)	NOTICE OF DISMISSAL
	)	WITH LEAVE TO AMEND
SACRAMENTO CITY UNIFIED SCHOOL DISTRICT,	)	
	)	
Respondent.	)	
	)	
	)	
	)	

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Notice is hereby given that the above-captioned unfair practice charge is dismissed with leave to amend within twenty (20) calendar days after service of this Notice.

DISCUSSION

This is the second dismissal issued in this case. The first dismissal with leave to amend was issued on July 17, 1978. That dismissal took into consideration the responses by the charging party to two orders to particularize. On July 18, 1978, the Sacramento Regional Office received a "Third Supplement to the Charge," which ostensibly was responsive to the second order to particularize but which was not timely filed. By a letter dated August 2, 1978, the charging party has requested that the Third Supplement to the Charge be considered an amendment in response to the July 17 dismissal. It is concluded that as amended the charge still fails to state a prima facie case.

The charge alleges that the adoption by the respondent school board of certain emergency policies on April 27, 1978, and the denial to employees of personal business and necessity leave for absences on April 26, 1978, constituted violations of Government Code sections 3543.5(a) and (c). It was alleged that the actions were taken because the respondent believed that the employees had been "absent from work in support of Local 22." The original dismissal, which is incorporated herein, concluded that there was no allegation of a subsection

(a) violation because the facts alleged, if assumed to be true, did not demonstrate interference with activity protected by the EERA; and it concluded further that there was no allegation of a subsection (c) violation because the adoption of the emergency policies, even if there was no notice to the charging party, did not cause the harm complained of, i.e. the denial of personal business and necessity leave for the April 26 absences.

As subsequently amended, the charge alleges that the employees in the bargaining unit withheld their services on April 26 because of their frustration with the respondent's unfair practices. Those alleged unfair practices were the subject of a previous charge (case number S-CE-109) in which it was alleged that the school district was negotiating in bad faith. That charge was withdrawn on May 12, 1978.

The EERA does not generally authorize concerted work stoppages by school district employees. Gov. Code sec 3549; and see Pasadena Unif. Sch. Dist. v. Pasadena Fed. of Teachers (1977) 72 C.A.3d 100. Government Code section 3543, which is the basic statement of employee rights protected by the EERA makes no mention of the right to engage in concerted activity. Compare NLRA sec. 7; Labor Code sec. 923. Therefore, the participation by employees in a work stoppage is not a right guaranteed by the EERA.

In the present case, the harm complained of is that employees were denied leave benefits on an occasion when they withheld their services allegedly out of frustration with what they perceived as unlawful bargaining tactics by the employer. In the absence of authorization by administrative regulation, contract, or Education Code provision, school district employees simply are not entitled to receive leave benefits. As set forth more fully in the original dismissal, neither the respondent's normal administrative regulations nor the emergency policies adopted on April 27 on their face provide for the payment of leave benefits to employees engaged in a work stoppage. The charging party alleges no other basis upon which leave benefits could be authorized. The denial of leave benefits consistent with existing school board regulations and for an absence from work to participate in activity unprotected by the EERA does not constitute a reprisal or discrimination within the meaning of section 3543.5(a).

For the above reasons, the section 3543.5(a) charge is dismissed.

It is noted that the denial of leave benefits where none are authorized is totally distinguishable from disciplinary action or discharge for participation in a strike carried out in response to an employer's unfair practices. See Rockwell v.

Crestwood School District Board of Education (Mich.S.Ct.,  
1975) 227 N.W.2d 736, 89 LRRM 2017.

No new facts are alleged which would alter the basis for the dismissal of the section 3543.5(c) charge. Therefore, it is dismissed on the grounds previously stated.

The action is taken pursuant to PERB Regulation 32630(a), formerly PERB Regulation 35007(a).

If the charging party chooses to amend, the amended charge must be filed with the Sacramento Regional Office of the PERB within twenty (20) calendar days. (PERB Regulation 32630(b).) Such amendment must be actually received at the Sacramento Regional Office of the PERB before the close of business (5:00 p.m.) on September 11, 1978 in order to be timely filed. (PERB Regulation 32135.)

If the charging party chooses not to amend the charge, it may obtain review of the dismissal by filing an appeal to the Board itself within twenty (20) calendar days after service of this Notice. (PERB Regulation 32630(b).) Such appeal must be actually received by the Executive Assistant to the Board before the close of business (5:00 p.m.) on September 11, 1978 in order to be timely filed. (PERB Regulation 32135.) Such appeal must be in writing, must be signed by the charging party or its agent, and must contain the facts and arguments upon which the appeal is based. (PERB Regulation 32530(b).) The appeal must be accompanied by proof of service upon all parties. (PERB Regulations 32135, 32142 and 32630(b).)

Dated: August 22, 1978

WILLIAM P. SMITH  
General Counsel

By \_\_\_\_\_

Franklin Silver  
Hearing Officer