

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



AMERICAN FEDERATION OF STATE, COUNTY
AND MUNICIPAL EMPLOYEES, LOCAL 377,
COUNCIL 57, AFL-CIO,

Charging Party,

v.

REDWOOD CITY SCHOOL DISTRICT,

Respondent.

Case No. SF-CE-172

PERB Decision No. 115

February 7, 1980

Appearances: J. Anthony Gaenslen, Attorney (Norback, DuRard, Belkin & Carcione) for American Federation of State, County and Municipal Employees, Local 377, Council 57, AFL-CIO; Richard J. Loftus, Jr., Attorney (Paterson & Taggart) for Redwood City School District.

Before Gluck, Chairperson; Gonzales and Moore, Members.

DECISION

This case is before the Public Employment Relations Board (hereafter Board) on exceptions taken by the American Federation of State, County and Municipal Employees, Local 377, Council 57, AFL-CIO (hereafter AFSCME) to the hearing officer's proposed decision. AFSCME objects to the hearing officer's conclusion that the Redwood City School District did not engage in conduct violative of section 3543.5(c) or (e) of the Educational Employment Relations Act (hereafter EERA).¹

¹The Educational Employment Relations Act is codified at Government Code section 3540 et seq.

The Board has considered the record as a whole and the attached proposed decision in light of the exceptions filed. The Board is in agreement with and hereby adopts the hearing officer's findings of fact and conclusions of law.² The hearing officer's proposed decision, attached hereto, is likewise adopted by this Board.

ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, it is hereby ORDERED that the unfair practice charge be dismissed.

PER CURIUM

Section 3543.5(c) and (e) state:

It shall be unlawful for a public school employer to:

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

.....

(e) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).

²The Board notes that the hearing officer's discussion of AFSCME's surface bargaining charge is in conformity with the Board's decision in Muroc Unified School District (12/15/78) PERB Decision No. 80, issued subsequent to the hearing officer's proposed decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

STATE OF CALIFORNIA

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| In the Matter of: |) | |
| LOCAL 377, COUNCIL 57, AFSCME, AFL-CIO, |) | Case No. SF-CE-172 |
| Charging Party, |) | |
| vs. |) | |
| REDWOOD CITY SCHOOL DISTRICT, |) | PROPOSED DECISION |
| Respondent. |) | UNFAIR PRACTICE CHARGE |
| |) | April 25, 1978 |

Appearances: J. Anthony Gaenslen, Attorney (Norback, Durard and Belkin) for Local 377, Council 57, AFSCME, AFL-CIO; Richard Loftus, Attorney (Paterson and Taggart) for Redwood City School District.

Before Sharrel J. Wyatt, Hearing Officer.

PROCEDURAL BACKGROUND

On January 19, 1978, Local 377, Council 57, AFSCME, AFL-CIO (hereinafter AFSCME or Charging Party) filed an unfair charge against the Redwood City School District ¹ (hereinafter District or Respondent) with the Public Employment Relations Board (hereinafter PERB) which

¹Redwood City School District is located in San Mateo County and has an enrollment of approximately 8100 attending grades K-8 attending school at 15 sites. 1977 California Public School Directory, California State Department of Education at p. 470.

was amended on February 1, 1978 and February 16, 1978. The charges essentially allege violation of Section² 3543.5(c)³ and (e) for (1) surface bargaining, (2) failure to participate in the mediation in good faith and (3) breach of the agreement to grant release time. During the hearing which was held at Redwood City on March 16 and 17 and April 6 and 7, 1978, the charge relating to breach of the agreement to grant release time was withdrawn with prejudice.

At the close of Charging Party's evidence, the Respondent made a motion to dismiss for failure to prove a prima facie case which was granted for the reasons set forth hereinafter.

FINDINGS OF FACT

AFSCME was certified as the exclusive bargaining representative for the maintenance and operations unit at Redwood City School District by the Educational Employment Relations Board⁴ on February 11, 1977, following a consent election.

²All references are to the Government Code unless otherwise indicated.

³Section 3543.5(c) and (e) state:

It shall be unlawful for a public school employer to:

- (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative;
- (e) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).

⁴Predecessor to the Public Employment Relations Board.

After certification, AFSCME sought input from employees in the unit and put together an initial proposal. AFSCME and the District exchanged initial proposals as required by the public notice provisions of Article 8 of the Act.⁵

The first meet and negotiate session was held on May 16, 1977. As a rule, the parties worked from AFSCME's proposal at the table. As negotiations progressed, one of the major items in issue was work week/work day. The maintenance and operations day crew had worked 8 hours per day, 40 hours per week. The swing shift worked 7½ hours per day, 37½ hours per week. The swing shift had received the same amount of pay for 37½ hours as the day shift employees received for 40 hours. AFSCME sought a 7½ hour day, 37½ hour work week for all employees in the unit. There was no Monday - Friday work week for employees in the District. AFSCME proposed a Monday through Friday standard work week with work outside the standard work week to be paid at overtime rates. No swing shift differential had been paid by the District previously. AFSCME sought a 5% swing shift differential. In the course of negotiations,

⁵Prior to the consent election, the superintendent, at a public meeting of the Board of Trustees in September or October of 1976, indicated that CSEA had always represented employees in the District, that the District would prefer to continue to deal with classified employees as one group, and that he did not feel that AFSCME should represent employees. The hearing officer ruled that this background information was not of probative value in that it did not tend to prove or disprove elements of the pending charges.

the District sought an 8 hour day, 40 hour week for all employees in the unit. In response to that position, AFSCME sought compensation for the increased half an hour per day to be worked by the swing shift. The increase sought varied from 6-1/4% to 6-3/4%. The increased half an hour per day of work represented a 6-3/4% increase in work week.

On December 12, 1977, the District offered a 40 hour work week, any five consecutive days, and 5% swing shift differential. AFSCME rejected this offer.

On January 10, 1978, the District offered 8 hours per day and 40 per week except for the swing shift which would continue on 7½ hours per day and 37½ hours per week. No Monday - Friday work week was included. This represented the status quo to AFSCME and was rejected.

On January 13, 1978, the parties were in agreement on use of school mails and remittance of dues. Grievance procedures were discussed and at a later date, the District moved from its position insisting on American Arbitration Association.

At the session of January 18, 1978, Dr. Cochran, a member of the District's team indicated the Board of Trustees would be resistant to anything that smacked of taking away management's right to manage and they would not be able to swing all three: Monday - Friday work week, 7½ hour work day, and 5% swing shift differential.

During caucus, Dr. Cochran returned to the room where the AFSCME team was, indicated he should not be there, that he was not

negotiating, but that he wanted to clarify AFSCME's position on work week/work day. AFSCME indicated their position was 8 hour day/40 hour week, Monday through Friday work week, 5% swing shift, and 6¼% for the extra half an hour for swing shift.

Later in this session, the AFSCME representative felt there was no way to reach a middle ground on work week/work day, and suggested a side letter on flex time as an alternative. A booklet on flex time prepared by U.C.L.A. was loaned to the District.

At this same meet and negotiate session, Dr. Wilson, the superintendent, stated that the end of AFSCME's certification year was approaching quickly. He stated that it was not to the District's advantage to have AFSCME decertified if the District had its druthers. On the other hand, it wouldn't break their heart. He stated that if AFSCME did not give the District representatives time to take the agreement to the Board of Trustees, they would not be able to complete it before decertification. The parties were aware that CSEA had declared its intent to seek decertification.

Earlier, on November 30, 1977, the AFSCME representative had met with Dr. Hill, a representative from the District, at a restaurant and raised the issue that AFSCME's certification would be running out. A similar conversation was held at the same restaurant with Drs. Hill and Wilson in early January, 1978. They said they had no desire for decertification.

At the January 19, 1978 meet and negotiate session, the AFSCME representative offered to prepare language on flex time during caucus and the District agreed to look at it. During caucus, AFSCME began to prepare the language, but after caucus the District indicated they were not interested in it.

A heated discussion on work week/work day followed and AFSCME indicated no resolution was possible, so impasse was likely.

After caucus, the District suggested that the AFSCME local chapter president serve as the AFSCME spokesperson rather than the AFSCME business agent who had been spokesperson. This suggestion was emphatically rejected and a caucus followed.

Following caucus, moods had cooled. The District offered a Monday through Friday work week, an 8 hour day, 40 hour work week, a 5% swing shift differential with a side letter on flex time. The District's offer did not mention 6½% additional pay for those swing shift employees whose work day would increase from 7½ to 8 hours.

AFSCME caucused. During the caucus, the additional 6½% for the increased half an hour was discussed. Following caucus, AFSCME accepted the District's work week/work day proposal. The 6½% for the half an hour increase was not mentioned to any District representative. No specific wording was agreed to, but the parties felt they had conceptual agreement. Dr. Cochran indicated that was a lot to give.

Thereafter, negotiations moved rapidly and tentative agreement was reached on a number of items. On several items, AFSCME changed their position by agreeing to the status quo. At the end of the day, AFSCME's representative stated, "We are pretty close."

On January 23, 1978, the parties met and agreement was reached on a number of items. The 6½% for the increased half an hour was not mentioned. Dr. Hill, a negotiator for the District, suggested a three-year agreement as the Board of Trustees and administration were

anxious to return to items other than collective bargaining. On January 25, 1978, there was some question as to three percentage figures and the District's basis for arriving at them. Computations had to be checked.

AFSCME then inquired as to how the staff on swing shift was to be adjusted to reflect the additional 6 $\frac{1}{4}$ % representing compensation for the half an hour increase in work day.

The District expressed surprise. Dr. Hill indicated that the District thought they had agreement on work week/work day without the 6 $\frac{1}{4}$ % increase for employees on swing shift.

AFSCME indicated that if they didn't have the agreement offered by the District including 6 $\frac{1}{4}$ % for the additional half an hour, they would declare impasse.

Following caucus, the District's representatives suggested that they keep discussions open and revert to a 7 $\frac{1}{2}$ hour work day with no differential.

AFSCME suggested a 7 $\frac{1}{2}$ hour work day for swing shift with a 3% differential.

AFSCME at all times felt that the District knew they had a firm position requiring 6 $\frac{1}{4}$ % for the extra half an hour for swing shift and, therefore, that the District's offer of January 19 implicitly included 6 $\frac{1}{4}$ % for the extra half an hour.

Dr. Cochran, after it became evident that the parties did not have conceptual agreement on work week/work day, stated that the District felt they had agreement without the 6-3/4%⁶ pay increase by giving

⁶The 6-3/4% was the increase initially sought by AFSCME.

the 5% differential to employees on swing shift.

The District suggested AFSCME accept the District's last counter-proposal so they could take it to the Board that night and avoid the decertification problem.

AFSCME indicated they were very close to impasse. The District said they could not subscribe to this. A meet and negotiate session was scheduled for February 2, 1978.

After the session adjourned, the AFSCME committee met to discuss continuing to meet and negotiate or declaring impasse.

By letter of January 30, 1978, AFSCME declared impasse. On January 31, 1978, the District wrote to AFSCME indicating they assumed that since AFSCME had declared impasse, the meet and negotiate session of February 2, 1978 was cancelled.

By letter of February 3, 1978, the San Francisco Regional Director of PERB found an impasse existed. The District appealed the finding of the Regional Director to the Executive Director of the PERB.

The mediator from State Conciliation Service contacted AFSCME on February 6, 1978. On February 8, 1978, the AFSCME representative spoke to the mediator to discuss the basis for the impasse. AFSCME was ready to meet at any time on 24 hours' notice or less.

On Saturday, February 11, the date AFSCME's certification expired, the mediator called the AFSCME representative and suggested trying to set up meetings for Tuesday, February 14 or the following Thursday or Friday.

On Thursday, February 16, the mediator told AFSCME's representative no meeting was set up because the District declined to meet pending

resolution of the appeal of the impasse, and that he had spoken to the Regional Director. The Regional Director had spoken with the District on February 15, 1978, to indicate mediation should continue pending the appeal.

The first mediation session was held on February 23, 1978. At the next session on March 2, 1978, several counterproposals on work week/work day were exchanged. The union's final counterproposal was to be taken back to the Board of Trustees. Two days after the Board met, the mediator reported to AFSCME that the proposal was not acceptable. No official explanation was given to AFSCME.

CSEA filed for decertification on March 10, 1978.

Following a hearing in this matter on March 16, 1978, the parties were scheduled to meet with the mediator. The District indicated they would not meet, but later spent time talking with the mediator.

On March 31, 1978, the mediator declared that factfinding was appropriate.

AFSCME placed the agreement reached between the District and CSEA in evidence. This agreement covers clerical and paraprofessional employees and provides for a 37½ hour work week. Because of State requirements under the retirement fund, clerical employees had moved from a 7 hour work day to a 7½ hour work day and had received a commensurate increase in pay.

The agreement with CSEA provides:

"The bargaining unit may be expanded to other classes by mutual agreement of the District and CSEA subject to the rules of EERB."

The District points out that AFSCME proposed the following language:

"The Employer further recognizes the Union as the exclusive bargaining representative for all newly created positions, except those that lawfully are certificated, management, confidential and supervisory."

The District made a counterproposal of similar language.

Finally, AFSCME placed evidence on the record that on one occasion in March of 1978, an employee on sick leave was at the maintenance yard during coffee break attempting to get authorization cards for CSEA signed. On another occasion, another employee who had completed her work day was in the maintenance yard near closing time with a CSEA field representative talking to employees. AFSCME made protest over failure of these persons to sign in and over presence of the field representative during working hours. The employee on sick leave said he was an employee and didn't have to sign in. AFSCME had no knowledge of whether the CSEA field representative had signed in at District administration offices or whether the District had followed up on AFSCME's protests.

CONCLUSIONS OF LAW

The charge of surface bargaining was dismissed for failure to prove a prima facie case. The record reflects that the District gave on a number of issues. On the central issue of work week/work day, there was substantial movement on the part of the District on standard Monday - Friday work week, 5% swing shift differential and in the side letter on flex time. Following the January 19, 1978 session, AFSCME claims they had the belief that the District's offer included the 6 $\frac{1}{4}$ %. The District's belief was that their offer had been accepted as proffered without the 6 $\frac{1}{4}$ %.

The District offer of January 19, 1978 did not include the 6½% for the additional half an hour. The District reasonably hoped that the 5% differential would suffice. Despite the fact that AFSCME discussed the 6½% in caucus, they never raised it with the District on the 19th of January. Since negotiations involve constant movement of parties from heretofore adamant positions, AFSCME's secret retention of its position on the 6½% cannot be transformed into a tacit offer by the District or an effort by the District to lead AFSCME to believe they had given in on this issue of the 6½% so as to delay negotiations until certification ran out. The District made a specific offer and AFSCME accepted the offer. If AFSCME thought the offer included the 6½%, they should have mentioned it. Their failure to do so cannot be transformed into surface bargaining on the part of the District.

While the offering of a proposal which cannot be accepted coupled with an inflexible attitude on major issues and the failure to offer reasonable alternatives has been held to be surface bargaining,⁷ that has not occurred in this case. Although AFSCME suggests the District knew they could not accept an offer unless it included the 6½%, they never made that position clear to the District. The movement made by the District from no set work week to any consecutive five days and, finally, to AFSCME's demand of a Monday-Friday work week and from no swingshift differential to a 5% swingshift differential, does not support the accusation of an

⁷S. Marina & Sons, 163 NLRB 1071, 65 LRRM 1054 (1967), Ray E. Hansen, Jr., Mfg., 137 NLRB 251, 50 LRRM 1134 (1962).

inflexible attitude. The District was also willing to revert from its position that swingshift move from a 7½ hour day/37½ hour week to an 8 hour day/40 hour week back to accepting the status quo of a 7½ hour day/37½ hour week.

Assuming, arguendo, that the District's proposal on January 19th had been predictably unacceptable as claimed by AFSCME, it would not constitute surface bargaining unless it foreclosed future negotiations or was so patently unreasonable as to frustrate possible agreement. Neither the District's offer of January 19th nor its response to discovery of error on January 25th evidence intent to foreclose future negotiations.

Nor can it be said that the District was trying to push AFSCME to decertification. The fact that the certification year would be up on February 11, 1978 was raised by AFSCME on November 30, 1977 and again in January, 1978. Nothing in the record indicates intent by the District to do anything other than attempt to reach agreement. The fact that AFSCME subjectively felt pressured to reach agreement is not attributable to the District, but to the objective fact that only one year of certification is provided following election.

The desire expressed by the District to reach agreement soon so they would have time to take it to the Board of Trustees for ratification before AFSCME's certification expired and the suggestion of a three-year

agreement by them is evidence of the desire for peace in employer/employee relations, not an expression of desire to oust AFSCME in favor of CSEA.

AFSCME argues that the work week offer by the District constitutes a net decrease in pay. Nothing in the record supports this argument.

AFSCME argues that the District's final offer was a take-it or leave-it offer and that the District never moved from adamant insistence on a 40 hour work week. However, the record reflects that when the mutual mistake as to work week was discovered on January 25, 1978, the District offered to revert to a 7½ hour work week for swing shift and delete the differential; proposals were also exchanged in mediation.

AFSCME urges the 37½ hour work week for clerical as evidence of preference on the part of the District. Since this represents an increase, this evidence is irrelevant for purposes of showing preference. The background, pay rates, and terms and conditions of employment for clericals simply are not analogous to the conditions of employment in the maintenance and operations unit.

AFSCME claims the language in the agreement with CSEA⁸ is designed to simply sweep the maintenance and operations unit under that agreement. It cannot be said that the language was designed for anything more than including new classifications within the CSEA unit, should any be created. Presumably, that was the intent of similar language in AFSCME's proposed agreement. The contract language in the agreement between CSEA and the

⁸See p. 9, supra.

District is not evidence of intent by the District to include maintenance and operations employees under that agreement.

Regarding failure to participate in the impasse procedures in good faith, impasse was found by letter of February 3, 1978; the mediator contacted AFSCME on February 6 and spoke with their representative on February 8, 1978. On the 11th, the mediator suggested they attempt to meet on the 14th, 16th or 17th. On the 16th, the mediator advised AFSCME that the District had declined to meet because the finding of impasse was being appealed. The Regional Director spoke with the District on the 15th and advised them that, under the rules and regulations, mediation should continue pending outcome of the appeal. The record does not reflect when the mediator spoke with the District, or how long a delay, if any, resulted because the District declined to mediate pending outcome of their appeal. Nor does the record reflect that the District refused to mediate at any time subsequent to their conversation with the Regional Director. Based on this record, it cannot be said that the District refused to participate in good faith in the impasse procedures.

AFSCME argues persistent refusal to participate in mediation with the exception of February 23 and March 2, 1978. The record reflects only the one delay of unexplained length on the part of the District. There is no evidence of persistent refusal.

Further, it is noted that AFSCME never attempted to communicate with the District to move the process along. Nor is this a situation where time was of the essence and the slightest delay would create irreparable

injury. Because of the timing of the declaration of impasse by AFSCME, it was not until February 11, 1978, the date on which AFSCME's certification year expired, that the mediator called AFSCME to suggest specific dates the following week for mediation. Thus, there was no possibility that rapid action could result in agreement while AFSCME was still within the protective umbrella of their certification year.

For the foregoing reasons, it is found that AFSCME failed to put on sufficient evidence to support the charge of failure to participate in the mediation procedures in good faith.

Since AFSCME completed their case and the record failed to support their charges, this dismissal will be without leave to amend.

AMENDED PROPOSED ORDER

Upon the foregoing findings of facts, conclusion of laws and the entire record in this case, it is HEREBY ORDERED THAT THE UNFAIR PRACTICE CHARGE, ALLEGING VIOLATION OF SECTIONS 3543.5(c) & (e), FILED BY LOCAL 377, COUNCIL 57, AFSCME, AFL-CIO ARE DISMISSED.

The parties have twenty (20) calendar days after service of this Proposed Decision in which to file exceptions in accordance with California Administrative Code, Title 8, Part III, Section 32300. If no party files timely exceptions, this Proposed Decision will become final on May 26, 1978 and a Notice of Decision will issue from the Board.

Dated: May 1, 1978

Sharrel J. Wyatt
Hearing Officer