

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION)
AND ITS CHICO CHAPTER #110,)
)
Charging Party,)
)
v.)
)
CHICO UNIFIED SCHOOL DISTRICT,)
)
Respondent.)

Case No. S-CE-404
PERB Decision No. 286
February 22, 1983

Appearances: Siona D. Windsor, Attorney for California School Employees Association and its Chico Chapter #110;
Richard J. Currier, Attorney (Littler, Mendelson, Fastiff & Tichy) for Chico Unified School District.

Before Tovar, Jaeger and Morgenstern, Members.*

DECISION

MORGENSTERN, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Chico Unified School District (District) to the hearing officer's proposed decision finding that the District had made unilateral changes in leave policy in violation of the collective bargaining agreement without negotiating in good faith in violation of subsections 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA).¹ Based on our

*Chairperson Gluck did not participate in the determination of this matter.

¹EERA is codified at Government Code section 3540

review of the entire record in this case in light of the District's exceptions, we reverse the hearing officer's conclusion as to this matter.

No exceptions were filed to the hearing officer's dismissal of alleged violations of subsections 3543.5(a) and (b) charged California School Employees Association and its Chico Chapter #110 (CSEA or Association). Those matters not excepted to are not before us.

STATEMENT OF FACTS

The Association is the exclusive representative of classified employees of the District. The parties negotiated their first agreement in 1977 and, in September 1979, entered into a successor agreement effective through June 30, 1982. Pursuant to a reopener clause in the second negotiated

et seq. All references are to the Government Code, unless specified otherwise.

Subsections 3543.5 (a), (b) and (c) provide as follows:

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.

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

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

agreement, the parties began negotiations in May 1980. The parties were unable to reach agreement and, in September 1980, impasse was declared and a mediator appointed. At a mediation session conducted on October 2, 1980, CSEA felt that, under direction from the District's attorney, the District's bargaining team reneged on a tentative agreement. When the disgruntled CSEA team left the mediation session, it appeared at the District's administrative office and joined a CSEA-authorized informational picket line.

Rumors of a potential sick-out began surfacing Thursday at the informational picket line and Friday afternoon, October 3, 1980. Eileen Robinson, chairperson of the CSEA bargaining team, advised the members that CSEA did not sanction and would not participate in a sick-out. She did say that she would request executive board sanction for an informational picket line on Tuesday, October 7, 1980. CSEA Field Representative Neil McAfee confirmed, when asked by Ms. Robinson, that a sick-out had not been authorized by CSEA.

Dr. Don Cloud, the associate superintendent (acting as superintendent at the time), was advised of a possible sick-out on Friday afternoon by Yolanda Crane, a food services supervisor. Ms. Crane told Dr. Cloud that she had heard a sick-out was planned for Monday, October 6, 1980. The District had never experienced or prepared for a sick-out prior to October of 1980.

In light of the rumors, the District administrators met on Friday and started what would become a three-step plan to deal with the rumored sick-out. First, they prepared a phone questionnaire which they used Saturday and Sunday to poll bargaining unit members to determine whether a sick-out was planned and how extensive it would be, and to warn people that they could be docked their salary for the day.

By the phone poll, they found that there indeed was talk of a sick-out, and they could expect that some people would not be coming to work on Monday, October 6.

With regard to the employees' attendance on Monday, October 6, the parties stipulated as follows:

The parties hereby stipulate that in the bargaining unit represented by the CSEA there was an exceptionally high absence rate on Monday, October 6, 1980; and that this absence rate can in no way be considered normal. The parties also hereby stipulate that prior to and after October 6, 1980, there has not been near as high an absence rate on the bargaining unit represented by CSEA as there was on October 6, 1980.

The District then prepared a second phone questionnaire to be used on Monday to call the 88 people who did not come to work. In this conversation, the employees were asked why they were not at work and what form of verification they would submit to the District to substantiate the taking of a leave.

The third step was a directive to the supervisors entitled "Procedures to Use to Verify Employees' Absence on Monday,

October 6, 1980." The procedures required employees to sign an absence report form and present verified evidence (doctor's statement or vacation verification) justifying the absence. Principals and supervisors were instructed to sign the absence report form only after informing the employee that unauthorized leave would result in a day's loss of pay and possible written reprimand, whereas false reporting would result in stiff discipline which could include dismissal. Administrators were told that employees who insisted that their absences were justified but who lacked verification should be directed to fill out an affidavit before a notary public provided by the District at the District office. Refusal to comply with these procedures was to result in loss of pay and possibly a charge of insubordination. Employees who did not verify their absence pursuant to the District's procedures were not paid.² NO other disciplinary action was taken.

Spring Toms-Oakes, the CSEA chapter president, was required to sign an affidavit to verify her personal necessity leave.

Positions of the Parties

CSEA alleges that requiring verification by either a doctor's letter or an affidavit was a unilateral change in the collective bargaining agreement, specifically section 4.2.6 of

²Twenty-nine employees were paid for the day and fifty-nine were not.

the leave and transfer section.³ The Association based its assertion of a unilateral change on the past practice of the District and the intent of the parties as found in the history of bargaining. Eileen Robinson, who had participated in both the 1977 and 1979 negotiations, testified to the intent of the parties regarding section 4.2.6, as follows:

1. The Merit System Rules (MSR) would apply to the sick leave clause, and 1007(j)⁴ of the MSR required verification of illness by production of a doctor's note only after five days of illness.
2. Prior to the five days, the "reasonable form of proof" that the District could require would be the absence report form negotiated at the table for that purpose.

The past practice of the District, admitted by Dr. Cloud, has been to require verification of illness or injury by a letter from the doctor only after five days as is required under the merit system rules.

³Section 4.2.6 provides, in pertinent part:

An employee shall, when reasonably required by the District, give adequate proof of illness or injury in the form of a letter from his or her physician or such other reasonable form of proof as may be required.

⁴Section 1007(j) of the merit system rules provides:

An employee absent for five working days or more may be required to present a doctor's statement stating the nature of the illness or injury and the date the employee is able to return to work.

The District's position is that it followed the merit system rules in routine situations, but past practice in such routine situations in no way limits or changes their contractually negotiated rights in the event of a sick-out.

Dr. Cloud testified that in 1977, the administrators, who were negotiating with both the certificated and classified employees, were determined to provide language in the leave clause which allowed greater flexibility than the MSR language in order to protect the District in the event of a sick-out or any other occasion where it had good reason to suspect an abuse of sick leave. They wanted language which deleted the five-day requirement, and they got it.

The parties differ as to the proper interpretation of section 1.4.2⁵ of the contract which sets the contract above the MSR where there is an inconsistency between the two.

⁵Section 1.4.2 provides:

Except to the extent that the Merit System (Personnel Commission) Rules are inconsistent with the terms of this contract, or concern subjects within said scope of representation, the Merit System Rules and Regulations shall remain in full force and effect, subject to change in accordance with such rules and regulations and California law.

Exceptions to the foregoing which the parties believe are required because of possible interpretations of the meaning

Ms. Robinson claims the intent of the parties was to have no inconsistency, that the "reasonably required" and "reasonable form of proof" language in section 4.2.6 was an implementation of section 1007(j) of the MSR concerning absences of more than five days. Dr. Cloud contends that the language of section 4.2.6 is inconsistent with the MSR and must be given significance according to the meaning on its face, and that its more open and flexible language must control in this sick-out situation. The parties agree that, when there is an actual conflict between the MSR language and the contract language, the contract prevails.

The District's position is that, in the immediate situation, it had a reasonable suspicion that there would be a sick-out. The suspicion was confirmed by the telephone polling. According to the District, it had the right under the contract to require adequate proof of illness. A doctor's report would be adequate but, in the alternative, a sworn

of scope of representation, are as follows:

- A. The Merit System Rules concern procedural matters relating to entitlement to employee rights, which rights are governed by this contract.
- B. Merit system matters, including but not limited to classification, reclassification, placement on salary schedule, disciplinary appeals, certification and layoff shall be governed by the Merit System Rules.

affidavit would be a reasonable requirement in addition to the normal absence report form.

The District bolsters its position by pointing to section 4.17 of the contract which provides:

No leave may be taken under this article for reasons of participation in employee organization activities of a concerted nature such as work stoppages or the like.

Ms. Robinson admitted that this was added and applied to the whole leave section, not just personal necessity leave, but claims that it referred only to concerted activity sanctioned by CSEA. The District responds that it was intended to apply to concerted activities, whether or not sanctioned or sponsored by an employee organization.

The District's position, then, is that it has two contractual clauses which protect it in the event of an abuse of leave, and that the inconsistency with the MSR only points up the increased flexibility that it has negotiated for itself in the contract. As long as that flexibility is exercised reasonably and non-discriminatorily, it has the power under the contract to assert the requirements that it did set for the October 6 sick-out participants.

The District similarly asserts that it was acting within the contract language when it required additional personal necessity verification from Spring Toms-Oakes. Given the certification requirements of the personal necessity leave

section,⁶ the District contends that an affidavit verifying the absence report form provides proof of personal necessity without requiring disclosure of the actual reason for the leave.

DISCUSSION

Sick Leave Verification

Consistent with subsection 3541.5(b) of EERA,⁷ PERB has authority to analyze and interpret contractual provisions to

⁶Personal Necessity Leave

- 4.5.4 An employee shall be allowed to use three (3) days leave under this section for any other reason except vacation, recreation or business pursuits. The District shall not require the employee to specify the reason for the leave, but shall require the employee to certify that "the leave meets the qualifications of this section 4.5 concerning family need. (Emphasis added.)
- 4.5.5 . . . Excluding subsection 4.5.4, such employee shall supply to the District proof of personal necessity for the purpose of this section 4.5 in the form of a declaration, under penalty of perjury, stating the reasons for such personal leave. Advance notice shall not be required for personal necessity leave, but reasonable notice shall be provided to the District by the employee.
- 4.5.7 The burden of proof of reason for this leave shall be on the employee in disputed cases.

⁷Subsection 3541.5 (b) provides:

- (b) The board shall not have authority to enforce agreements between the parties, and

determine if a unilateral change has occurred. Victor Valley Joint Union High School District (12/31/81) PERB Decision No. 192. As the instant case involves conduct which could independently violate EERA and because no provision for binding arbitration exists to which the Board would defer,⁸ we conclude that the Board is not precluded from reviewing the applicable provisions of the parties' agreement.

Additionally, in Grant Joint Union High School District (2/26/82) PERB Decision No. 196, the Board held that subsection 3541.5(b) permits it to entertain a breach of contract as an independent unilateral change if the employer's conduct evidences a change in policy which has a "generalized effect or continuing impact" on the terms and conditions of employment.

This case falls within the requirement of the Grant decision. If the sick leave verification requirements were a

shall not issue a complaint on any charge based on alleged violation of such an agreement that would not also constitute an unfair practice under this chapter.

⁸Subsection 3541.5(a) provides in part:

(a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following:
. . . . (2) issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration

contract violation, they would also be significant enough to have a generalized effect and continuing impact. However, the Association must first show a violation of the contract. We find in the instant case that the procedures implemented were not a breach but a reasonable application of the contract's provisions. The Board, therefore, rejects the hearing officer's conclusion that the District acted beyond its contractual authority in requiring the verification of absences by either a doctor's letter or, in the alternative, a notarized affidavit.

While the Board will afford deference to the hearing officer's findings of fact which incorporate credibility determinations, we are required to consider the entire record, including the totality of the testimony offered and are free to draw our own inferences from the evidence offered. Santa Clara Unified School District (9/26/79) PERB Decision No. 104.

There is conflicting testimony regarding the intent of the parties when, in negotiations, they agreed to the sick leave and personal necessity leave language. The hearing officer resolved all differences in favor of CSEA.

We find it difficult to reconcile the hearing officer's findings with the history of negotiations and the plain meaning of sections 4.2.6, 4.17 and 1.4.2 of the collective bargaining agreement. The Association's contention that the sick leave section limits the District to the procedure stated in the

Merit System Rules is insupportable in light of the language of the contract.

The MSR mentions only a doctor's statement as proof of illness and requires documentation only after five days. The contract language, on the other hand, adds "such other reasonable form of proof," deletes the reference to five days and explicitly substitutes "when reasonably required." Here, we have distinct calculated differences in language, differences which give credence to Dr. Cloud's testimony that the District was determined to arrive at language which gave it greater flexibility than the MSR language.

In addition, the hearing officer's conclusion that the sick leave language was negotiated by management without it having sick-outs in mind, because there never had been a sick-out in the District, is strained, at best, as it relates to the 1977 negotiations. The addition of section 4.17 in 1979 indicates that, by that time, work stoppages were explicitly considered and discussed.

In Chula Vista Police Officers Assn, v. Cole (1980) 107 Cal.App.3d 242, the court recognized that an employer, through the negotiation process, may alter its rules concerning sick leave to afford itself more protection from a sick-out. Here, the District did precisely as was suggested in Chula Vista, supra. Over the years, it negotiated into the agreement language which provided flexibility in the sick leave procedure

to protect itself when it reasonably suspected that a sick-out had occurred or would occur.

The fact that the District, in its routine procedure, has followed a five-day rule and allowed absence reports to function as adequate verification of illness does not indicate that those are the exclusive procedures allowed under the agreement. The contract language does not require a change in existing practice but, rather, it allows a "reasonable form of proof" "when reasonably required." Here, we have a sick-out by a large number of employees, exactly the kind of situation under which the "when reasonably required" language of the contract might be expected to be utilized to determine who was abusing the sick leave benefit. The District's affidavit requirement is not so burdensome as to make it an unreasonable form of proof, but rather well within the contractual standard of a "reasonable form of proof." The additional requirement that an affidavit be attested to by a notary provided by the District and executed on District time is neither arbitrary nor discriminatory. The requirement reasonably balances the burden of documentation so that those who cannot produce a doctor's statement cannot take advantage of a markedly less burdensome requirement such as merely filling out the absence report form.

Barstow Unified School District (6/11/82) PERB Decision No. 215 and Sacramento City Unified School District (6/28/82) PERB Decision No. 216 are distinguishable from the instant

case. In Barstow, the parties' collective bargaining agreement was silent on leave verification requirements. In Sacramento the District unilaterally changed the reasons for which leave could be taken. In the instant case, we have found that there was no unilateral change because the action taken by the District had been subject to bargaining and was consistent with the agreement reached through the 1977 and 1979 contract negotiations which provided the District with authority to undertake such action.

Personal Necessity Leave Verification

We take the same position with regard to the claim of Spring Toms-Oakes. The additional requirement of a sworn affidavit verifying that her personal necessity leave was taken in accordance with the requirements of the contract was not a unilateral change. The plain meaning of the contract applies. The agreement specifies that the employee certify that the personal leave taken was not used for "vacation, recreation or business." While the contract provides, on the one hand, that the employee need not reveal the reason for the leave as long as it was not for one of the above purposes, it also provides that, in the event of a dispute, the burden of proof rests with the employee. The District's resolution of this conflict by having the employee fill out an affidavit attesting to the validity of the absence report form allows the employee to meet her burden of proof without necessarily revealing the specific reason for the leave.

There is no claim made nor evidence presented that this action was taken because Spring Toms-Oakes was president of the Association.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ORDERED that the subsections 3543.5(a), (b) and (c) violations charged against the District be DISMISSED with prejudice.

Member Tovar joined in this Decision.

Member Jaeger's dissent begins on page 17.

Member Jaeger, dissenting. I dissent from the opinion of the majority and find that the District did violate subsections 3543.5(a), (b) and (c) by taking unilateral action to alter the sick leave verification requirement.

The majority's creative interpretation of, and reliance on, section 4.2.6. of the parties' collective bargaining agreement is misplaced. This section is not clearly written on its face and, being ambiguous, it is susceptible to more than one interpretation. Since the parties have failed to express their intent with clarity, the ambiguity must be resolved by relying on bargaining history and any past practice which may exist. NLRB v. C. & C. Plywood Corp. (1967), 385 U.S. 421, 17 L.Ed. 486.1

The District did not controvert the Association's showing that the merit system rules governed the leave verification requirement. The evidence also demonstrates that the merit system rules were on the table in 1977 and discussed as the verification requirement. It is interesting to note that the District did propose alternate language in 1977 for section 4.2.6. stating:

An employee shall, when required by his or her supervisor, give adequate proof in the form of a letter from his or her physician as required by such supervisor.

¹It is appropriate for the Board to take guidance from federal labor law precedent when applicable to public sector labor relations issues. Fire Fighters Union, Local 1186 v. City of Vallejo (1974) 12 Cal.3d 608 [116 Cal.Rptr. 5071]; Los Angeles County Civil Service Commission v. Superior Court (1978) 23 Cal.3d 65 [15 Cal.Rptr. 547].

The fact that the District did raise the issue of a more stringent sick leave procedure, but during the course of negotiations either dropped its proposal or modified the language to the more benign "reasonable" wording, implies acquiescence. The District did have the opportunity to strengthen its verification procedure and, if it wished to change the practice that existed under the merit system rules, it should have done so during contract negotiations in 1977 and 1979. Otherwise, it ran the risk of having any ambiguity in the language resolved on the basis of construction established by past practice and bargaining history. In this case, the identical leave verification language was incorporated in the agreement of 1977 and again included, without change, in 1979. It would appear, therefore, that in the absence of any change or qualification in the language, the merit system rules control and not the interpretation given by the District and affirmed by my colleagues.

In respect to the majority's reliance on section 4.17 of the contract, I find no basis on which to conclude that this provision reinforces the District's right to alter the leave verification procedure. I agree that the language of this provision means that the District should not subsidize work stoppages by granting paid leaves, but also it does not grant the District the right to unilaterally impose more rigorous verification practices to curtail such activity. Therefore,

only those rights reserved to it in other provisions of the contract can be exercised. Section 4.17 simply does not include a mechanism for its enforcement and we cannot as a matter of law infer an enforcement right that was never negotiated.