

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



GRENADA ELEMENTARY SCHOOL DISTRICT,)	
)	
Employer,)	Case No. S-D-67
)	
and)	(S-R-222)
)	
GRENADA TEACHERS ASSOCIATION,)	PERB Decision No. 387
CTA/NEA,)	
)	June 29, 1984
Employee Organization,)	
)	
and)	
)	
ELIZABETH YOUNG DEALEY, et al.,)	
)	
Petitioners/Appellants.)	
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Appearances: Elizabeth Young Dealey, et al., Petitioners/
Appellants, in pro per; M. Mari Merchat, Attorney
(Kronick, Moskovitz, Tiedemann & Girard) for Grenada
Elementary School District; Kirsten L. Zerger, Attorney
for Grenada Teachers Association, CTA/NEA.

Before Tovar, Morgenstern and Burt, Members.

DECISION

BURT, Member: Appellants are seven teachers in the Grenada Elementary School District (District), six of whom signed a decertification petition seeking to decertify the Grenada Teachers Association, CTA/NEA (GTA or Association) as the exclusive representative of the certificated unit in the District. They appeal a Public Employment Relations Board (PERB or Board) regional office order blocking the election

pending the resolution of unfair practice charges filed by GTA against the District.

FACTS

The Grenada Elementary School District is located in Siskiyou County. The District employs nine teachers who are represented by the Association. The Association was voluntarily recognized by the District in 1976.

The Association and the District have entered into two collective bargaining agreements. The first agreement was executed on March 11, 1980. A second agreement began on July 1, 1981 and expired on June 30, 1982. The District and the Association have not negotiated a successor agreement.

On November 17, 1983, a group of teachers filed a decertification petition against the Association. The regional office issued an administrative determination on December 20, 1983 establishing that the petition was timely filed and accompanied by adequate proof of support pursuant to PERB regulation 32770.1

The Association filed an unfair practice charge (Case No. S-CE-712)² against the District on December 23, 1983 and amended the charge on February 14, 1984. As a part of its

¹PERB regulations are codified at California Administrative Code, title 8, section 31001, et seq.

²We hereby take administrative notice of the PERB case files in Case Nos. S-CE-712 and S-CE-524.

unfair practice charge, the Association requested a stay of election in accordance with regulation 32752, which provides that PERB may stay an election where the conduct alleged would affect the election process and interfere with employee free choice.

The Association's charge, as amended, contains a lengthy recitation of alleged violations, many dating back over two years.

Many of these charges, and a few others, were included by the Association in its previous charges in Case No. S-CE-524, filed on July 19, 1982. A general complaint issued in that case on September 21, 1982. The file in that case reflects that those charges were withdrawn with prejudice pursuant to a settlement agreement signed by GTA and the District on February 22, 1983. In return for withdrawal of charges, the District agreed to abide by the law. The Board was not involved in the settlement.

In the instant case the regional office dismissed some of the charges and issued a complaint on March 13, 1984, charging the District with violating subsections 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA)³ by

³The EERA is codified at Government Code section 3540 et seq. Unless otherwise noted, all references are to the Government Code.

refusing to negotiate in good faith. The material allegations of the complaint are that the District:

1. Reneged on a tentative agreement on October 11, 1983,
2. Failed to provide a final typed version of a tentative agreement reached October 31, 1983,
3. Refused to bargain with the Association since on or about November 14, 1983, and
4. On or about November 22, 1983, took unilateral action on a required subject of bargaining by resolving to give a one-time pay increase to unit members without negotiating with the Association and subsequently distributing the money.

In support of these allegations, the Association has charged that the parties, after negotiating since March 1982, reached agreement on a successor contract on August 25, 1983, subject only to putting the agreement in writing and securing the ratification of the parties. The agreement was to be typed and mailed by September 2, but the Association did not receive it until September 23. The Association further alleges that the typed version contained many omissions and oversights about which the Association's negotiator unsuccessfully attempted to contact the District's negotiator by phone. The Association negotiator wrote to the District outlining the problems on October 7. The District negotiator responded by phone on October 11, indicating that the school board refused to accept the document as a tentative agreement, wished to change its

mind about salary, no longer wanted a three-year agreement, and had problems with the agreement generally. The parties met again on October 31, and once again reached tentative agreement. The agreement was to be typed by the District and sent to the Association by November 9, with ratification by the teachers set for November 14. The District failed to perform these tasks, and refused to negotiate with GTA after the decertification petition was filed.

With regard to the alleged unilateral change in wages, the Association contends in its charge that salary has been a major item in negotiations, with the District offering no increase for 1982-83. The Association questioned whether the District was in compliance with Education Code section 41372, which mandates that no less than 60 percent of an elementary school district's costs shall be for instructional salaries. Specifically, the Association's bargaining chair raised this issue at a school board meeting in October 1982.

GTA further contends that on December 14, 1983, after the filing of the decertification petition, the District notified all teachers that they would receive an immediate increase in salary in order to bring the District into compliance with this section of the Education Code. On January 18, 1984, the District distributed the money. The Association was never given an opportunity to negotiate about this change.

The Sacramento regional office notified all interested parties in a letter dated March 15, 1984, that an investigation was being conducted to determine whether or not the election should be stayed pending resolution of the unfair practice complaint. The parties were afforded an opportunity to submit facts or legal argument and responding argument to the issue of the stay. The District, the Association and the Petitioners all responded.

On April 18, 1984, the regional office issued its administrative determination finding that the conduct alleged in the complaints, if found to be true, would preclude the holding of a fair election. Citing National Labor Relations Board (NLRB) and PERB precedent, the Board agent set out the reasons for the blocking charge rule and the rationale for finding that bad faith bargaining allegations block elections. He then analyzed each charge against the District: surface bargaining "has the effect of frustrating the ability to reach a negotiated settlement"; an outright refusal to bargain is "tantamount to ignoring the existence of the Association and might well have contributed to the teachers' view that the Association is impotent and unnecessary"; unilateral action necessarily undermines the exclusive representative in the eyes of employees.

The Board agent noted that the District defended its refusal to negotiate and its unilateral change by arguing that

these actions were justified by a good faith doubt as to majority status of the Association. He cited NLRB v. Carilli (CA 9 1981) 648 P.2d 1206 [107 LRRM 2961], however, to conclude that the claim of good faith doubt of majority status is not available to an employer as a defense to a refusal to bargain when the employer itself has undermined the organization's support.

Finding that the conduct alleged would preclude the holding of a fair election, the regional office therefore stayed the decertification election pending the resolution of the unfair practice complaint. The Petitioners appeal this determination. The District filed "Exceptions in Support of Appeal" of Petitioners, and the Association responded to both.

DISCUSSION

The Board applied a blocking charge rule in Jefferson School District (6/29/79) PERB Decision No. Ad-66, noting that a decision to stay an election will not be exercised by rote, but will be made on the facts of each case. It there found it proper to block an election where

. . . the employees' dissatisfaction with their representative is in all likelihood attributable to the employer's unfair practices rather than to the exclusive representative's failure to respond to and serve the needs of the employees it represents.

The Board there directed the regional director to

. . . conduct an investigation to determine whether a danger remains that the District's

alleged unlawful conduct will so affect the election process as to prevent the employees from freely selecting their exclusive representative.

Subsequently, it codified that rule in regulation 32752, following the practice of the NLRB in the private sector:

The Board may stay an election pending the resolution of an unfair practice charge relating to the voting unit upon an investigation and a finding that alleged unlawful conduct would so affect the election process as to prevent the employees from exercising free choice.

The NLRB's blocking charge rule was upheld by the court in Bishop v. NLRB (5th Cir. 1974) 502 F.2d 1024 [87 LRRM 2524] noting that:

In the absence of the "blocking charge" rule, many of the NLRB's sanctions against employers who are guilty of misconduct would lose all meaning. Nothing would be more pitiful than a bargaining order where there is no longer a union with which to bargain.

This principle has been applied in bad faith bargaining cases, such as NLRB v. Big Three Industries, Inc. (5th Cir. 1974) 497 F.2d [86 LRRM 3031] where the court held:

It would be particularly anomalous and disruptive of industrial peace to allow the employer's wrongful refusal to bargain in good faith to dissipate the union's strength, and then to require a new election which 'would not be likely to demonstrate the employee's true undistorted desires.'

.....

The reasoning underlying this limitation on temporary employee sentiment flows from the

Supreme Court's decision in Frank Bros. (321 U.S. 702, 14 LRRM 591). As the Court there stated, 'Out of its wide experience, the Board many times has expressed the view that the unlawful refusal of an employer to bargain collectively with its employees' chosen representative disrupts the employees' morale, deters their organizational activities, and discourages their membership in unions.'¹

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(Blocking a decertification petition) works no injustice to the employees. In the first place, courts have long recognized that employee free choice is not necessarily reflected in an election where the employer, by committing substantial unfair labor practices, has poisoned the electoral well. (Citations omitted.) Indeed, a decertification petition tendered on the heels of employer unfair labor practices may 'merely indicate that the unfair labor practices . . . continue to affect employee sentiment and make a fair election impossible.' NLRB v. Kaiser Agricultural Chemical (5th Cir. 1973) 473 F.2d 374.

Taken together, these cases establish that an election may properly be blocked where there has been a failure to bargain in good faith, since that conduct by its very nature undercuts support for an individual union or unions in general, and renders a fair election impossible.

Petitioners here assert that their decertification petition was in no way related to any alleged unfair practices by the employer. They allege that the effectiveness of GTA is not at issue; simply that the teachers at Grenada do not wish to be represented. They conclude that GTA has lost no support among

these teachers at Grenada since it never had that support so the District's actions could have had no causal connection with the move to decertify.

The District cites several facts which it says are relevant to the decision whether to stay the election, and which were allegedly ignored by the Board agent. The District notes that six of the nine members of the unit signed the decertification petition, and notes as well two letters dated March 19 and March 29, 1984 filed by Petitioners and signed by seven unit members urging PERB to proceed with the election. It further asserts that only one of the petitioning teachers had ever been a member of GTA, and only briefly, and it is therefore untrue that GTA has lost support. It claims that the Association has had plenty of time to prove itself to the employees. The District also asserts that the Board agent ignored the wishes of those in the unit, and their assurances that a fair election could proceed. The District concludes that, while blocking charge cases frequently deal in speculation (whether misconduct has a likelihood of affecting the employees), the Board may here deal in certainties, based on the assurances of the unit members.

In Regents of the University of California (SUPA) (4/17/84) PERB Decision No. 381-H, the Board addressed the primary argument raised by Petitioners, i.e., the claim that the filing of the decertification petition was not motivated by any action

of the District, but rather by a wish to eliminate the exclusive representative. The Board found that the motivation of the individual petitioners in seeking a decertification election is not determinative. Following the Board's regulations, the regional director is directed to investigate not the reasons the petition was filed, but whether the alleged unlawful conduct would so affect the election process as to prevent the employees from exercising free choice.

Certainly this case differs from SUPA, supra, since here the District actually has the assurance of seven of the nine members of the unit concerning the reasons for filing the petition and the possibility of a fair election. Nevertheless, as demonstrated by the NLRB cases above, the proper focus of the Board agent's inquiry is an objective evaluation of the probable effect of the conduct alleged and the possibility of a free election.

Both the Petitioners and the District argue here that the Association's strength was not dissipated, since over time the unit simply lost the members who supported the Association and gained others who did not. That argument ignores the fact that, if the Association's bad faith bargaining charges are true, the new employees in the District were not faced with the presence of an effective representative, but rather a representative which was impotent and ineffective because of the District's illegal actions.

The District objects to the Board agent's reliance on Big Three, supra, since, in that case, the Association was newly certified and had not had an opportunity to prove itself to its members. The District contends that is not the case here, since GTA has been certified since 1976 and has had ample time to prove itself to employees. However, the Board agent did not rely exclusively on Big Three, supra, in finding it appropriate to block an election in the face of an alleged refusal to bargain in good faith. Bishop, supra, which involved a number of unfair labor practices including a refusal to bargain in good faith upheld the NLRB's blocking charge rule in a situation in which the collective bargaining relationship had existed for some time.

The District also challenges the legal conclusions of the Board agent and his reliance on Big Three, supra, with regard to the District's duty to negotiate and to refrain from unilateral changes after the filing of a decertification petition. (In his letter, the Board agent noted that the NLRB has determined that an employer may not raise good faith doubt of majority status as a defense for refusing to bargain where the employer has undermined the employee organization's support. NLRB v. Carilli, supra. The District points to recent NLRB cases concluding that the employer has no duty to negotiate with a representative when it has a reasonable good faith doubt of majority status. Dressier Industries Inc.

(1982) 264 NLRB 145 [111 LRRM 1436]; RCA Del Caribe (1982) 262 NLRB 116 [110 LRRM 1369]. See also Pittsburg Unified School District (6/10/83) PERB Decision No. 318.

The District's argument essentially states its defense to the merits of the charge. As we stated in Pleasant Valley, p. 7:

This is a matter to be addressed in the unfair practice hearing. It is neither the Board agent's obligation nor function to resolve disputed facts or venture into a pre-judgment of the merits of the unfair practice complaint.

We find, then, that the District's obligation to negotiate under these circumstances is properly resolved through the hearing process, and is not properly considered by the Board at this stage of the proceedings.

In urging that the Board proceed with the election in order to effectuate the wishes of the members of the unit, the District relies on Templeton v. Dixie Color Printing Company (5th Cir. 1972) 463 F.2d 378 [80 LRRM 2804], and Surratt v. NLRB (5th Cir. 1972) 463 F.2d 378 [80 LRRM 2804] where the court ordered the NLRB to lift its blocking order and process decertification petitions. In Templeton, the petition had been dismissed without investigation based on unfair practice charges which were ten years old. In Surratt, the petition was dismissed based on charges which were not sustained at hearing and were on appeal to the board, resulting in litigation which

had been ongoing for three years. Here the charges are current, there has been no hearing officer's decision dismissing the charges and the case is receiving expedited treatment.⁴ Further, the 5th Circuit decided the Bishop case after Templeton and Surratt, characterizing those decisions as limited to situations where the Board has followed a per se rule, without any effort to make a determination on a case-by-case basis. Here the decision to stay the election was made after a thorough review of the specific charges filed and the probable effect of the conduct alleged in the complaint on a decertification election.

The District also complains that the Board agent improperly presumed that the allegations in the complaint are true for purposes of his analysis. However, it is clear that the Board has directed its agents to do so for purposes of evaluating whether or not an election should be blocked. Pleasant Valley Elementary School District (2/28/84) PERB Decision No. 380.

Petitioners and the District also claim that the regional office ignored evidence developed in its investigation, particularly with regard to the unilateral change, since the change occurred after the decertification petition was filed and could have had no effect on the decision to seek

⁴The complaint was heard in an expedited hearing on May 29, 30 and 31, 1984. The administrative law judge has not yet rendered a decision.

decertification. We find the fact that some of the District's alleged actions occurred after the filing of the petition rather than before is immaterial in determining whether or not a fair election is possible. Again, the focus remains not on the reasons for filing a decertification petition, but on the ability of the members of the unit to exercise free choice in an election untainted by the employer's unfair practices.

The Association argues that PERB may rely on conduct occurring outside the six-month statutory limitation in determining whether a decertification election should be blocked. The Association acknowledges that this conduct may not sustain an independent violation of EERA, but it nevertheless contends that, just as evidence of such conduct may be used to shed light on events occurring within the time limits, it may be considered in evaluating whether or not a fair election is possible.

We reject the Association's claim that the regional office should consider conduct occurring outside the six-months limitation period covered by the complaint in deciding to stay an election. The Board's investigation and decision to block occurs only pursuant to the filing of timely charges alleging conduct which would interfere with a free election. Since PERB's investigation is a limited one which involves primarily an investigation and analysis of the charges filed, it is improper for the regional office to reach beyond the subject

matter of the complaint in making its decision whether or not to block.

The Board will defer to the Board agent's determination that an election should be blocked pursuant to PERB rule 32752 when that order is the result of a sufficient investigation and analysis of the allegations of the complaint and the potential impact on the employees in the unit, and the agent's conclusions are amply supported by the record. Pleasant Valley, supra; Regents (SUPA), supra. We find that those conditions have been met here, and we therefore affirm the regional office's stay of the decertification election in this case.

ORDER

Based on the foregoing, and on the record as a whole, the Public Employment Relations Board hereby DENIES the appeal of the regional office's order staying the election in Case No. S-D-67 and AFFIRMS that order.

Members Tovar and Morgenstern joined in this Decision.