

9 PERC ¶ 16042

GILROY UNIFIED SCHOOL DISTRICT

California Public Employment Relations Board

Gilroy Federation of Teachers, AFT Local 1921, AFL-CIO, Charging Party, v. Gilroy Unified School District, Respondent.

Docket No. SF-CE-608

Order No. 471

December 28, 1984

Before Hesse, Chairperson; Tovar, Jaeger, Morgenstern and Burt, Members

Refusal To Bargain -- Release Time -- Union's Selection Of Negotiating Team -- 22.51, 41.21, 41.132, 43.169, 72.18, 72.23, 72.533, 72.589 Where teachers' union selected one negotiating team, comprised of both classified and certificated employees, for collective bargaining over provisions of both unit contracts, school district violated its duty to bargain in good faith by refusing to negotiate or provide release time on ground that release time could not be granted to members of one unit for purpose of negotiating on behalf of other unit. In addition, district's action constituted interference with union's right to determine composition of its negotiating team. ALJ's decision, 6 PERC 13215 (1983), affirmed.

APPEARANCES:

Garry, Dreyfus & McTernan, Inc. by Janet K. King, Attorney, for Gilroy Federation of Teachers, AFT, Local 1921, AFL-CIO; Littler, Mendelson, Fastiff & Tichy by Patricia P. White, Attorney, for Gilroy Unified School District.

DECISION

BURT, Member: The Gilroy Unified School District (District) excepts to the finding by an administrative law judge (ALJ) of the Public Employment Relations Board (PERB or Board) that it violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA)¹ by refusing to negotiate paid release time for all employee members of the bargaining committee of the Gilroy Federation of Teachers, AFT, Local 1921, AFL/CIO (AFT) [see 6 PERC 13215 (1982)].

FACTS

The original charge alleged that the District interfered with employee and organizational rights by refusing to provide AFT's bargaining committee with reasonable paid release time as required by the EERA section 3543.1(c).² The charge was later amended to include an allegation that the District had refused to negotiate on release time in violation of section 3543.5(c). Neither the original nor amended charge detailed the District's allegedly unlawful conduct.³ However, during the unfair practice hearing, evidence was presented as to the following:

AFT was the exclusive representative for both the classified and the certificated units. It used a single bargaining committee composed of both certificated and classified employees to negotiate contracts for both units. Several times in the past, AFT had used mixed teams to negotiate classified contracts and once to negotiate a supplemental contract for certificated employees.

From the start of negotiations in the summer of 1981, the District and AFT bargained for both units at the same sessions. Agendas included items concerning teachers and aides and the District

made counterproposals to both units. When school resumed in September, AFT proposed that negotiations take place during the workday and that the District provide paid release time to all of its committee members. The District proposed that negotiations for the two units take place separately during school hours.

Although there is no record of any reference to the composition of the AFT committee or to release time in the District proposal, it is clear that the District's position was to refuse to pay certificated or classified employees while engaged in negotiations on behalf of a unit other than that in which they were employed. Larry Gable, AFT's negotiator for both units on economic issues, testified that when they requested release time for all members of the negotiating team:

The District's response was that it did not want to give release time to certificated members to bargain aide issues and vice versa. They [sic] were to be two separate teams, certificated bargaining, certificated issues and aides bargaining, aide issues.

He later testified that there,

. . . was no problem with agendas that included both aide and certificated issues. The problem was getting reasonable release time to negotiate those agendas.

District negotiator Dave Downey testified:

No, we wouldn't mind if certificated wanted to take time off without pay. We would be concerned that they would be out of the classroom, but we've never objected to who represents them.

And later in the same testimony:

Our offer was to negotiate during the day and provide released time for those bargaining unit members whose issues we were bargaining.

And finally, he stated:

I can assure you, we were not willing to provide released time to certificated bargaining unit members to negotiate on classified issues.

In view of the stalemate, AFT rejected the District's proposal and suggested that the parties return to negotiations after school hours. The parties did so, negotiating for both units at the same sessions.

AFT then filed the instant charge. Shortly thereafter, the District filed an unfair practice charge alleging that AFT unlawfully insisted upon negotiating for both units at the same time.

Prior to the commencement of the PERB hearing, the parties entered into a stipulation pursuant to which the District withdrew its charge and AFT agreed to negotiate for each unit in separate sessions in the future. The stipulation was silent on the question of release time but explicitly acknowledged the parties' right to use bargaining committee members of their own choosing.

DISCUSSION

An employee organization has the right to choose its own bargaining representative. *General Electric Co. v. NLRB* (2d Cir. 1969) 412 F.2d 512 [71 LRRM 2418]; *San Ramon Valley Unified School District* (8/9/82) PERB Decision No. 230, p. 16. The EERA places no limitations on this right. Moreover, EERA section 3543.1(c) provides that:

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

A refusal to grant released time is a violation of 3543.5(b). *Muroc Unified School District* (12/15/78) PERB Decision No. 80; *Magnolia School District* (6/27/77) EERB Decision No. 19.4

Release time proposals are within the scope of representation and the parties may negotiate what constitutes a "reasonable" number of representatives and a "reasonable" amount of release time. In the instant case, AFT at all times wished to employ a single bargaining committee composed of both classified and certificated employees. Although the subject of release time arose in negotiations and the District made several offers, it is clear that, at all times, the District denied any obligation to grant or negotiate even a minimal amount of release time for employee-members of AFT's mixed bargaining team while negotiating on behalf of the unit in which they were not employed. Thus, the central issue raised by these facts is whether the District violated section 3543.5(a), (b) and (c) by refusing to negotiate release time for employee-members of the union bargaining team, irrespective of which unit they were bargaining for. We conclude that the answer depends on the particular course the negotiations take.

The record supports a finding that the parties contemplated three distinct negotiating procedures during the course of their discussions: 1) negotiation, during *separate* sessions, of separate and independent contracts for the classified and certificated units; 2) negotiation, during the *same* sessions, of separate and independent contracts for the classified and certificated units;⁵ and 3) merger of both unit negotiations.⁶

Coordinated bargaining

This practice, usually involving bargaining teams with members from different unions representing other groups of the employer's workers, is common in the private sector and has found administrative and judicial approval.⁷ In *General Electric Co. v. NLRB* (2nd Cir. 1969) 412 F.2d 512 [71 LRRM 2418], the court noted that section 7 of the National Labor Relations Act (NLRA) guarantees the right of employees to bargain through representatives of their own choosing and that an employer cannot object to the selection of representatives unless there is a "clear and present danger" to the collective bargaining process. The court explained why coordinated bargaining receives section 7 protection, pointing out that through this practice the union can enhance its bargaining expertise and counterbalance the employer's centralized formulation of labor relations policy. See also, *Standard Oil Co. v. NLRB* (6th Cir. 1963) 332 F.2d 40 [50 LRRM 1238]; *Minnesota Mining & Mfg. Co.* (1968) 173 NLRB 275 [69 LRRM 1313]; *NLRB v. Indiana & Michigan Electric Co.* (7th Cir. 1979) 599 F.2d 185 [101 LRRM 2470]. In *American Radiator and Standard Sanitary Corp.* (1965) 155 NLRB 736 [60 LRRM 1385], the NLRB concluded that the composition of the employees' bargaining committee is the internal business of the union over which the employer has no control and that the employer was not relieved of its duty to bargain by the presence of "outsiders" on the employees' negotiating team.

Merged/Coalition bargaining

It is necessary at the outset to distinguish between the negotiations of separate unit agreements during common sessions ("coordinated" bargaining) and the merger of negotiations for two or more units ("coalition" bargaining). In the first case, the respective unit proposals are considered independently of each other and the settlement of one contract is not dependent upon the settlement of the other. The only significant area of commonality is the use of the same bargaining sessions to address the separate issues. In coalition bargaining, however, negotiations are directed toward similar contracts, containing the same or similar provisions. Further, the settlement of each contract is usually dependent upon the settlement of the others. The fundamental legal distinction that we perceive between coordinated and coalition bargaining is that the first is a mandatory subject of bargaining requiring good faith response, and the other is not. See, I. Morris, *The Developing Labor Law* (2d Ed. 1983) pp. 666-667.

The use of common bargaining sessions to negotiate separate agreements merely goes to the time and place of negotiations and does not impinge on the integrity of the individual units or the employer's right to consider unit proposals on their own merits. For example, there is no significant difference between a negotiating session during which the parties spend the first hour

on teachers' issues and then proceed to classified issues for the remaining hour and two separate sessions of one hour each, separated by just enough time to close one session and open the other. It follows that a proposal to negotiate two separate contracts during the same bargaining sessions falls within the right of a party to suggest reasonable times and intervals for bargaining sessions. See *Anaheim Union School District* (11/28/81) PERB Decision No. 177.

On the other hand, the merger of two or more unit negotiations inherently alters the finding of unit appropriateness established by the recognition or certification process and affects the employer's resulting bargaining obligation. The duty imposed on employers and labor organizations to bargain collectively:

is predicated on the cardinal principle that the existing unit, whether established by certification or voluntary recognition, fixes the periphery of the bargaining obligation.

Utility Workers Union of

America AFL-CIO (1973) 203

NLRB 55.

In *Operating Engineers Local 428* (1970) 184 NLRB 112, the NLRB, citing *Douds v. International Longshoremen's Association* 241 F.2d 278, *NLRB v. Wooster Division of Borg-Warner Corp.* 356 U.S. 342, and others, stated:

. . . it is well established that the integrity of a bargaining unit, whether established by certification or voluntary agreement of the parties, cannot as here be unilaterally attacked. The conduct of negotiations on a basis broader than the established bargaining unit is nonmandatory, and the Respondent's insistence that the Charging Party engage in such bargaining was violative of the Act.

It follows that a proposal for merger of unit negotiations cannot be deemed a mandatory subject for bargaining. To justify a refusal to bargain on these grounds, however, a considerable burden lies with the employer to establish that it had adequate basis for concluding that the union's intent was to force the employer to engage in such nonmandatory coalition bargaining. *Harley Davidson Motor Co., Inc.* (1974) 214 NLRB 433 [87 LRRM 1571]; *NLRB v. Indiana & Michigan Electric Co.* (7th Cir. 1979) 599 F.2d 185 [101 LRRM 2470]; Morris, *The Developing Labor Law, supra*, at p. 670.

In the instant case, it is difficult to be certain whether AFT intended the negotiations in the fall to be coordinated or merged. The evidence on this point is lean and what exists is ambiguous. AFT contends, however, that it intended to negotiate each contract separately and that a mixed team was chosen in order to enhance the union's negotiating expertise and, hopefully, to streamline the process. The burden is on the employer to show that they had adequate basis for concluding this was not the case, however, and we find the District did not satisfy this requirement. The issue, thus, is whether the EERA, like the NLRA, protects coordinated bargaining.

The EERA adopts the NLRA section 7 principle of protecting the employees' free choice of representatives. Section 3543 provides, in part, that employees shall have 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 3540.1(d) includes in the definition of employee organization, "any person such an organization authorizes to act on its behalf."

We do not read the provisions relied on by the District as proscribing coordinated bargaining. Nothing in section 3543.1(c) specifies who may or may not serve as "representatives of an

exclusive representative" or otherwise negates the contrary indication of section 3540.1(d). Nor do we construe the use of the disjunctive "or" in section 3540.1(e),⁸ read alone or together with section 3545(b)(3),⁹ to have such an effect. The first of these sections merely defines an exclusive representative. The second precludes the placement of classified and certificated employees in the same bargaining unit.

In its exceptions, the District contends that the difference in community of interest between the two groups underlying the prohibition against combined units is germane to the issue of paid released time. We disagree. Granted, for the sake of argument, that the Legislature perceived the differences between the interests of classified and certificated employees as being sufficiently substantial to preclude a combined unit, section 3543(b)(3) should not be stretched to include an intention to bar the use by classified employees of teacher-negotiators possessing special negotiating skills or particular knowledge pertinent to classified employee concerns. Both qualifications are irrelevant to the differences in community of interest and both enhance the employee organization's ability to deal with the employer's centrally formulated labor relations policy.

Had the Legislature intended to prohibit the use of mixed committees, it could have done so by specific interdiction as it did elsewhere in EERA and as it did in the State Employer-Employee Relations Act (SEERA).¹⁰ EERA section 3543.4 limits the right of managerial and confidential employees to representation by organizations composed exclusively of such employees. SEERA section 3522.2 is an even clearer demonstration of the legislative ability to put its objections into language which leaves no doubt as to its intentions. It reads:

(a) Supervisory employees shall not participate in the handling of grievances on behalf of nonsupervisory employees. Nonsupervisory employees shall not participate in the handling of grievances on behalf of supervisory employees.

(b) Supervisory employees shall not participate in meet and confer sessions on behalf of nonsupervisory employees. Nonsupervisory employees shall not participate in meet and confer sessions on behalf of supervisory employees.

(c) The prohibition in subdivisions (a) and (b) shall not be construed to apply to the paid staff of an employee organization.

(d) Supervisory employees shall not vote on questions of ratification or rejection of memorandums of understanding reached on behalf of nonsupervisory employees.

Presumably, the Legislature was mindful of and approved the well-established principle that an employer is entitled to the undivided loyalty of its supervisory cadre, and that such loyalty would be compromised if supervisors were permitted to join with their subordinates in bargaining with the employer.¹¹ However, the Legislature is also presumed to have been aware of the practice of coordinated bargaining, yet EERA contains no prohibition against the practice. We conclude that it has legislative approval.

The District insists that the Legislature nevertheless disapproved paid release time for such lawful committees. When the purposes of coordinated bargaining committees is considered together with the rationale underlying section 3543.1(c), we are led to the conclusion that employee members of a bargaining committee are entitled to the benefits of the EERA provision irrespective of their unit membership.

In *Anaheim Union School District, supra*, this Board found that a legislative purpose in enacting section 3543.1(c) was to further its interest in expedited negotiations. Toward that end, it made it possible for employees to conduct negotiations during school hours without loss of pay. Employee negotiators would not be forced either to bargain during personal time or forfeit pay for sessions during school time, either of which would likely result in shorter bargaining meetings

over a longer period of time. To adopt the District's reasoning here would be counterproductive to the legislative objective.

These considerations aside, we find the District's refusal to negotiate paid release time under any circumstances for all employee-members of the committee violates section 3543.5(a) because it inherently interferes with the employees' exercise of their statutory right to choose their own representatives. The District's refusal, if upheld, would have the tendency to discourage those employees who would not be provided with the benefits of section 3543.1(c) from serving on bargaining committees. In so deciding, we consider the District's attempt to justify its position by expressing concern that teachers, who participate in bargaining on behalf of classified employees as well as on their own behalf, would be away from their classrooms twice as often as would otherwise be necessary.

We find in the record no evidence that the District entertained the thought of meeting its concerns by proposing that negotiations be divided between school and after-school hours with paid release time limited to the daytime sessions. In response to the ALJ's questions concerning this possibility, the District was only unable to recall *AFT* ever making such a proposal. The District clearly made none of its own, remaining immovable in its rejection of paid released time for some members of the committee.

In view of the fact that the District did not refuse to negotiate with a mixed committee for both units and, indeed, acknowledged AFT's right to use such a committee, it is possible that it hoped to discourage that practice by its refusal to provide paid time off. If so, such a strategy must fail. At any rate, it is our view that the right to choose one's own representatives is the *sine qua non* of the collective bargaining scheme. The employees' opportunity to exercise that right has not been outweighed by the justification the District offers.¹²

Further, the District's refusal to consider paid release time violated section 3543.5(b). By its tendency to discourage participation on the AFT committee, the proposal would give the District the opportunity to assert prohibited control over the committee's composition and interfere with AFT's right, as exclusive representative, to authorize any person to act on its behalf.

In *Anaheim*, the Board indicated that the area of negotiability open to the employer included the total number of negotiators to be provided with paid release time and the amount of time during which such payment would be made. The Board intended then, and now makes clear, that an employer may not insist, as the District attempted to do here, on which particular employee members of the committee shall be granted release time.

CONCLUSION

The District's refusal to grant or negotiate any release time for the negotiation of separate agreements for the two units violated EERA section 3543.5(c) and, concurrently, sections 3543.5(a) and (b).

ORDER

Based on the record before it, the Public Employment Relations Board ORDERS that the Gilroy Unified School District shall cease and desist from refusing to negotiate the matter of paid release time for any employee-members of the exclusive representative's bargaining committee while engaged in negotiations conducted in a manner protected by EERA, as herein described.¹³ Members Tovar and Jaeger joined in this Decision.

¹ EERA is codified at Government Code section 3540 et seq. All statutory references hereafter are to the Government Code unless otherwise indicated.

² Section 3543.1(c) reads:

(c) A reasonable number of representatives of an exclusive representative shall

have the right to receive reasonable periods of release time without loss of compensation when meeting and negotiating and for the processing of grievances.

3 The District filed no exception to the ALJ's failure to consider the objection raised in its answer that the charge failed to state a prima facie case. Board regulation 32300(c) provides that a matter not excepted to is deemed waived.

4 Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board.

5 This is referred to as "coordinated" bargaining.

6 This is referred to as "coalition," or "merged" bargaining.

7 See Gorman, *Labor Law Basic Text* (1976) pp. 404-405.

8 Section 3540.1(e) reads:

. . .

(e) "Exclusive representative" means the employee organization recognized or certified as the exclusive negotiating representative of certificated or classified employees in an appropriate unit of a public school employer.

9 Section 3545(b)(3) reads:

. . .

(3) Classified employees and certificated employees shall not be included in the same negotiating unit.

10 SEERA is codified at Government Code section 3512 et seq.

11 See *Sacramento City Unified School District* (3/25/80) PERB Decision No. 122.

12 *Carlsbad Unified School District* (1/30/79) PERB Decision No. 89.

13 Because AFT is no longer the exclusive representative of both the certificated and classified units, we do not order the posting of a remedial notice.

MORGENSTERN, Member, dissenting: Stripping away an abundance of verbiage on issues only peripherally, if at all, related to this case, the gist of the majority's Decision is that the District violated its obligation to negotiate in good faith by adopting and maintaining the position that it would not agree to an Association proposal that it provide released time for employee members of one unit to bargain on behalf of a different unit. The majority does not otherwise fault the District's bargaining conduct and concedes that the District negotiated regarding released time on at least six occasions and advanced several proposals on the subject.¹

In our view, no violation can be found on these facts.

We have long held, consistent with federal precedent, that EERA does not require the parties to negotiations to reach agreement or make concessions on every proposal. Thus, adamant insistence on a bargaining position is not necessarily a refusal to bargain in good faith. Rather, it is necessary to consider the totality of the circumstances. *Oakland Unified School District* (11/2/81) PERB Decision No. 178.

Here, the District demonstrated a good faith effort to reach agreement on the released time issue by making two significantly different counterproposals of its own, and by willingly discussing the subject on six separate occasions. In addition, there is testimony that the District was particularly eager to reach agreement on released time because *its* negotiating committee also preferred to meet during school hours. Given these facts, we cannot conclude that the District lacked the requisite good faith or subjective intent to reach agreement as to constitute bad faith bargaining.

Pajaro Valley Unified School District (5/22/78) PERB Decision No. 51; Muroc Unified School District (12/15/78) PERB Decision No. 80.

Moreover, we would find that the specific proposal to which the District refused to accede was beyond the scope of representation under EERA.² The District, therefore, had no obligation to negotiate the proposal.

In *Anaheim Union High School District (10/28/81) PERB Decision No. 177*, we held that, although released time is not a specifically enumerated subject in scope, it is logically and reasonably related to both the wages and hours of employment of unit members and, therefore, is negotiable. As the majority itself notes, the Board indicated that the area of negotiability includes the *number* of representatives released for negotiations and the *amount* of time to be compensated: that is, what constitutes a "reasonable" number of representatives and a "reasonable" amount of released time as required by section 3543.1(c).³

The Board did *not* suggest that the *identity* of the Association's team is negotiable nor that released time, or any other matter pertaining to persons who *are not members of the bargaining unit*, are negotiable. See, e.g., *Healdsburg Union High School District and Healdsburg Union School District/San Mateo Unified School District (1/5/84) PERB Decision No. 375* (proposals affecting short-term employees who are not unit members are out of scope); *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.* (1971) 404 U.S. 157 [78 LRRM 2974] (benefits of retired employees who are not members of the unit are not mandatory subjects of bargaining).

Similarly, here, the Association's proposal to provide released time for nonunit members is simply not logically or reasonably related to the wages, hours, or any condition of employment of *members of the bargaining unit* and is, therefore, out of scope. *Anaheim, supra*.

As the majority correctly notes, the Association has a broad right to freely select its bargaining committee. That right is not at issue in this case, the majority's arguments notwithstanding.⁴ Thus, a union may include on its bargaining committee, for example, local and international union staff, lawyers, experts, and members of sister locals as well as, in this case, members of other bargaining units represented by the same employee organization. While the employer is obligated to negotiate in good faith with the committee regardless of its composition, nothing in the Act or in any reasonable approach to the collective bargaining process requires an employer to provide, or indeed, to negotiate regarding the provision of, released time or any other form of compensation for members of the employees' bargaining committee not in the bargaining unit.

While the majority requires management to negotiate and grant released time to any employee, we find, to the contrary, that the released time mandated by section 3543.1(c) is necessarily limited to representatives *in the bargaining unit*. In this way, employee organizations are guaranteed an opportunity to be represented (at least in part) by people who work at the jobs that the negotiations concern. This is a logical approach to collective bargaining consistent with the history of public sector labor relations and with EERA's statutory scheme which is based, fundamentally, on the representation of employees *in an appropriate unit*.⁵

The majority's elaborate exercise in statutory construction does not compel a different conclusion and is simply misleading. Its extensive discussion of legislative intent serves only to establish that coordinated bargaining is permitted under the EERA, a conclusion with which neither we nor the District disagree. Rather, our disagreement centers on the majority's giant leap to conclude that *because* coordinated bargaining is permitted, the employer is, therefore, obligated to provide released time for all employees on the union bargaining committee. This reasoning is a logical non sequitur which is without support in either the language of the Act or sound policy considerations.

Chairperson Hesse joined in this Dissent.

1 The District offered to provide released time for bargaining unit members while negotiating for their unit. It later offered to provide released time for each bargaining unit, with back-to-back negotiating sessions and a break between the two sessions for the teams to caucus and compare notes.

2 Section 3543.2 provides, in pertinent part, as follows:

(a) The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits . . . leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security . . . procedures for processing grievances . . . and the layoff of probationary certificated school district employees. . . .

3 Section 3543.1(c) provides:

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

4 The District *never* attempted to determine the composition of the union's team. As the majority itself concedes, "the District did not refuse to negotiate with a mixed committee for both units, and, indeed, acknowledged AFT's right to use such a committee." (Decision, p. 15.)

5 See, e.g., sections 3540 (purpose of the Act), 3540.1(e) (definition of exclusive representative), 3543 (rights of employees), 3543.1 (rights of employee organizations) and 3543.3 (duty to negotiate).
