

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



EL DORADO COUNTY OFFICE OF)
EDUCATION,)
)
Charging Party,) Case No. S-CO-197
)
v.) PERB Decision No. 759
)
EL DORADO COUNTY TEACHERS)
ASSOCIATION, CTA/NEA,)
)
Respondent.)
)
_____)

Appearances: Girard & Griffin by Allen R. Vinson, Attorney, for El Dorado County Office of Education; California Teachers Association by Ramon E. Romero, Attorney, for El Dorado County Teachers Association, CTA/NEA.

Before Hesse, Chairperson; Porter, Craib, Shank and Camilli, Members.

DECISION AND ORDER

This case is before the Public Employment Relations Board (Board) on appeal by the charging party of a Board agent's dismissal (attached hereto) of its charge that the respondent violated section 3543.6 of the Educational Employment Relations Act (Gov. Code sec. 3540 et seq.). We have reviewed the dismissal and, finding it free of prejudicial error, adopt it as the Decision of the Board itself.¹

¹We note that, in the attached dismissal letter, the Board agent inadvertently stated that the Board "does not recognize" unilateral changes committed by the exclusive representative as an unfair practice. As she correctly stated in the attached warning letter, the Board has not yet addressed that issue directly. Nevertheless, the Board agent correctly determined that, in any event, the allegations are insufficient to state a prima facie case.

The unfair practice charge in Case No. S-CO-197 is hereby
DISMISSED WITHOUT LEAVE TO AMEND.

By the BOARD

PUBLIC EMPLOYMENT RELATIONS BOARD



Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916) 322-3198



[Attachment 2 of Dismissal Letter
not included]

April 28, 1989

Allen R. Vinson
Girard & Griffin
1535 Treat Blvd.
Walnut Creek, CA 94598

Ramon E. Romero
California Teachers Assoc.
1705 Murchison Drive
Burlingame, CA 94010

Re: El Dorado County Office of Education v. El Dorado County
Teachers Association. CTA/NEA.
Unfair Practice Charge No: S-CO-197
DISMISSAL LETTER

Dear Mr. Vinson:

The above-referenced charge alleges that the El Dorado County Teachers Association (Association), attempted to change the meaning of the parties' collective bargaining agreement without first meeting and negotiating in good faith. This was accomplished by the Association's filing of an Unfair Practice Charge against the El Dorado County Office of Education (County). The County alleges that the Association's conduct violated section 3543.6(c) of the Educational Employment Relations Act (EERA).

I indicated to you in my letter dated March 15, 1989 (Attachment 1) that the above-referenced charge did not state a prima facie case, and that unless you amended the charge to state a prima facie case, or withdrew it prior to March 29, 1989, the charge would be dismissed.

On March 28, 1989, you filed a First Amended Charge. It adds some new facts concerning each of the Association's alleged unilateral changes of policy. In addition, your amended charge adds another theory of an EERA violation. The County alleges that the Association's conduct, in addition to being a unilateral change, "constitutes a general violation of EERA [which] should be remedied by PERB pursuant to Compton, as it interferes with and is disruptive to the educational process." On March 28, 1989, you mailed to PERB a letter citing federal authority in support of the First Amended Charge. [Attachment 2].

The charge, as amended, still fails to state a prima facie case for the reasons stated in my March 15, 1989 letter, and for the reasons set forth below.

Unilateral Change

As was indicated in my March 15, 1989 letter, PERB does not recognize unilateral changes committed by the exclusive representative as an unfair practice. In your letter of March 28, 1989, you rely on three private sector cases to show that the National Labor Relations Board (NLRB), and federal courts will find under appropriate circumstances that a union has failed to bargain in good faith by unilaterally changing employees' terms and conditions of employment. You assert that the facts in Associated Home Builders of the Greater East Bay v. NLRB (9th Circuit 1965) 352 F.2d 745, 60 LRRM 2345; NLRB v. System Council T-6 (First Circuit 1979) 599 F.2d 5; and Chemical Workers Local 29 (Morton-Norwich Products, Inc.) (1977) 228 NLRB No. 127, 94 LRRM 1696 are analogous to those in the instant case.

Each of the cases upon which the County relies, however, is factually distinguishable. In all of the federal cases cited, the exclusive representative engaged in some affirmative conduct resulting in an impact of considerable magnitude on a negotiable subject. For example, in Associated Home Builders, supra, the Local formally approved a resolution initiating, on a unit-wide basis, specific production limitations for shinglers. Any union member's violation of the limitations would result in sanctions imposed by the exclusive representative. Similarly, in System Council T-6, supra, the exclusive representative adopted a rule prohibiting all members from accepting temporary management assignments to supervisory positions. The rule was promulgated despite language in the collective bargaining agreement, as well as a long-standing past practice, recognizing management's right to make such temporary assignment. In Chemical Workers Local 29, supra, the President of the union, despite a past practice of ten years to the contrary, insisted on tape recording monthly meetings on pending grievances. When the management representative refused to discuss grievances if such discussions were tape recorded, the President, in turn, refused to discuss them at all; nor would she agree to an expedited arbitration over the propriety of the tape recording. This resulted in a virtual halt in the grievance processing procedures.

In contrast, the three instances which the County alleges constitute the exclusive representative's unilateral change of policy, involve a dispute over an application of a contractual provision. For example, the County alleges that the Association's assertion in Case No. S-CE-1252 that the County unilaterally changed the contract's transfer provision [Article

11.7.5]¹ by denying unit member Jeff Kitchen a transfer constituted the exclusive representative's attempt to unilaterally change a negotiable subject.² Similarly, the County alleges that the Association's filing of a charge over unit member Hancock's denial of a leave of absence pursuant to Article 13.10 also demonstrated its attempt to change a term in the contract. The County's third argument is that the Association attempted to unilaterally change the contract's teacher evaluation provision [Article 8.5.4], by challenging the County's procedure of permitting a parent to visit Kitchen in his classroom, accompanied by Kitchen's evaluator.

The Association's disagreement—as evidenced by its filing of a charge at PERB—over the application of a contractual provision is not tantamount to a wholesale repudiation of a negotiable subject. With respect to at least two of the Association's alleged "unilateral changes," those regarding transfer and leave of absence, the County does not allege any affirmative conduct on the part of the exclusive representative, other than the filing of an unfair practice charge, demonstrating its intent to change a negotiable subject. Concerning the Association's alleged change of the contract's teacher evaluation procedures, the First Amended Charge alleges that Kitchen stated to the County that after talking with "his representatives," he would no longer permit parents accompanied by his evaluator into the classroom. The County alleges that it believes that Kitchen's representatives include "unknown representatives or agents of the Association." However, there are no allegations and no facts in support thereof that the exclusive representative issued a directive ordering the repudiation of a term of employment established by the contract or past practice. At best, it appears that Kitchen received some advice which he either ignored, or which he was unable to successfully implement. Thus, the federal cases relied upon by the County are factually distinguishable in this regard.

¹ It should be noted that the parties' collective bargaining agreement contains separate provisions governing employees who wish, in general, to obtain a transfer, and those who have been involuntarily transferred, who then desire to obtain a second transfer. (Compare Article 11.6 with Article 11.7) Bargaining unit employee Jeff Kitchen was involuntarily transferred to Winnie Wakely, a school for the developmentally disabled, effective Fall of 1987.

² PERB has thus far not recognized as an unfair practice, a party's "attempt" to commit a unilateral change.

Even assuming, for the sake of argument, that the exclusive representative's conduct here did amount to more than a mere filing of an unfair practice charge, the cases cited in the County's March 28, 1989 letter are still distinguishable by the scope and magnitude of the exclusive representative's conduct at issue. Each of the federal cases involved the union's promulgation of a rule of unit-wide application. In sharp contrast, the Association's alleged unilateral changes of policy in the instant case essentially involve a dispute over an application of a contractual provision to a single unit member.

In this regard it is noteworthy that an essential element for finding that an employer has violated EERA based upon a unilateral change theory, is that the change of policy had a "generalized effect or continuing impact" on terms and conditions of employment. (See Grant Joint Union High School District (1982) PERB Decision No. 196; Chico Unified School District (1983) PERB Decision No. 286; Calexico Unified School District (1983) PERB Decision No. 357.) In absence of this essential requirement, the controversy is relegated to a mere contractual dispute over which PERB has no jurisdiction. (EERA section 3541.5(b).)

Thus, for these reasons, and those in my letter of March 15, 1989, a complaint will not issue against the Association based upon a unilateral change theory.

Independent Violation of EERA

You further allege in your First Amended Charge that the Association's conduct constituted a "general violation" of EERA remediable in the fashion of Compton Unified School District (1987) PERB IR-50. In a subsequent telephone conversation with the regional attorney, you indicated that the Association's conduct constituted an independent, as opposed to a general violation of EERA. The section alleged to have been violated is EERA section 3540, which designates among the purposes of EERA, the goal of the "improvement of employer-employee relations."

As the majority noted in Compton, supra, and as you correctly assert in your March 28, 1989 letter, the courts have found that PERB is not limited in all instances to remedying only violations of EERA sections 3543.5 or 3543.6. (Leek v. Washington Unified School District (1981) 124 Cal.App.3d 43, 48-53, hg. den.; Link v. Antioch Unified School District (1983) 142 Cal.App.3d 765, 768-769. EERA section 3541.3(i).) Instead, PERB's recognition of violations of EERA independent of its unfair practice provisions has been judicially sanctioned under certain circumstances. (See also San Jose Teachers Association v. Superior Court and Abernathy (1985) 38 Cal.3d 839, vacated and reversed on other grounds.)

In Compton, supra. Member Porter and concurring Member Hesse found that there was probable cause to believe that a post-impasse intermittent teacher strike constituted an independent violation of EERA section 3540, as well as a violation of EERA section 3543.6(c). Compton involved a series of work stoppages, lasting from one to five days at a time, for a total of 16 days. The work stoppages began in early November 1966 and continued through March 1987. The District was unable to replace the striking teachers with substitutes to any significant degree. Student attendance was down approximately 70% from normal pre-strike attendance. Moreover, attendance was well below average even on days when no strike was in progress. Consequently, a majority of the Board found that a considerable portion of the District's student population received little or no meaningful education for the period during which teachers engaged in intermittent work stoppages. The Compton majority, in deciding to request a court order enjoining the strike, determined that the work stoppages resulted in a "total breakdown in education", and constituted probable violations of EERA sections 3543.6(c) and 3540.³

It is not clear from the County's First Amended Charge or March 28, 1989, letter how the Association's alleged unilateral changes of policy governing transfer, leave of absence or parental classroom visitation disrupted and interfered with the educational process in the manner recognized by the majority in Compton. With respect to the Association's alleged unilateral change of the County's transfer policy, the County posits that there would be an "administrative nightmare" if every teacher employed by the County submitted a general request for transfer to a unspecified position. However, the Association's unfair practice is limited to the situation in which a teacher who has been involuntarily transferred subsequently requests a transfer to a different location. (See fn. 1, supra.) The County's speculation of future administrative burden is not akin to the type of actual disruption recognized by the majority in Compton.

Further, with respect to the Association's assertion in Case No. S-CE-1262 that the contract entitles Hancock to a personal leave of absence beyond the period of one year, the County alleges that the Association's

³The Court of Appeal in PERB v. Modesto City Schools District (1982) 136 Cal.App.3d 881 delineated a two-part test under which PERB may seek an injunction during the pendency of an unfair practice proceeding. First, there must exist reasonable cause to believe that an unfair practice has occurred; and second, the granting of injunctive relief must be just and proper.

attempt to unilaterally change the intent of Article 13.10 ...is disruptive and interferes with the educational process in that there is a loss of continuity which results from a teacher being out of the classroom for more than one school year. ...

Again, the County's assertion appears to be speculation. The Association's mere filing of an unfair practice charge has not resulted in such occurrences. Further, as was relayed in a telephone conversation with the regional attorney, the County has never granted back-to-back leaves of absence. Therefore, it is difficult to anticipate interference with the educational process of any appreciable magnitude.

Finally, the County argues that the Association's challenging of the County's parental visitation policy is disruptive of the educational process because parents of developmentally disabled children cannot have meaningful input into the preparation of a program responsive to their child's special needs. The County asserts that Kitchen's revocation of parental visitation, on the alleged advice of his "representatives", is actual evidence of disruption as it now happens. Although, with respect to this argument, the County refers to an actual event which appears to be beyond mere speculation, in conversations with the regional attorney it was recognized that, despite Kitchen's purported "revocation," parental visitations continued nonetheless. In any event, this degree of disruption is vastly different in magnitude from that identified by the majority in Compton.

For the above reasons, a complaint will not issue on the County's allegation that the exclusive representative's conduct constituted an independent violation of EERA section 3540.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal (California Administrative Code, title 8, section 32635(a)). To be timely filed, the original and five copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing (California Administrative Code, title 8, section 32135). Code of Civil Procedure section 1013 shall apply. The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty calendar days following the date of service of the appeal (California Administrative Code, title 8, section 32635(b)).

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See California Administrative Code, title 8, section 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail postage paid and properly addressed.

Extension of Time

A request for an extension of time in which to file a document with the Board itself must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party (California Administrative Code, title 8, section 32132).

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

CHRISTINE A. BOLOGNA
General Counsel

By, _____
Jennife A. Chambers
Regional Attorney

Attachments

PUBLIC EMPLOYMENT RELATIONS BOARD



Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916) 322-3198



March 15, 1989

Allen R. Vinson
Girard & Griffin
1535 Treat Blvd.
Walnut Creek, CA 94598

Re: El Dorado County Office of Education v. El Dorado County
Teachers Association. CTA/NEA
Case No: S-CO-197

Dear Mr. Vinson:

The above-referenced charge alleges that the El Dorado County Teachers Association (Association), attempted to change the meaning of the parties' collective bargaining agreement without first meeting and negotiating in good faith. This was accomplished by the Association's filing of an Unfair Practice Charge against the El Dorado County Office of Education (County). The Association's conduct is alleged to violate section 3543.6(c) of the Educational Employment Relations Act. (EERA).

My investigation revealed the following facts. The above-referenced charge refers to two charges filed by the Association against the employer. One charge, (S-CE-1100), filed on May 29, 1987, culminated in a proposed decision issued by Administrative

Law Judge Ronald Blubaugh.¹ Although Case No. S-CE-1100 is mentioned in the County's allegations against the Association, this charge is not directly at issue. The second charge referred to in the County's unfair practice charge is Case No. S-CE-1252,

¹In Case No. S-CE-1100, the Association alleged, in part, that two unit teachers, Jeff Kitchen and Ray Hancock, were unlawfully transferred to another school due to their exercise of protected activities. The charge additionally alleged that the employer retaliated against Kitchen by issuing him an unlawfully motivated reprimand, and that the County unilaterally changed the work year calendar, and unilaterally subcontracted nursing services to independent contractors. A complaint issued on these allegations, and the ALJ found that the County did not retaliate against Kitchen and Hancock by transferring them to another school. However, the ALJ did find violations of EERA as to the other allegations mentioned above. Neither party appealed the ALJ's Proposed Decision, and it became final on October 3, 1988.

filed by the Association on December 7, 1988 and amended on December 20, 1988, and again on February 27, 1989. It is directly implicated in the County's unfair practice charge. As of the date of this warning letter, the investigation of Case No. S-CE-1252 is still pending.

In Case No. S-CE-1252, the Association alleged, in part, that the District unilaterally changed the transfer policy as expressed in Article 11.7.5 of the parties' collective bargaining agreement.² That Article provides, in pertinent part:

If an employee is transferred involuntarily and is dissatisfied with the new position, the employee may request a voluntary transfer to the next available County Office staff position for which the employee is qualified. ...

In Case No. S-CE-1252, the Association alleged that the transfer policy as expressed in Article 11.7.5 was unilaterally changed when the County imposed the new requirement that employees wishing to transfer must request the specific location to which they would like to be transferred. In the instant case, the County alleges that the Association's pursuit of its charge against the County, in which the County's requirement of a "specific request" is challenged, itself constitutes an "attempt by the Association to unilaterally change the intent and practice of Article 11.7", in violation of EERA Section 3543.6(c).

In Case No. S-CE-1252, prior to its second amendment³, the Association additionally alleged that the County unilaterally changed the policy as expressed in Article 13.7.5 of the parties' contract, which provides:

An industrial accident or illness is defined as an injury or illness whose cause can be traced to the performance of duties on the job and as adjudged under the provisions of the State Workers' Compensation Insurance law.

²All of the County's contractual references are to the parties' collective bargaining agreement which expired on June 30, 1988. The parties agreed to a successor contract in the Fall of 1988. The successor retains the same language as the expired contract in all contractual provisions at issue herein.

³ The Association omitted this allegation from its Second Amended Charge. See footnote 4, infra.

The theory alleged by the Association in Case No. S-CE-1252 was that, when unit member Ray Hancock requested the County Office to grant him an "illness leave of absence", the County required him to take a physical examination, even though he was not required to take one the previous year, and the contract did not provide for one. The County's requirement of a physical exam was alleged to demonstrate its unilateral change of the policy expressed in Article 13.7.5.

The County's charge against the Association, in turn, avers that the Association's allegation relating to Article 13.7.5 demonstrates its attempt to unilaterally change the "intent and practice of the collective bargaining agreement". This is so because Article 13.7.5. clearly provides that there must be an adjudication "under the provision of the Workers' Compensation Insurance Law", which did not occur in Hancock's situation.

The County additionally alleges that Hancock actually requested a leave pursuant to Article 13.10 of the contract, designated "Personal Leave", as opposed to "Industrial Leave" under Article 13.7.5.* However, Article 13.10 of the parties' contract, alleges the County, forbids the employer's granting of a personal leave in excess of one year. Since Hancock requested two successive one year leaves, the Association in effect was attempting to unilaterally change the policy expressed in 13.10 by challenging, via its unfair practice charge, the County's denial of a personal leave of absence to Hancock.

In Case No. S-CE-1252, the Association additionally alleged that the County unilaterally changed Article 8.5.4 of the collective bargaining agreement by permitting parents to participate in the teacher evaluation process.

Article 8.5.4 provides, in pertinent part:

The supervisor will normally make an appointment in advance to observe the teacher's effectiveness in the classroom....

Nothing herein shall restrict a supervisor or administrator from making unannounced classroom visits for the above and other purposes.

⁴ In the Association's Second Amended Charge, it omitted all references to the County's alleged unilateral change of the policy expressed in Article 13.7.5, and advanced instead allegations that the county unilaterally changed the contract's "Personal Leave" provision of Article 13.10.

In the Association's charge, it alleged that, by permitting administrators accompanied by parents into the classroom to observe the teacher, the County was unilaterally changing its policy on conducting teacher evaluations solely by a supervisor or administrator. The County, in turn, alleges in its charge against the Association that the contractual procedures for evaluation contained at Article 8.5 are in no way related to the long established practice of permitting parents inside the classroom to observe the teacher. By asserting such a theory in its unfair practice charge the Association is attempting:

to unilaterally change the practice and intent of the County office in allowing parents to visit classrooms and observe teachers, and is a unilateral attempt to change the meaning, intent and practice of Article 8.5.4 of the collective bargaining agreement without meeting and negotiating....in violation of EERA Section 3543.6(c).

Based upon the facts described above, the County's charge fails to state a prima facie violation of EERA for the reasons which follow.

The conduct alleged to violate EERA section 3543.6(c) is the Association's filing of an unfair practice charge, which the County maintains constitutes a "unilateral change" of certain policies expressed in the parties' collective bargaining agreement.

At present, there is no PERB decision that recognizes as an unfair practice a union's unilateral change of a policy. Thus far, PERB has exclusively interpreted EERA section 3543.6(c) to find an unfair practice by a union against an employer only on the basis that the former has refused to bargain in good faith. If the employer can demonstrate that the union has, for example, fostered unreasonable delay in the negotiating process, refused to make counter-proposals, or has otherwise refused to bargain in good faith, PERB may find a violation of EERA section 3543.6(c) based upon the totality of circumstances. (See, eg, Gonzales Union High School District (1985) PERB Decision No. 480).

Although the County cannot cite to any PERB authority which finds a violation of EERA section 3543.6(c) on the theory that the union has committed a unilateral change, it is worthy of mention that in Compton Unified School District (1987) PERB IR-50, Member Porter identified a post-impasse teacher strike as constituting a unilateral change in terms and conditions and employment. However, neither concurring Member Hesse, nor dissenting Member Craib joined Member Porter in recognizing this theory for finding a violation of EERA section 3543.6(c).

The allegations contained in the County's unfair practice charge may more appropriately be used for argument in its defense against the Association's charge, as opposed to stating a prima facie violation of EERA. If the County feels that the Association's filing of Case No. S-CE-1252 is unfounded it should, assuming that a complaint issues, request the hearing officer to order the Association to pay the County's attorney's fees as part of that litigation. (King City Joint Union High School District (1982) PERB Decision No. 197, review pending).

For these reasons, Case Number S-CO-197, as presently written, does not state a prima facie case. If you feel that there are any factual inaccuracies in this letter or any additional facts which would require a different conclusion than the one explained above, please amend the charge accordingly. This amended charge should be prepared on a standard PERB unfair practice charge form clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must be served on the respondent and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before March 29, 1989, I shall dismiss your charge without leave to amend. If you have any questions on how to proceed, please call me at (916) 322-9198.

~~Sincerely,~~

Jennifer Chambers
Regional Attorney

JAC:djt