

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



TEMPLE CITY EDUCATION)	
ASSOCIATION, CTA/NEA,)	
)	
Charging Party,)	Case Nos. LA-CE-2628
)	LA-CE-2662
v.)	
)	PERB Decision No. 782
TEMPLE CITY UNIFIED)	
SCHOOL DISTRICT,)	December 22, 1989
)	
Respondent.)	
<hr/>		

Appearances: California Teachers Association by Charles R. Gustafson, Attorney, for Temple City Education Association, CTA/NEA; Wagner, Sisneros & Wagner by John J. Wagner, Attorney, for Temple City Unified School District.

Before Hesse, Chairperson; Craib and Camilli, Members.

DECISION

CRAIB, Member: These consolidated cases are before the Public Employment Relations Board (PERB or Board) on exceptions filed by both parties to a PERB administrative law judge's (ALJ) proposed decision. The ALJ found that the Temple City Unified School District (District) unlawfully by-passed the Temple City Education Association, CTA/NEA (CTA) by negotiating directly with two teachers over the terms of their severance from employment. The ALJ dismissed allegations that the District retaliated against these same two teachers for refusing the District's severance offers. The alleged retaliation involved unfavorable assignments. The ALJ found that those allegations were subject to binding arbitration pursuant to the parties' contractual

grievance machinery and, therefore, must be deferred. (Lake Elsinore School District (1987) PERB Decision No. 646.)

As discussed below, we affirm the finding that the retaliation allegations must be deferred to binding arbitration and reverse the finding that the District unlawfully by-passed CTA by negotiating directly with the two teachers over the terms of their severance.

FACTUAL SUMMARY

Case No. LA-CE-2628

In the spring of 1987, Richard Anthony, the District's assistant superintendent of pupil personnel, was advised that there would be a surplus of teachers in the Social Studies Department at the District's high school. The surplus was due to the need to place a former coach in that department who was resigning his coaching assignment and had to be reassigned to make room for the new coach in the Physical Education Department. At about the same time, Anthony was informed by the superintendent and the high school principal that Marjorie Mohr, a teacher for the District for almost 33 years, might be interested in retiring, but first wanted to save enough money for a new car.

About April 1, 1987, Anthony asked Mohr to come to his office, where he told her that "the Board is interested in buying you a car to help with your retirement." Anthony and Mohr spoke again shortly thereafter. Mohr asked if the offer was in lieu of the five-year early retirement program offered by the District.

When Anthony replied that it was, Mohr told him that she could not afford to retire at the end of the year. There is no evidence that the matter was ever brought up again. It is undisputed that CTA was given no notice of the negotiations with Mohr.

Soon after the conversations between Mohr and Anthony, preparations began to place the new Social Studies teacher and cure a shortage of teachers in the English Department. On the recommendation of the chair of the English Department, Mohr was tentatively selected to be reassigned to that department. Members of the Social Studies Department were not pleased with this prospect and suggested various alternatives, including the hiring of someone specifically trained to teach English and having various Social Studies teachers teach part-time in the English Department. These suggestions were not acceptable to the administration, though a compromise eventually was reached whereby Mohr was to teach three classes in English and two in Social Studies. Also a factor in Mohr's reassignment was the District's desire to add greater emphasis on economics in the Social Studies classes Mohr had been teaching. Another teacher, Theodore Carothers, had extensive training in the teaching of economics. Mohr's reassignment to the English Department is the basis for her retaliation claim.

Case No. LA-CE-2662

In the winter of 1987, Roger Juranek, a teacher at the District for about 15 years, was very unhappy with his assignment

at Longden Elementary School. He did not trust, or get along with, the principal at that school. On or about January 13, 1987, Juranek went to see Anthony to request a transfer to Cloverly School. Anthony testified that a transfer to Cloverly was ruled out due to a controversy that had arisen there eight years earlier involving Juranek and students who, at the time of the transfer request, had younger siblings at the school. A transfer to Emperor Elementary was ruled out, Anthony asserted, because Juranek's ex-wife taught there. Anthony stated that Oak Avenue Junior High was also ruled out because Juranek had taught there in the past and the experience was "not particularly successful."

On May 5, 1987, Anthony sent a message to Juranek that he wanted to see him that afternoon. When they met, Anthony told Juranek that a transfer to Cloverly, or to any other school in the District, was not likely to happen. Anthony suggested that Juranek might want to go to a different district and get a fresh start. He also suggested that the District might be willing to provide a cash settlement, up to a year's salary, if he resigned. Juranek rejected this offer. As with Mohr, there was no notice to CTA that such an offer would be made to Juranek.

Two allegedly adverse personnel actions took place after the May 5 meeting. First, Anthony advised Juranek that, given a new parental complaint, the Board of Education might study his personnel history, including a sealed envelope in his personnel file. By letter dated May 26, 1987, the District informed

Juranek that the envelope would be opened and "reviewed with the appropriate persons." JuraneK considered this a repudiation of a written assurance he had received from the superintendent in 1981 that the information in the sealed envelope would not be used against him in the future. The second adverse action was a May 15 memorandum which informed JuraneK that he had been reassigned from his position at Longden to a position as a roving substitute.

Past Practice On Retirement/Resignation Buy-outs

It is undisputed that for many years the District had a practice of offering incentives to particular employees to induce them to resign or retire. There was testimony that such offers were usually precipitated by the District's view that the teacher was ineffective. In no instance was CTA notified in advance of the District's interest in pursuing any particular buy-out. In five out of twelve examples mentioned in the record, CTA became involved in subsequent negotiations (usually upon the request of the employee), but in each instance the District had originally contacted the employees directly, without notice to CTA.

There is no evidence that CTA ever sought to negotiate a policy of general application with regard to such buy-outs. Moreover, prior to the filing of the charges in this case, there is no evidence that CTA ever protested the District's practice of negotiating buy-outs directly with the affected employee. Where CTA did get involved after initial contacts between the District and the employee, testimony revealed that the CTA representatives

merely assisted in discussions that continued to be, in essence, between the employee and the District.

The parties' collective bargaining agreement in effect at the time in question is silent on the subject of severance pay or other severance benefits. The last contract that mentioned these subjects, which was effective 1978-1980, contained the following two provisions:

10. The District shall continue to provide an opportunity for eligible unit members to participate in an early retirement plan.

11. Health and welfare benefits provided in the Agreement shall be provided in the District's Auxiliary Services Contract.

The record does not indicate what early retirement or severance benefits were generally available to employees after the expiration of the 1978-1980 contract. There are, however, references in the record to the availability of an early retirement plan in later years, but its terms are not revealed.

Article XII of the current contract, effective 1986-1989, contains a "zipper clause," which has the effect of allowing either party to avoid (during the term of the agreement) further negotiations on matters established by either contract or past practice.¹ (Los Rios Community College District (1988) PERB

¹Article XII of the parties' agreement states, in pertinent part:

. . . the Association and District express, waive, and relinquish the right to meet and negotiate with respect to any subject or matter whether referred to or covered in this Agreement or not, even though each subject or matter may not have been within the knowledge

Decision No. 684, p. 13.) The clause specifically states that it does not constitute a waiver of CTA's right to bargain a change in past practice, though this would be the case even in the absence of such language. (See Los Rios Community College District, supra, p. 14; Los Angeles Community College District (1982) PERB Decision No. 252.)

DISCUSSION

Retaliation

Relying on Lake Elsinore School District, supra, PERB Decision No. 646, the ALJ dismissed the retaliation allegations for lack of jurisdiction. The 1986-1989 agreement contains a grievance procedure which culminates in binding arbitration (Article III). Article III, section 2 states:

The Association may file a grievance on its own behalf with respect to an alleged violation, misinterpretation, misapplication, or nonapplication of a provision of this Agreement which provides for Association rights.

Article X, which contains a reprisal prohibition that mirrors the language of EERA, is entitled "Association Rights." Concluding

or contemplation of either or both the District or the Association at the time they met and negotiated on and executed this Agreement, and even though such subjects or matters were proposed and later withdrawn.

The parties agree that this Article is not intended as either a general or specific waiver of the bargaining rights that the Association might have under the Rodda Act as a result of the District's attempt to change any past benefit or practice not contained in this Agreement which is within the mandatory scope of bargaining of the Act.

that CTA had standing to file a grievance concerning the alleged retaliation against Mohr and Juranek, the ALJ determined that she had no choice but to dismiss the complaint as to those allegations. She went on to address the merits of the allegations anyway, concluding that CTA failed to establish a prima facie case because it failed to show that Mohr or Juranek engaged in protected activity that could have precipitated the adverse actions.

CTA excepts to the ALJ's dismissal of the retaliation allegations, claiming that, notwithstanding Article X's title, its reprisal prohibition concerns only individual unit members' rights. Consequently, CTA argues, since it could not file a grievance itself, deferral to arbitration is improper. CTA also excepts to the ALJ's conclusion that no protected activity was shown.

While it is true that the reprisal provision of Article X refers to the rights of unit members, we affirm the ALJ's finding that the retaliation allegations should be deferred to arbitration based on Lake Elsinore School District, supra. Though CTA's construction of the interaction of Articles III and X is not unreasonable, we find the ALJ's construction, which relies on the plain language of the title of Article X, to be more plausible. While there is some ambiguity in the way the two articles interact, there is no evidence that CTA's construction is the one intended by the parties. In fact, it is unlikely that CTA would have intended a construction which minimized its right

to file grievances. We conclude that the retaliation allegations must be deferred to binding arbitration.²

After concluding that there was no jurisdiction, the ALJ stated that it would be unnecessary, and perhaps inappropriate, to reach the merits of the allegations. Nevertheless, she preceded to find that CTA had failed to demonstrate protected activity on the part of Mohr and Juranek. We find it unnecessary to reach the merits after concluding that the allegations must be deferred to arbitration, and we decline to do so.

By-passing

CTA argued during the hearing that, in meeting with Mohr and Juranek individually, the District sought to by-pass the contractual disciplinary procedures. The ALJ instead viewed the issue as whether the District by-passed CTA by negotiating with Mohr and Juranek over severance pay options not normally afforded to other employees. However, the ALJ concluded that the result in the case is not affected by which characterization is chosen. We agree. However, we will analyze the case using the latter characterization, which is more consistent with the charges and complaints.

The ALJ found that the District's direct dealing with Mohr and Juranek, without notice to CTA, constituted illegal by-

²For the reasons stated in his dissent in Eureka City School District (1988) PERB Decision No. 702, at pp. 9-14, Member Craib would condition deferral on the willingness of the District to waive procedural defenses. However, the majority of the panel, consistent with the majority opinion in Eureka, places no such condition on deferral of this case to binding arbitration.

passing of an exclusive representative. This conduct was found to violate section 3543.5, subdivisions (b) and (c) of the Educational Employment Relations Act (EERA).³ As the ALJ pointed out, the Board will find unlawful by-passing where the employer deals directly with employees and seeks to create a new policy of general application or seeks a waiver or modification of existing policy applicable to those employees. (Walnut Valley Unified School District (1981) PERB Decision No. 160, pp. 4-6; Lake Elsinore School District (1986) PERB Decision No. 563, p. 3.) In the ALJ's estimation, a violation must be found because the record clearly shows that the District, without notice to CTA, offered Mohr and Juranek incentives to retire or resign that were not available to most employees.

The ALJ found no merit in the District's past practice defense. First, the ALJ noted that in seven of the twelve examples in the record, CTA had no knowledge whatsoever of the District's negotiations with individual employees. On the other five occasions, CTA participated once it was informed of the

³EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.5, subdivisions (b) and (c) provide as follows:

- It shall be unlawful for a public school employer to:
-
- (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.

impending negotiations (presumably by the employees, as it is undisputed that the District never gave CTA notice of any sort). The ALJ stated that CTA certainly could not have waived the right to negotiate where it had no notice, nor did it waive the right to negotiate future acts of by-passing by participating on the five occasions where it got wind of the District's intent. In short, the ALJ viewed each set of individual negotiations as a distinct act of by-passing, to which CTA retained the right to object, as it saw fit.

Next., the ALJ rejected the District's argument that the question of benefits for those who resign or retire is not within the scope of negotiations because the benefits will be received by those who are no longer employees. The ALJ explained that both private sector and PERB precedent exempt from coverage only those already retired or separated from employment. (Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co. (1971) 404 U.S. 157 [78 LRRM 2974] (rights and benefits of former employees and retirees nonnegotiable); Hacienda La Puente Unified School District (1988) PERB Decision No. 685, p. 13 (former employees have no standing to invoke the protection of the EERA).) Future benefits of those still employed are unquestionably within the scope of representation. (Pittsburgh Plate Glass Co.; supra; Mt. Diablo Unified School District (1983) PERB Decision No. 373, p. 41 (severance pay within the scope of representation); Jefferson School District (1980) PERB Decision

No. 133, pp. 46-48 (future retirement benefits for current employees negotiable).)

In excepting to the ALJ's finding of unlawful by-passing, the District puts forth three arguments. First, the District asserts that the ALJ ignored the fact that there was a long-standing practice (of which CTA was aware) of negotiating buy-outs directly with employees. Consequently, the District states, it had the right to continue to act in accordance with that practice until CTA demanded to bargain and they reached agreement to change the practice. Second, the District asserts that (assuming the allegation is one of by-passing the contractual disciplinary procedures) discipline of certificated employees is governed exclusively by the Education Code and is, therefore, non-negotiable. Third, the District repeats the argument made at hearing that benefits to be received in the future by a non-employee are not negotiable.

We believe the ALJ was correct in finding that neither the holding in Hacienda La Puente Unified School District, supra, concerning the standing of former employees, nor private sector precedent makes future, post-employment, benefits nonnegotiable vis-a-vis present employees.⁴ There is simply no authority for the proposition that an employer does not have to negotiate

⁴In San Leandro Unified School District (1984) PERB Decision No. 450, the Board held that neither retired employees nor a retiree organization has standing to file an unfair practice charge.

retirement or severance benefits because they will not be received until after the employment relationship is severed.

The District's supersession argument must also be rejected. EERA section 3543.2, subdivision (b) specifically makes discipline (other than dismissal) of certificated employees negotiable, notwithstanding Education Code section 44944. In any event, this exception pertains only to the theory that the District used the buy-out negotiations to avoid adhering to contractual disciplinary procedures. As noted above, we do not subscribe to that theory of the case; therefore, it is unnecessary to further address this exception.

Lastly, we turn to the District's argument that the ALJ failed to attach significance to the fact that the District had a long-standing practice of negotiating buy-outs with individual employees. We find that this exception has merit. It is axiomatic that an employer may, even where there has been a demand to bargain, continue to act consistent with existing policy until agreement is reached to alter that policy.⁵ The issue thus becomes: did the District have an established past practice with regard to buy-outs and were the District's actions consistent with that policy?

The twelve examples of buy-outs introduced into the record span a period from 1981 to 1988 (the two buy-outs at issue here occurred in 1987). Of the five times when CTA was involved, two

⁵As discussed above, the "zipper clause" in the parties' agreement would have allowed the District to reject, for the term of the agreement, a demand to bargain a change in past practice.

were in 1982, two were in 1985 and one was in 1986. Therefore, the District had been engaging in such individual negotiations for at least six years before the unfair practice charges were filed, and CTA was aware of this practice since 1982 at the latest. At no time prior to the filing of charges did CTA make a bargaining demand or otherwise protest the District's actions. Given these facts, we conclude that a past practice of engaging in individual negotiations over severance benefits was established and that CTA acquiesced to the development of that practice.

When CTA was asked by a particular employee for assistance in negotiating with the District, CTA provided that assistance. There is no evidence that the District ever opposed or discouraged CTA involvement if the employee desired it. Moreover, there was undisputed testimony that, even where CTA was involved, the negotiations were still essentially between the District and the individual, with the CTA representative merely present to offer assistance or advice if asked. Thus, we disagree with the ALJ's conclusion that CTA did negotiate over buy-outs whenever it had notice of them. Had CTA demanded to bargain or had otherwise protested the District's actions, and simply waited until 1987 to fully enforce its bargaining rights by filing the unfair practice charges, we might well have reached a different result in this case. However, we find that the evidence does not support such a version of events.

Having found that a past practice was established with regard to buy-out negotiations with individual employees, we now examine whether the District acted in accordance with that practice. The ALJ concluded that the District's actions were deviations from established policy because it was undisputed that the terms offered Mohr and Juranek were not afforded to the average employee who retired or resigned. However, we believe the policy at issue should be more narrowly defined to include only those situations involving "buy-outs," which would not include the average employee who resigned or retired. The circumstances underlying the two types of situations are markedly different and logically would involve distinct policy considerations.

The record shows that, whenever the District desired to have someone leave its employ before normal retirement age, it offered some combination of auxiliary service contracts, continuation of fringe benefits or cash in exchange for early retirement or resignation. With this as the definition of the policy at issue, it is clear that the terms offered Mohr and Juranek were consistent with that policy.

In sum, we find that the evidence shows that a past practice developed whereby the District would engage in direct negotiations with individual employees when the District wished to "buy out" that employee through either early retirement or resignation. Further, we find that CTA acquiesced to the development of this practice. As the terms offered to Mohr and

Juranek were consistent with that practice, the District committed no violation.

ORDER

Based on the foregoing findings of fact and conclusions of law, the complaints in Case Nos. LA-CE-2628 and LA-CE-2662 are hereby DISMISSED.

Chairperson Hesse and Member Camilli joined in this Decision.