

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**

BURLINGAME ELEMENTARY SCHOOL
DISTRICT,

Charging Party,

v.

CALIFORNIA SCHOOL EMPLOYEES
ASSOCIATION,

Respondent.

Case No. SF-CO-601-E

PERB Decision No. 1510

February 13, 2003

Appearances: Lee A. Thompson, Attorney, for Burlingame Elementary School District;
David J. Dolloff, Staff Attorney, for California School Employees Association.

Before Baker, Whitehead and Neima, Members.

DECISION

BAKER, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Burlingame Elementary School District (District) of a Board agent's dismissal (attached) of its unfair practice charge. The charge alleged that the California School Employees Association (CSEA) violated section 3543.6(a) and (b) of the Educational Employment Relations Act (EERA)¹ by representing Payroll Benefits Technician, Sally Padilla, a confidential employee.

¹ EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

It shall be unlawful for an employee organization to:

(a) Cause or attempt to cause a public school employer to violate Section 3543.5.

(b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

The Board has reviewed the entire record in this case, including the original and amended unfair practice charges, the warning and dismissal letters,² the District's appeal, and CSEA's response to the appeal. The Board finds the Board agent's dismissal letter to be free from prejudicial error and adopts it as the decision of the Board itself consistent with the following discussion.

DISCUSSION

The District's appeal reiterates arguments made before the Board agent. As the Board agent correctly noted, on the face of the charge it is readily apparent that the District actually seeks to modify the bargaining unit by removing a confidential position from the unit. Absent agreement with CSEA, the proper manner to seek such a modification is a unit modification proceeding before this Board.

In disputed cases, a unit modification can only be accomplished through PERB's unit modification procedure. (The Regents of the University of California (1989) PERB Decision No. 722-H. (Regents)). In Regents, the Board affirmed the administrative law judge's proposed decision which held that the university was not entitled to unilaterally transfer alleged supervisors into new classifications and engage in a "technical refusal to bargain" as an alternative means of testing the contours of an existing unit. Just as a technical refusal to

² The Board agent's reference to the warning letter on page 1, paragraph 3, of the dismissal letter indicates that the warning letter is dated March 5, 2002. The correct date of the warning letter is March 6, 2002.

bargain cannot be used to secure PERB review of a disputed unit modification, neither should an allegation in an unfair practice charge that the District is forced to violate EERA section 3543.4³ be used as the basis to secure PERB review. A unit modification proceeding is the proper mechanism to evaluate the duties of the payroll benefits technician against the standards for designating a position confidential.

ORDER

The unfair practice charge in Case No. SF-CO-601-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Whitehead and Neima joined in this Decision.

³ Section 3543.4 states:

A person serving in a management position, senior management position, or a confidential position may not be represented by an exclusive representative. Any person serving in such a position may represent himself or herself individually or by an employee organization whose membership is composed entirely of employees designated as holding those positions, in his or her employment relationship with the public school employer, but, in no case, shall such an organization meet and negotiate with the public school employer. A representative may not be permitted by a public school employer to meet and negotiate on any benefit or compensation paid to persons serving in a management position, senior management position or a confidential position.

Dismissal Letter

March 25, 2002

Lee A. Thompson, Deputy County Counsel
County of San Mateo
400 County Center
Redwood City, CA 94063

Re: Burlingame Elementary School District v. California School Employees Association
Unfair Practice Charge No. SF-CO-601-E
DISMISSAL LETTER

Dear Mr. Thompson:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on January 18, 2002. On February 4, 2002, Charging Party filed a letter with PERB confirming that the case would be placed in abeyance pending further discussion between the parties. The matter was removed from abeyance on March 4, 2002, based on a Notice of Intent to Seek Injunctive Relief filed with PERB's General Counsel.

In its charge, the Burlingame Elementary School District alleges that the California School Employees Association violated the Educational Employment Relations Act (EERA) by representing Payroll Benefits Technician Sally Padilla, a confidential employee.

I indicated to you in my attached warning letter dated March 5, 2002, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to March 13, 2002, the charge would be dismissed.

On March 15, 2002, you filed a letter in response to my warning letter and as preliminary support for the District's request for injunctive relief. The letter also serves as a response to an unfair practice charge filed by CSEA (PERB Case No. SF-CE-2249-E) relating to the same matter. Your letter restates the allegations contained in District's charge, but alleges no new facts to show that a violation of either Government Code Section 3543.6(a) or (b) has occurred. Therefore, since the charge does not state a prima facie violation, it is dismissed.

Right to Appeal

Pursuant to PERB 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. (Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Regulations 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

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 (20) calendar days following the date of service of the appeal. (Regulation 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 Regulation 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. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

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 (3) calendar days before the expiration of the time required for

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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. (Regulation 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,

ROBERT THOMPSON
General Counsel

By _____
Jerilyn Gelt
Labor Relations Specialist

Attachment

cc: David J. Doloff

Warning Letter

March 6, 2002

Lee A. Thompson, Deputy County Counsel
400 County Center
Redwood City, CA 94063

Re: Burlingame Elementary School District v. California School Employees Association
Unfair Practice Charge No. SF-CO-601-E
WARNING LETTER

Dear Mr. Thompson:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on January 18, 2002. On February 4, 2002, Charging Party filed a letter with PERB confirming that the case would be placed in abeyance pending further discussion between the parties. The matter was removed from abeyance on March 4, 2002, based on a Notice of Intent to Seek Injunctive Relief filed with PERB's General Counsel.

In its charge, the Burlingame Elementary School District alleges that the California School Employees Association violated the Educational Employment Relations Act (EERA)¹ by representing Payroll Benefits Technician Sally Padilla, a confidential employee.

According to the charge, sometime prior to last year, the District agreed to place Padilla's position into the CSEA bargaining unit. Previously, the position had been confidential. During negotiations in November, 2001, it became evident to the District that it "had made a mistake by agreeing to release the position of payroll benefits technician" to the unit. Charging Party asserts that Padilla's position is the only one in the District assigned to handle certificated, classified and management payroll and benefits. As such, the position has information critical to the District in determining salary and benefits proposals for negotiations. The remedy sought is to remove the position from the unit and designate it confidential.

Despite noting on the unfair practice charge form that CSEA has violated Government Code §§3543.6(a) and 3543.6(b),² apparently by not agreeing to release Padilla's position from the unit, Charging Party has alleged no facts in support of this assertion. Rather, it is clear from the facts stated and the remedy sought that Charging Party wishes to modify the bargaining

¹ EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

² The Notice of Intent to Seek Injunctive Relief states that CSEA may be in violation of Government Code §3543.4 by representing a confidential employee. However, by placing the payroll benefits technician in the bargaining unit, its confidential status was removed.

unit by removing the payroll benefits technician. Absent agreement from CSEA, such a modification may only be obtained through PERB's unit modification procedures.³

Government Code Section 3543.6(a) makes it unlawful for "an employee organization to cause or attempt to cause a public school employer to violate Section 3543.5." To demonstrate a violation of section 3543.6(a), there must be a clear showing of how and in what manner the employee organization induced or attempted to induce employer interference or discrimination. (Tustin Unified School District (1987) PERB Decision No. 626; AFSCME (Waters) (1988) PERB Decision No. 697-H, California Department of Personnel Administration (1987) PERB Decision No. 609-S; California School Employees Association (Petrich) (1986) PERB Decision No. 577). The evidence must also show a casual connection between the employer's

³ PERB Regulation 32781(b) provides, in pertinent part:

Absent agreement of the parties to modify a unit, an exclusive representative, an employer, or both must file a petition for unit modification in accordance with this section. Parties who wish to obtain Board approval of a unit modification may file a petition in accordance with the provisions of this section.

(b) A recognized or certified employee organization, an employer, or both jointly may file with the regional office a petition for unit modification.

(1) To delete classifications or positions which by virtue of change in circumstances are no longer appropriate to the established unit because said classification(s) or position(s) are management, supervisory, confidential, not covered by EERA, . . . or otherwise prohibited by statute from inclusion in the unit;

(4) To delete classification(s) or position(s) not subject to (1) above which are not appropriate to the unit because said classification(s) or position(s) are management, supervisory, confidential, not covered by EERA . . . , or otherwise prohibited by statute from inclusion in the unit, provided that:

(A) The petition is filed jointly by the employer and the recognized or certified employee organization, or

(B) There is not in effect a lawful written agreement or memorandum of understanding, or

(C) The petition is filed during the "window period" of a lawful written agreement or memorandum of understanding as defined in these regulations in Section 33020 for EERA, . . .

unlawful conduct and the employee organization's behavior. (California Department of Personnel Administration, supra, PERB Decision No. 609-H.)

To demonstrate a violation of EERA section 3543.6(b), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employee organization had knowledge of the exercise of those rights; and (3) the employee organization imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.⁴)

The facts presented in this charge do not support a finding that either of these tests have been met. For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, please amend the charge. The 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 have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative 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 13, 2002, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Jerilyn Gelt
Labor Relations Specialist

JAG

⁴ While these cases concern an employer's unlawful acts, the standards discussed are the same.