

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

WILLITS TEACHERS ASSOCIATION,
CTA/NEA,

Charging Party,

v.

WILLITS UNIFIED SCHOOL DISTRICT,

Respondent.

Case No. SF-CE-2254-E

PERB Decision No. 1521

May 8, 2003

Appearances: California Teachers Association by Ramon E. Romero, Attorney, for Willits Teachers Association, CTA/NEA; School and College Legal Services of California by Patrick D. Sisneros, Attorney, for Willits Unified School District.

Before Baker, Whitehead and Neima, Members.

DECISION

BAKER, Member: This case is before the Public Employment Relations Board (Board) on appeal by the Willits Teachers Association, CTA/NEA (Association) from a Board agent's dismissal (attached) of its unfair practice charge. The charge alleges that an arbitrator's award denying a grievance for an alleged unilateral change by the Willits Unified School District (District) is repugnant to the Educational Employment Relations Act (EERA).¹ The charge requests that a complaint be issued against the District for an alleged violation of EERA section 3543.5(c).²

¹ EERA is codified at Government Code section 3540 et seq.

² Section 3543.5(c) provides, in relevant part:

The Board has reviewed the entire record in this matter, including the original unfair practice charge, the Board agent's warning and dismissal letters, the Association's appeal and the District's response. The Board finds the warning and dismissal letters to be free from prejudicial error and adopts them as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. SF-CE-2254-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Whitehead and Neima joined in this Decision.

It shall be unlawful for a public school employer to do any of the following:

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

Dismissal Letter

July 24, 2002

Ramon E. Romero, Staff Attorney
California Teachers Association
P O Box 921
Burlingame, CA 94011-0921

Re: Willits Teachers Association v. Willits Unified School District
Unfair Practice Charge No. SF-CE-2254-E
DISMISSAL LETTER

Dear Mr. Romero:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 28, 2002. The Willits Teachers Association alleges that the Willits Unified School District violated the Educational Employment Relations Act (EERA)¹ sections 3543.5(a), (b) and (c) by making an unlawful unilateral change.

I indicated to you in my attached letter dated July 11, 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 July 22, 2002, the charge would be dismissed.

I have not received either an amended charge or a request for withdrawal. Therefore, I am dismissing the charge based on the facts and reasons contained in my July 11, 2002 letter.

Right to Appeal

Pursuant to PERB Regulations,² 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.)

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 PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

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 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.)

SF-CE-2254-E

July 24, 2002

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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 _____
Marie Nakamura
Regional Attorney

Attachment

cc: Patrick D. Sisneros

Warning Letter

July 11, 2002

Ramon E. Romero, Staff Attorney
California Teachers Association
P O Box 921
Burlingame, CA 94011-0921

Re: Willits Teachers Association v. Willits Unified School District
Unfair Practice Charge No. SF-CE-2254-E

WARNING LETTER

Dear Mr. Romero:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 28, 2002. The Willits Teachers Association alleges that the Willits Unified School District violated the Educational Employment Relations Act (EERA)¹ sections 3543.5(a), (b) and (c) by making an unlawful unilateral change.

With this charge, you seek to establish that an arbitrator's award concerning an alleged breach of the parties' collective bargaining agreement is repugnant to EERA.

The Willits Teachers Association (WTA) is the exclusive representative of certificated employees in the District. The District and WTA are parties to a collective bargaining agreement effective from July 1, 1999 through June 30, 2002.

Michael Harrison is a resource specialist at Blosser Lane Elementary School. As a resource specialist, Mr. Harrison schedules and attends Individualized Education Program (IEP) meetings for students and teachers at his school. IEP meetings are required by state and federal law for all special education students. At such meetings a representative other than the student's teacher is designated by the District to attend. Program specialists may be designated by the District to attend such meetings.

Bob Lounibos is fifth grade teacher at Blosser Elementary School. During IEP meetings, the student's teacher is required to attend. During the 2000-2001 school year, Mr. Lounibos attended approximately ten IEP meetings. The majority of those meetings took place after the regular workday.

During the 2001-2002 school year, bargaining unit members became concerned about the increasing number of IEP meetings and the fact that most of them were scheduled after regular

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.

work hours. Early in the school year, Mr. Lounibos and other teachers expressed their concerns about duties assigned to be performed after regular workday hours.

On October 11 and October 12, 2000, Mr. Lounibos attended IEP meetings that he was assigned to and occurred after the regular workday. On October 13, 2000 he submitted a supplemental timesheet for time spent at those IEP meetings. The District subsequently denying his request for pay for those duties.

During the 2000-2001 school year, Mr. Harrison attended approximately forty IEP meetings after the regular workday. He was directed to do so by the principal at Blosser. On October 20, 2000, after learning that he should be paid for duties assigned beyond the regular workday, Mr. Harrison began submitting supplemental timesheets for pay for IEP meetings held after the regular workday. The District subsequently denied his request for pay for those duties.

On October 31, 2000, Mr. Lounibos filed a grievance on behalf of himself and other similarly situated teachers, who were not paid for attending IEP and Student Study Team (SST)² meetings after the regular workday. The grievance alleged a violation of Article XVIII, section 2, of the parties' agreement, which provides:

2. individuals who perform duties outside of the school day and (sic) will be paid the same hourly rate, with exceptions noted in Appendixes A-1, A-2, and A-3.³

The grievance proceeded through the designated levels and ended in binding arbitration. On October 3, 2001, Arbitrator Franklin Silver conducted a hearing regarding the grievance. Both parties presented evidence during the hearing and submitted post-hearing briefs to the Arbitrator.

On February 18, 2002, the Arbitrator issued his decision denying the grievance. In his decision the Arbitrator examined the language of Article XVIII, section 2 and concluded that the word "duties" in that section of the agreement was latently ambiguous. Because of the latent ambiguity, the Arbitrator decided to consider past practice in order to determine the parties' mutual understanding of the scope of duties not listed in the appendices, and still subject to extra duty pay. The Arbitrator concluded that the past practice was for teachers to attend IEP and SST meetings without additional compensation and that such a longstanding past practice represented a mutual acknowledgement that IEP and SST meetings were not subject to Article VIII, section 2 of the contract.

² SST is a team that reviews concerns about student progress. The team generally consists of at least the student's regular classroom teacher and an administrator. SST meetings often occur after the regular workday.

³ IEP and SST meetings are not noted as exceptions.

Discussion

Although you allege that Arbitrator Silver's decision is repugnant to EERA, you have not established post arbitration repugnancy.

Government Code section 3541.5(a)(2) provides in pertinent part:

(2) ...The board shall have discretionary jurisdiction to review the settlement or arbitration award reached pursuant to the grievance machinery solely for the purpose of determining whether it is repugnant to the purposes of this chapter. If the board finds that the settlement or arbitration award is repugnant to the purposes of this chapter, it shall issue a complaint on the basis of a timely filed charge, and hear and decide the case on the merits. Otherwise, it shall dismiss the charge. The board shall, in determining whether the charge was timely filed, consider the six-month limitation set forth in this subdivision to have been tolled during the time it took the charging party to exhaust the grievance machinery.

In Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81, PERB adopted the NLRB post-arbitration deferral standard. PERB will defer to an arbitration award if the matters raised in the charge were presented to, and considered by the arbitrator; the arbitration proceedings were fair and regular; the parties agreed to be bound by the award and the award is not repugnant to the act.

Unless the arbitrator's award is "palpably wrong," and not susceptible to an interpretation consistent with EERA, the Board will defer to the arbitrator's award. (Yuba City Unified School District (1995) PERB Decision No. 1095.) The Board has stated that the possibility that PERB may have reached a different conclusion in interpreting the parties' agreement does not automatically render the award repugnant. (Ibid) Where a claim of unilateral change is grounded in the contract, and there is no suggestion that the arbitrator failed to consider all of the evidence relevant to the alleged repudiation of the contractual provisions, the arbitrator's award is not repugnant to the Act. Fremont Unified School District (1994) PERB Decision No. 1036.

You argue that because the Arbitrator's decision is contrary to PERB precedent, the decision is repugnant to EERA. You cite Marysville Joint Unified School District (1983) PERB Decision No. 314 in support of your position that when a party to a collective bargaining agreement has a clear and unambiguous right under such agreement, that party may enforce the contractual right even if it has failed to do so for an extended period of time.

If the conduct underlying this charge had not been deferrable, you could have filed a unilateral change charge with PERB. During the investigation, the Board Agent would have looked at the same relevant facts as did the Arbitrator. The Board Agent would have examined Article

XVIII, section 2 of the agreement to determine if the Article established a clear policy. If the Board Agent concluded, as did the Arbitrator, that the meaning of the Article was unclear, the Board Agent would have examined the past practice of the parties and discovered that certificated employees in the District had never been paid for attending IEP and SST meetings outside of the school day. Based on this analyses the Board Agent would have found no unilateral change violation under these fact, which supports the finding that the Arbitrator's decision is not repugnant to the Act.

Because the above analysis is somewhat speculative, it should also be noted that PERB might have reached a different conclusion than that of the Arbitrator. This, however, does not render the arbitration award repugnant to the Act. According to the charge, through the introduction of evidence and briefs the Arbitrator considered the meaning of Article XVIII, section 2 of the agreement and the proceeding was fair and regular. There is no suggestion that the arbitrator failed to consider all of the evidence relevant to the alleged repudiation of the contractual provision. Further, the Arbitrator's determination that past practice should be used to determine the meaning of what he deemed a "latent ambiguity" in the agreement was not palpably wrong. Thus you have not established that the arbitrator's decision was repugnant to EERA.

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 Monday, July 22, 2002, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Marie Nakamura
Regional Attorney

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