STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SAN YSIDRO SCHOOL DISTRICT,	)	
	)	
Respondent,	)	
and	)	Case No. LA-CE-212
	)	
SAN YSIDRO FEDERATION OF TEACHERS,	)	PERB Order No. IR 4
	)	
Charging Party, PETITIONER.	)	Administrative Appeal August 8, 1978
	)	

Appearances: J. Michael Taggart, Attorney (Paterson & Taggart) for San Ysidro School District; Lawrence Rosenzweig, Attorney (Levy, Koszdin, Goldschmid & Sroloff) for San Ysidro Federation of Teachers, Local 3211, CFT/AFT/AFL-CIO.

Before Gluck, Chairperson; Cossack Twohey and Gonzales, Members.

OPINION

This case before the Public Employment Relations Board (hereafter Board) is an appeal from the general counsel's denial of a request by San Ysidro Federation of Teachers for injunctive relief pursuant to section 3541.3(j) of the Educational Employment Relations Act (hereafter EERA).[1]

FACTS

On January 18, 1978 San Ysidro Federation of Teachers (hereafter SYFT) filed an unfair practice charge against the San Ysidro School District (hereafter District) alleging that the District

[1]The Educational Employment Relations Act is codified in Gov. Code sec. 3540, et seq. All references are to the Government Code unless otherwise specified.

had violated sections 3543.5(a), (b) and (c) of the EERA.[2] SYFT amended its charge on February 15, 1978 to include an alleged violation of section 3543.5(e).[3]

In essence, SYFT alleged that the District's refusal to grant the four members of its negotiating team full-day release time on January 4 and 11, 1978, the January 27, 1978 Notices of Unprofessional conduct pursuant to Education Code section 44938[4] issued to the

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[2] Gov. Code sec. 3543.5(a), (b) and (c) provides:

> 3543.5. It shall be unlawful for a public school employer to:
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> (a) 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.
>
> (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.

[3] Gov. Code sec. 3543.5(e) provides:

> 3543.5. It shall be unlawful for a public school employer to:
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> *****
>
> (e) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).

[4] Ed. Code sec. 44938, in pertinent part, provides:

> "The governing board of any school district shall not act upon any charges of unprofessional conduct or Incompetency unless during the preceding term or half school year prior to the date of the filing of the charge, and at least 90 days prior to the date of the filing, the board or its authorized representative has given the employee against whom the charge is filed, written notice of the unprofessional conduct or Incompetency, specifying the nature thereof with such specific instances of behavior and with such particularity as to furnish the employee an opportunity to correct his faults and overcome the grounds for such charge."

three permanent teachers who were members on the negotiating team, the February 9, 1978 Notice of Dismissal pursuant to Education Code 44949[5] issued to the one probationary teacher who was a member of the negotiating team, and deduction of pay from the salaries of all negotiating team members constitute violations of the EERA.

On February 13, 1978 SYFT filed a request for injunctive relief with the Board's general counsel.[6] SYFT urged that

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[5]Ed. Code sec. 44949, in pertinent part, provides:

> "(a) No later than March 15 and before an employee is given notice by the governing board that his services will not be required for the ensuing year, the governing board and the employee shall be given written notice by the superintendent of the district... that it has been recommended that such notice be given to the employee, and stating reasons therefor....
>
> (b) The employee may request a hearing to determine if there is cause for not reemploying him for the ensuing year....
>
> (c) ...The proposed decision shall be prepared for the governing board and shall contain a determination as to the sufficiency of the cause and a recommendation as to disposition. However, the governing board shall make the final determination as to the sufficiency of the cause and disposition....
>
> *****
>
> (e) Notice to the probationary employee by the governing board that his service will not be required for the ensuing year, shall be given no later than May 15."

[6]At the time SYFT filed its request, Board policy was to have requests for injunctive relief filed with its general counsel. At the Board's regular monthly public meeting held on July 5, 1978, the Board modified its policy with respect to requests for injunctive relief. The Board unanimously adopted the following policy:

Injunctive Relief.

(a) A party who wishes the Board to seek injunctive relief pursuant to section 3541.3(j) shall file such request for injunctive relief with the Board itself at the headquarters office. The request shall contain the following:

(cont.)

injunctive relief was necessary to maintain the status quo and to stay the hearing provided under Education Code section 44949 on the Notice of Dismissal of the probationary teacher who was a member of the negotiating committee. In essence the SYFT argued that irreparable harm would occur since the District would be free to terminate the probationary teacher for cause regardless of the teacher dismissal hearing and before the Board could render a decision on the pending unfair practice charge. SYFT characterized the situation as a "collision" between the Educational Employment

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(cont.)

(1) A copy of the underlying unfair practice charge;

(2) The date the unfair practice charge was filed;

(3) Affidavits and other appropriate evidence setting forth the specific facts upon which the request is based;

(4) A full description of the irreparable injury which the requesting party alleges it will suffer if the request is not granted;

(5) The basis for contending that the Board's normal processes and remedies are inadequate;

(6) The legal theory which supports the requesting party's belief that it will likely prevail on the merits of the underlying unfair practice charge; and

(7) A statement of the relief sought.

(b) In order to be considered filed, a copy of the request must have been actually served upon the charged party or parties prior to filing the request, and a statement of such service shall accompany the request. "Actual service" as used in this section means actual receipt by the party or their agent.

(c) The charged party shall have two days, exclusive of Saturdays, Sundays, and holidays following receipt of the request within which to present to the Board itself such evidence, including affidavits, as it may deem proper to rebut the request.

(d) The Board itself with the advice of its general counsel, shall immediately upon expiration of charged party's rebuttal period consider the request for injunctive relief and shall determine whether or not to issue complaint and seek injunctive relief. If the Board itself determines the request should be denied, it will so notify all parties in writing.

Relations Act and the Education Code. Under the Education Code a final dismissal notice had to be issued, if at all, by May 15. A Board decision could not be expected until sometime after that. The Board general counsel denied the request for injunctive relief on the basis that SYFT had an adequate remedy at law under the EERA.

Two hearings were held following the general counsel's denial of SYFT's request. An expedited Board hearing on the unfair practice charge was held on March 21 and 22.[7] A teacher dismissal hearing as provided by Education Code section 44949 was held before an administrative law judge of the Office of Administrative Hearings on April 3 and 4.[8]

On March 13, 1978, SYFT appealed the general counsel's decision to the Board itself. SYFT alleged that the normal administrative procedures of the Board were inadequate to provide an effective remedy even if the charging party prevailed on the merits of the case. In particular SYFT asserted that the employment of the probationary teacher was jeopardized when the District's action under the Education Code could impair a remedy ordered under the EERA.

On April 11 this Board, upon consideration of the appeal, ordered SYFT to prepare and submit facts in affidavit form supporting its request for injunctive relief. Board also invited the District to submit affidavits in response if it so chose.

Discussion

We agree with the general counsel's denial of the requested injunctive relief.

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[7] A hearing officer's proposed decision issued on May 25, 1978. Both SYFT and the District have filed exceptions to the proposed decision.

[8] The administrative law judge issued a proposed decision on April 18, 1978 in which it was ordered that the probationary teacher who was a member of the negotiating team was to be re-employed as a certificated employee of the District for the 1978-79 school year.

An injunction is proper in circumstances mandating extraordinary relief.[9] Two of the prerequisites for the issuance of an injunction, likelihood of irreparable harm and inadequacy of a legal remedy, were not satisfied here.[10] The facts as alleged in SYFT's affidavits fall short of these minimum requirements.

SYFT has failed to demonstrate that irreparable harm will result if an injunction is not obtained. SYFT asserts that the Board's normal remedies, in the event it prevails on the merits of its charge, cannot restore the integrity of the negotiating process.[11] However, SYFT has not asserted any specific facts in support of this conclusory allegation. Furthermore, we take official notice that SYFT and the District have proceeded to factfinding. Thus, negotiations between the parties about the terms of a new agreement have not broken down but rather are proceeding according to the statutory scheme of the EERA.

Nor is SYFT's bold assertion that it is in jeopardy of losing its support among members of the negotiating unit as a result of the District's conduct supported by any evidence. Assuming for the purpose of discussion that membership in SYFT has declined,

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[9]Wilkins v. Oken (1958) 157 Cal.App.2d 603; West v. Lind (1960) 186 Cal.App.2d 563.

[10]Weingard v. Atlantic Savings & Loan Assn. (1970) 1 Cal.3d 806.

[11]See Aerovox Corporation (1967) 165 NLRB 623 [65 LRRM 1406], enforced (Fourth Circuit, 1968) 390 F.2d 653 [67 LRRM 2513], enforcement pendente lite denied, (Fourth Circuit, 1967) 389 F.2d 475 [65 LRRM 2158]. In Aerovox Corporation, the NLRB issued a bargaining order after concluding that the employer had violated sections 8(a)(5) and (1) of the National Labor Relations Act. The Fourth Circuit, however, refused to grant the National Labor Relations Board's motion pendente lite for a temporary restraining order pursuant to section 10(j). Referring to circumstances in which an employer's refusal to bargain coupled with facts showing erosion of union strength could warrant such relief, the court described this case, in contrast, as one in which there was no evidence that the union was being undercut while awaiting the normal processes of court enforcement.

the nexus between the decline and the District's conduct has not been made. Suffice to note that employee organizations may suffer membership decline for any number of reasons unrelated to reprisals against the negotiating team.

As a corollary argument, SYFT also asserts that the threatened discharge of the one probationary teacher who was a member of the negotiating team has a "chilling effect" on participation of probationary teachers in employee organization activities. Again, however, no evidence of reduced participation was offered. In the absence of any facts to support this assertion, we are unable to infer that probationary teachers have ceased participating in employee organization activities.

SYFT claims that there is no adequate legal remedy in this case. We do not agree. The statute gives the Board broad remedial powers, and the type of disciplinary action taken by the District has been remedied countless times by agencies having authority comparable to that of PERB. If the District is ultimately found in the unfair practice case to have violated SYFT's and employees' rights under the EERA, a proper and enforceable remedy will be ordered.

Finally, we note that the affidavit submitted by SYFT counsel is entirely hearsay and does not cure the above-discussed defects of SYFT's request.

ORDER

The Public Employment Relations Board orders that:

The decision of the general counsel to deny the request for injunctive relief pursuant to section 3541.3(j) is sustained by the Board itself.

By Jerilou Cossack Twohey, Member

Harry Gluck, Chairperson

Raymond J. Gonzales, Member, concurring:

The general counsel properly denied SYFT's request for injunctive relief. However, since that time, this issue has become moot in that

the probationary teacher who was given a notice of dismissal has been reemployed by the District. I see no reason to issue a lengthy and very tardy decision resolving an issue which no longer has any relevance to the parties. I do not think the Board should enunciate policy in a case which is unlikely to be carefully scrutinized by the parties and cannot be tested in court. I do not mean to imply that parties should appeal all Board decisions to the courts. Nevertheless, the fact that the opportunity exists operates as a check on Board discretion. In this case, there is no such check since the issue is moot and courts usually avoid considering moot issues. In addition, the parties have no incentive to invest further time and energy on a case which is no longer relevant. Therefore, I only concur in the Board's order and do not concur in the rest of the decision.

Raymond J. Gonzales, Member

STATE OF CALIFORNIA

EDMUND G. BROWN JR., Governor

PUBLIC EMPLOYMENT RELATIONS BOARD
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March 2, 1978

Lawrence Rosenzweig, Esq.
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In re: PERB Case No. IA-CE-212 (San Ysidro Federation of Teachers vs. San Ysidro School District)

Dear Mr. Rosenzweig:

In response to your letter of February 13, 1978, please be advised that the above case does not appear to present considerations which would make it appropriate for this office to petition a court for temporary relief pending an administrative hearing on the merits of the unfair practice charge.

The charge which was filed in this matter is primarily concerned with disciplinary action taken with respect to members of the Federation's negotiating team. That this is the thrust of the charge is confirmed quite clearly by your letter. As you are aware, the EERA gives this agency the authority to order, where appropriate, reinstatement with or without back pay in cases of discriminatory dismissals. Thus, assuming the Federation prevails on the merits, it appears that the normal administrative procedures are adequate to provide an effective remedy.

Although you raise the question of whether this Board's powers of reinstatement might conflict with the provisions of Education Code Section 44949, it is difficult to see how the temporary injunctive relief which you suggest—postponement of a possible Section 44949 hearing-could help to avoid arguable conflict between the EERA and the Education Code. Rather, if this office were to seek immediate injunctive relief of the type you suggest, it would guarantee that the court would have to consider this possible conflict, and the case would be in a posture which would be highly unfavorable to a resolution in favor of the Board's remedial powers. This is because the court would be placed in a position of having to consider the legal issues where the facts have not been fully developed, and where the facts, judging from the allegations of the charge and the documents attached to the charge, will be the subject of substantial dispute.

In addition, since this agency is young and has not fully formulated its policies with regard to seeking temporary judicial relief pursuant to Government Code Section 3541.3(j), it is appropriate to consider the guidelines of the General Counsel of the NLRB in determining when to seek sililar relief under NLRB Section 10(j). Those guidelines are stated in the General Counsel's Report on Injunction Proceedings for August, 1971 - July, 1975 (Labor Relations Yearbook, 1975, B.N.A., pp 310-334). The basic criteria are stated at p. 312:

> In determining whether the institution of 10(j) proceedings is warranted, the major consideration is whether the alleged unlawful conduct made subject of a complaint is likely to frustrate the Board's remedial processes in the absence of interim injunctive relief. And this is related to whether the unfair labor practices involved can be effectively remedied, and the status quo restored, by a Board order and its subsequent enforcement by a court of appeals. Other pertinent considerations include the clarity of the alleged violation, the impact of the unfair labor practices on the public interest, the widespread or repetitious nature of the alleged violations, and the impact of the alleged unfair labor practices on the charging party and employee rights under the Act.

Without disregarding the seriousness of situations faced by the individuals faced with disciplinary action in San Ysidro, it is nevertheless quite apparent that the policy considerations raised by that charge do not meet the stringent requirements set by the NLRB General Counsel. In addition, our research indicates that the General Counsel has sought 10(j) relief, not always with success, in 8(a)(3) cases primarily, if not always, in the context of widespread and aggravated interference with employee rights during the crucial organizational period. In such cases, preliminary injunctive relief is appropriate to preserve the status quo and make possible a secret ballot election. In the San Ysidro case, of course, the Federation is already the exclusive representative, and so similar problems of maintaining the status quo are not present.

Please be assured that I take very seriously requests to invoke this agency's power to seek temporary judicial relief. It simply does not appear that the present case warrants this extraordinary remedy. Your request that this office seek such relief is therefore denied.

You may obtain a review of the denial of your request for temporary relief by filing an appeal with the Board itself at the Headquarters Office within ten (10) calendar days after service of this document. The appeal shall be in writing, signed by the petitioner or its agent, and shall contain the facts and arguments upon which the appeal is based. Any appeal shall be served upon each respondent to the above-entitled matter.

Very truly yours,

William P. Smith
General Counsel

cc: Michael Taggart, Esq.
Malaga Cove, Box 1088
Palos Verdes Estates. Ca. 90274

cc: Raoul Teilhet
cc: Andrea Skorepa, Chapter President