STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

COUNTY OF INYO, Charging Party, v. UNITED DOMESTIC WORKERS OF AMERICA, Respondent.	Case No. SA-CO-22-M PERB Decision No. 1783-M November 7, 2005

Appearance: Kuykendall & Simas by Steven L. Simas, Attorney, for County of Inyo.

Before Duncan, Chairman; Shek and Neuwald, Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the County of Inyo (County) to a Board agent's dismissal of its unfair practice charge. The unfair practice charge alleges that the United Domestic Workers of America (UDW) violated the Meyers-Milias-Brown Act (MMBA)[1] by failing to negotiate in good faith.

The Board has reviewed the complete record including, but not limited to, the unfair practice charge, the first amended charge, the warning and dismissal letters, and the County's appeal. UDW did not file a response to the appeal. The Board finds the Board agent's warning and dismissal letters to be in conflict with the Board's holding in Golden Plains Unified School District (2002) PERB Decision No. 1489 (Golden Plains). Under Golden Plains, any disputed facts or competing theories of law should be left for the Board hearing process to address.

[1]The MMBA is codified at Government Code section 3500, et seq. Unless otherwise indicated, all statutory references are to the Government Code.

In the warning letter, the Board agent stated that the County is obligated to provide a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice" as required under PERB Regulation 32615(a)(5)[2] and he further states that the County's burden does include setting forth the "who, what, when, where and how" of an unfair practice. (State of California (Department of Food and Agriculture) (1994) PERB Decision No. 1071-S, citing United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision No. 944.)

The County has met the burden in this case. While it is necessary to present the "who, what, when, where and how" in the charge, it is not necessary to include all the party's evidence or theories of law in the charge or amended charge. The charge itself, attachments, and the declaration of Mike Noda (Noda) provide clearly and concisely the information necessary. The letter from UDW to County Supervisor, Michael A. Dorame, dated February 6, 2004, confirms the allegations that UDW is trying to circumvent Community Services Solutions, Inc., the negotiators for the County. Here we know the UDW negotiator (who), has tried to circumvent the actual negotiator in this case contrary to the negotiation ground rules (what), on several specific occasions which are indicated in the pleadings (when), and that this was done by trying to communicate with the members of the County Board of Supervisors and the In Home Supportive Services Advisory Board (how).

The County has set forth allegations related to the UDW refusal to follow the ground rules. The declaration of Noda (attachment to first amended charge) also details specific instances in which the UDW representatives violated the ground rules, refused to meet and confer in good faith, attempted to circumvent the employer representative, and refused to discuss or agree to new or additional ground rules. Numerous instances over several months are documented.

[2]PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq.

We agree with the Board agent that while a party may not merely go through the motions of negotiations, it may lawfully maintain an adamant position on any issue. Adamant insistence on a bargaining position is not necessarily a refusal to bargain in good faith. (Placentia Fire Fighters v. City of Placentia (1976) 57 Cal.App.3d 9 [129 Cal.Rptr. 126].) However, in this particular case, the County has presented allegations of far more.

Acknowledging that there must be more than one indicator of bad faith under the totality of circumstances test that applies here (Oakland Unified School District (1982) PERB Decision No. 275), we believe the County has met its burden to establish a prima facie case.

In addition to alleging a refusal to bargain in good faith by refusing to discuss other options to the specific wage increase proposal of UDW, the County has alleged specific dates when UDW refused to follow ground rules already established, refused to discuss new ground rules or additional ground rules, and made efforts to circumvent the negotiating team for the County by attempting to go directly to the Board of Supervisors and at least one other entity that was not involved in the negotiations in violation of the MMBA. (Sec. 3505(c) and PERB Reg. 32604(a), (c) and (e).) It is up to the trier of fact to determine if the totality of circumstances constitutes bad faith by UDW, but the County has set forth a prima facie case.

UDW has not responded so the only evidence presented in relation to the allegations is that provided by the County.

The County has presented a well articulated case that includes the necessary elements and sets forth facts that must be taken at face value under precedential PERB case law.

ORDER

The unfair practice charge in Case No. SA-CO-22-M is REMANDED to the Office of the General Counsel for a complaint to issue.

Member Neuwald joined in this Decision.

Member Shek's dissent begins on page 5.

SHEK, Member, dissenting: I respectfully dissent. The Public Employment Relations Board (PERB or Board) should affirm the Board agent's dismissal of the unfair practice charge filed by the Community Service Solutions, Inc. (CSS) of the County of Inyo (County) against the United Domestic Workers of America (UDW). I have reviewed the entire record, including the original and amended unfair practice charge and attached documents, the warning and dismissal letters, and the County's appeal. I find the Board agent's warning and dismissal letters to be free of prejudicial error and supported by the facts and applicable law, and would adopt them as the decision of the Board itself.

BACKGROUND

The Board agent's factual findings are summarized as follows: CSS is the employer of record for the In-Home Supportive Services providers in the County. According to its agreement with the County, CSS is responsible for negotiations and all labor relations activity with the UDW.

In May 2003, CSS and the UDW began negotiations. They agreed on a set of ground rules, recognizing CSS as the employer representative in negotiations and limiting negotiations to the "negotiations teams". An addendum to the ground rules, to be effective 60 days from August 26, 2003, provided that there would be no contact with "those represented by the other side" regarding the "specific content of ongoing negotiations" and that the UDW bargaining team or their representatives agrees not to go to the Board(s).

At a negotiation session on May 30, 2003, UDW representatives stated that they would not accept any wages and benefit package that was below $8.50, and that position would remain firm.

At some point, CSS made a "best and final offer." On October 23, 2004, the UDW addressed a letter critical of that offer to CSS and members of the County Board of Supervisors (County Board).

On February 6, 2004, UDW Representative Thomas Meshak wrote to the County Board and expressed displeasure with CSS, its "paid consultant and designated negotiator," and asked that the Board "intercede."

DISCUSSION

It is the essence of surface bargaining that a party goes through the motions of negotiations, but in fact is weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent agreement. (Muroc Unified School District (1978) PERB Decision No. 80 (Muroc).) Where there is an accusation of surface bargaining, PERB will resolve the question of good faith by analyzing the totality of the accused party's conduct. The Board weighs the facts to determine whether the conduct at issue "indicates an intent to subvert the negotiating process or is merely a legitimate position adamantly maintained." (Oakland Unified School District (1982) PERB Decision No. 275 (Oakland I).)

The indicia of surface bargaining are many. Entering negotiations with a "take-it-or-leave-it" attitude evidences a failure of the duty to bargain because it amounts to merely going through the motions of negotiations. (General Electric Company (1964) 150 NLRB 192, 194 [57 LRRM 1491], enf. 418 F.2d 736 [72 LRRM 2530].) Recalcitrance in the scheduling of meetings is evidence of manipulation to delay and obstruct a timely agreement. (Oakland Unified School District (1983) PERB Decision No. 326 (Oakland II.) Dilatory and evasive tactics including canceling meetings or failing to prepare for meetings is evidence of bad faith. (Oakland II.) Conditioning agreement on economic matters upon prior agreement on non-

economic subjects is evidence of an unwillingness to engage in a give-and-take. (State of California (Department of Personnel Administration) (1998) PERB Decision No. 1249-S.)

Other factors that have been held to be indicia of surface bargaining include: negotiator's lack of authority which delays and thwarts the bargaining process (Stockton Unified School District (1980) PERB Decision No. 143 (Stockton)); insistence on ground rules before negotiating substantive issues (San Ysidro School District (1980) PERB Decision No. 134); and reneging on tentative agreements the parties already have made (Charter Oak Unified School District (1991) PERB Decision No. 873; Stockton; Placerville Union School District (1978) PERB Decision No. 69).

It is clear, however, that while a party may not merely go through the motions, it may lawfully maintain an adamant position on any issue. Adamant insistence on a bargaining position is not necessarily refusal to bargain in good faith. (Oakland I.) "The obligation of the employer to bargain in good faith does not require the yielding of positions fairly maintained." (NLRB v. Herman Sausage Co. (5th Cir. 1960) 275 F.2d 229 [45 LRRM 2829, 2830].) I therefore concur with the Board agent's finding that the County had not demonstrated that UDW's adamant and unyielding position on the issue of a wage increase to at least $8.50, standing alone, established a prima facie case of refusal to bargain in good faith.

An employer may not communicate directly with employees to undermine or derogate the representative's exclusive authority to represent unit members. (Muroc.) Similarly, the employer violates the duty to bargain in good faith when it bypasses the exclusive representative to negotiate directly with employees over matters within the scope of representation. (Walnut Valley Unified School District (1981) PERB Decision No. 160.)

Similarly, a union cannot bypass the employer's negotiators. (San Ramon Valley Unified School District (1982) PERB Decision No. 230 (San Ramon).)

The Board considered the issue of what limitations may be imposed on the content of an exclusive representative's address to a District in public meetings in San Ramon, and stated, at pp. 16-17:

> Bypassing the authorized negotiators, for example, by going straight to the school board of trustees with proposals or concessions, would subvert the statutory scheme and arguably violate the good-faith obligations of collective bargaining just as the employer's effort to bypass the union's negotiators by seeking direct access to the membership has been condemned. (Citations omitted.)

In Westminster School District (1982) PERB Decision No. 277, the Board stated, at pp. 8-9:

> After reviewing the decision of the Supreme Court in City of Madison v. Wisconsin Employment Relations Commission (1976) 429 U.S. 167 [93 LRRM 2970] and the decision of the Court of Appeal in Henrico Firefighters Assn. v. Supervisors (4th Cir. 1981) 649 F.2d 237 [107 LRRM 2432], [fn. omitted] both decided on First Amendment grounds, the Board, in San Ramon, supra, concluded that negotiations, but not mere advocacy, may be prohibited at a public meeting.

I therefore concur with the Board agent's findings that the County had not demonstrated that UDW had refused to deal with the employer's chosen representative. As stated at pp. 3-4 of the dismissal letter, dated December 17, 2004:

> The Union has not presented new proposals or concessions directly to the County's Board or sought to engage in the give and take of direct negotiations with that entity. [The facts show that UDW attempted] to engage in advocacy support for proposals already made to the employer's chosen negotiators. The Union's letter of October 23, 2003, merely explains and defends its offer, made at the bargaining table, and criticizes the proposal of the employer; it also requests that the County Board schedule a 'public report and review' of negotiations. Similarly, the letter of

> February 6, 2004, merely criticizes the manner in which CSS is conducting negotiations and asks that the Board 'intercede on behalf of your constituents and insist on an expeditious completion of this contract.' Such letters are well within a union's right to public advocacy and do not constitute illegal 'bypassing.' Westminster School District (1982) PERB Decision No. 277. [Emphasis added.]

Based on the discussion above, I would therefore dismiss the unfair practice charge without leave to amend.