STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

BEVERLY HILLS EDUCATION ASSOCIATION, Charging Party, v. BEVERLY HILLS UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-5034-E PERB Decision No. 1969 July 8, 2008

Appearances: California Teachers Association by Rosalind D. Wolf, Attorney, for Beverly Hills Education Association; Atkinson, Andelson, Loya, Ruud & Romo by Alan G. Atlas and Brian D. Bock, Attorneys, for Beverly Hills Unified School District.

Before Neuwald, Chair; Wesley and Dowdin Calvillo, Members.

DECISION

DOWDIN CALVILLO, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Beverly Hills Education Association (BHEA) of a Board agent's partial dismissal of an unfair practice charge. The second amended charge alleged that the Beverly Hills Unified School District (District) violated the Educational Employment Relations Act (EERA)[1] by: (1) unilaterally increasing teachers' work hours by adopting a policy requiring teachers to return student examinations upon parent request and thereby requiring the development of new exams for future use; (2) retaliating against teacher and BHEA Vice President Mark Frenn for sending to parents a letter asking them not to request examinations from him pursuant to the test release policy; and (3) refusing to meet and confer with BHEA over the effects of the test release policy on teachers' work hours. The

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

Board agent dismissed the unilateral change and refusal to bargain allegations and accordingly only those two allegations are before the Board on appeal.[2]

The Board has reviewed the entire record in this case, including but not limited to, the original and amended unfair practice charge, the District's position statements, the Board agent's warning and dismissal letters, BHEA's appeal and the District's response thereto. Based upon this review, the Board affirms the partial dismissal of the unfair practice charge subject to the discussion below.

BACKGROUND

Second Amended Unfair Practice Charge

On August 27, 2007, BHEA filed a second amended unfair practice charge alleging that the District violated EERA by, inter alia, unilaterally increasing teachers' work hours by adopting a new test release policy and refusing to meet and confer over the effects of the policy. Both of these alleged violations arose from an administrative directive issued by District Superintendent Kari McVeigh (McVeigh) on November 29, 2006. The directive stated that "effective immediately" teachers must provide to parents, upon request, a copy of their child's examination(s) for review outside of the classroom. Prior to November 29, 2006, there was a practice within the District that examinations could only be reviewed in the classroom. BHEA alleged that the District did not meet and confer over the test release policy before issuing the directive.

In support of its unilateral change claim, BHEA alleged that teachers "routinely constructed student examinations based on test questions used in prior years." Because the test release policy allows those questions to leave the classroom, BHEA asserted that now "teachers are required to construct new examinations for each class each year, resulting in a

[2]Simultaneously with the partial dismissal, the Office of the General Counsel issued a complaint on the retaliation allegation.

substantial increase in work hours." BHEA further alleged that the District did not instruct teachers to cease performing any of the other duties normally performed during their preparation periods. Finally, BHEA claimed that one teacher, Danny Zadeh (Zadeh), "worked additional hours outside of the normal work day" creating new examinations because he had released examinations to parents pursuant to the test release policy.

As for the refusal to bargain claim, BHEA alleged that on or about December 15, 2006, BHEA President Christopher Bushée (Bushée) delivered a memorandum to McVeigh and District Assistant Superintendent Sal Gumina (Gumina) in which BHEA demanded that the District meet and confer over "the impact and effects of requiring tests to be released." McVeigh and Bushée met on January 8, 2007, to discuss the test release policy. At the meeting, McVeigh proposed to create a task force consisting of herself, Bushée, teachers, administrators, a school board member and parents to evaluate whether the test release policy should "continue, be discontinued, or otherwise revised." BHEA alleged that it did not consider McVeigh's task force proposal to be responsive to its demand to bargain because: (1) McVeigh is not a member of the District's bargaining team; (2) the meeting did not constitute bargaining; and (3) the proposed task force could not engage in bargaining because it would include parent members.

According to the charge, Bushée reiterated BHEA's demand to bargain over effects of the test release policy to both McVeigh and Gumina on January 9 and 11, 2007. BHEA alleged that as of January 23, 2007, the District had not responded to its demand.

District's Position Statement

The District filed a response to each version of the charge. As to the unilateral change allegation, the District asserted that its decision to adopt the test release policy was not negotiable because it was a managerial prerogative under PERB case law and was also

specifically allowed under the management rights clause of the parties' collective bargaining agreement. The District further stated that if the test release policy resulted in the need for teachers to create new exams each year this could not be construed as a unilateral change because creating exams fell within teachers' existing job duties.

Regarding the alleged change in work hours, the District asserted that BHEA failed to provide "formal, empirical evidence" that the test release policy resulted in increased work hours for teachers. The District further contended that the allegation that Zadeh worked additional hours creating examinations did not establish that the District's decision "has actually changed the work hours of its teachers as a whole in a significant manner."

As to the failure to bargain allegation, the District stated that McVeigh met with Bushée in January 2007 "to discuss the recently received demand for bargaining" and that BHEA never responded to McVeigh's task force proposal, which was aimed at determining the District's continuing need for the test release policy.

Dismissal Letter

The Board agent dismissed the unilateral change and refusal to bargain allegations on October 4, 2007. Regarding the unilateral change allegation, the Board agent noted that under Imperial Unified School District (1990) PERB Decision No. 825 (Imperial), a party alleging a unilateral change in work hours must show "an actual change" in work hours as a result of either an increase in instructional time or a decrease in preparation time. Applying this standard, the Board agent concluded BHEA failed to allege facts demonstrating that existing preparation periods provided insufficient time to create any new examinations that might be required as a result of the test release policy.

Addressing the refusal to bargain allegation, the Board agent concluded that the District did not commit a "per se" violation of the duty to meet and confer because McVeigh met with

Bushée on January 8, 2007 to discuss the test release policy. The Board agent also concluded that no violation occurred under the "totality of the conduct" test because, even if the District's failure to respond to BHEA's subsequent demands to bargain constituted bad faith, BHEA did not allege any other facts that would support a finding of bad faith bargaining by the District.

BHEA's Appeal

On October 26, 2007, BHEA filed a timely appeal of the Board agent's partial dismissal. On appeal, BHEA admits that the District's decision to adopt the test release policy was not negotiable. However, BHEA argues the Board agent erroneously dismissed the unilateral change allegation because the District's decision had a negotiable effect on teachers' work hours and therefore the District had a duty to meet and confer over those effects before implementing the test release policy.

BHEA first claims that the Board agent "misstated" the law by requiring BHEA to establish that the District had implemented an "actual change" in work hours. BHEA argues that the law only requires a charging party to allege that the change has "reasonably foreseeable effects" on a negotiable subject. BHEA further asserts that the Board agent improperly resolved the factual dispute over whether existing preparation periods provide enough time for teachers to create new examinations that may become necessary as a result of the test release policy.

BHEA also claims that the Board agent erred in dismissing the refusal to bargain allegation. According to BHEA, the Board agent again improperly decided a factual dispute by concluding that the January 8, 2007 meeting between McVeigh and Bushée constituted bargaining over the effects of the test release policy. BHEA contends that the meeting was not responsive to the bargaining demand because it was merely a one-on-one discussion, not a negotiation session.

District's Response to Appeal

The District filed its response to the appeal on November 13, 2007. The District first asserts that the partial dismissal must be reviewed under the abuse of discretion standard.[3] The District then argues that the charge did not meet the legal standard set forth in Imperial because BHEA failed to allege facts demonstrating that the test release policy had an actual effect on teachers' work hours. As for the allegation regarding Zadeh preparing examinations outside of work hours, the District stated that the experience of one teacher is not enough to establish an actual change in work hours and that BHEA failed to allege why Zadeh could not prepare the examinations during his scheduled preparation periods.

The District further argues that it did not refuse to meet and confer with BHEA because its representative McVeigh met with Bushée to discuss the test release policy on January 8, 2007. The District claims BHEA never told the District that it did not consider this meeting to be responsive to the bargaining demand. Finally, the District states that BHEA failed to allege how it reiterated its demand to bargain on January 9 and 11, 2007.

Reply Briefs

On November 14, 2007, the Appeals Office notified the parties that the filings were now complete for this case and that the case had been placed on the Board's docket. On November 19, BHEA filed a reply brief in which it argues that: (1) a Board agent's dismissal of an unfair practice charge is reviewed de novo; and (2) the experience of one teacher is sufficient to show a negotiable change in work hours. Two days later, the District responded with its own reply brief. The District asks the Board not to consider BHEA's reply brief

[3]"The abuse of discretion standard measures whether, given the established evidence, the lower court's action falls within the permissible range of options set by the legal criteria . . . [D]iscretion may not be exercised whimsically, and reversal is required where there is no reasonable basis for the ruling or when the trial court has applied the wrong test to determine if the statutory requirements were satisfied." (Robbins v. Alibrandi (2005) 127 Cal.App.4th 438, 452 [25 Cal.Rptr.3d 387], citations and internal quotation marks omitted.)

because PERB Regulations[4] do not provide for filing of reply briefs on appeal. Alternatively, the District asks the Board to consider its reply brief, which reiterates the argument that abuse of discretion is the proper standard of review for a dismissal appeal.

DISCUSSION

Reply Briefs

As noted, both parties filed reply briefs as part of this appeal. PERB regulations do not expressly provide for or preclude the filing of reply briefs on appeal. (Los Angeles Unified School District (1984) PERB Decision No. 408.) Consequently, the Board has ruled that it has discretion to allow the filing of reply briefs when such briefs would "aid the Board in its review of the underlying dispute," such as by "rais[ing] new issues, discuss[ing] new case law or formulat[ing] new defenses to allegations." (Ibid.) Here, most of the parties' arguments on the standard of review issue are contained in the reply briefs. Because these arguments would aid in the Board's resolution of the issue, the Board exercises its discretion to consider the parties' reply briefs as part of the record in this appeal.

Standard of Review

It is well established that in deciding appeals, PERB reviews the entire record de novo and is free to reach different factual and legal conclusions than those in the decision being appealed. (Woodland Joint Unified School District (1990) PERB Decision No. 808a; Santa Clara Unified School District (1979) PERB Decision No. 104.) Nonetheless, the District argues that PERB should review a Board agent's dismissal of an unfair practice charge under the more deferential abuse of discretion standard. As support for this argument, the District relies on Los Rios College Federation of Teachers (Lowman) (1996) PERB Decision No. 1142, in which the Board stated: "The Board finds the warning and dismissal letters to be free of

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

prejudicial error and adopts them as the decision of the Board itself." The District also cites to similar language in two other cases, AFSCME (Alvarez) (1993) PERB Decision No. 984-H (AFSCME) and Apple Valley Unified School District (1992) PERB Decision No. 963 (Apple Valley), in support of its argument for an abuse of discretion standard of review.

The District draws an incorrect inference from the "free of prejudicial error" language in these cases. PERB case law clearly shows that this language does not establish an abuse of discretion standard for Board review of a dismissed unfair practice charge. Indeed, in AFSCME, which the District claims supports such a standard, the Board stated: "The Board has reviewed the entire record in this case de novo and, finding the dismissal to be free of prejudicial error, adopts it as the decision of the Board itself." Similar language is found in several other cases where the Board adopted the Board agent's dismissal following a de novo review of the record. (E.g., California State Employees Association (Katka) (1993) PERB Decision No. 996-S; Apple Valley; Los Angeles School District Peace Officer's Association (Brown) (1987) PERB Decision No. 627.) Moreover, the Board has used the "free of prejudicial error" language in cases where it adopted an administrative law judge's proposed decision, a situation where the District concedes that de novo review is appropriate. (E.g., Lodi Unified School District (2007) PERB Decision No. 1893 ["The Board finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and adopts the proposed decision as the decision of the Board itself"].) Thus, PERB has not used the phrase "free of prejudicial error" with the intent to establish an abuse of discretion standard of review. Accordingly, we reaffirm that the Board applies a de novo standard when reviewing a Board agent's dismissal of an unfair practice charge.

Negotiable Effects of Test Release Policy

A unilateral change is a "per se" violation of the employer's duty to meet and confer in good faith if: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Walnut Valley Unified School District (1981) PERB Decision No. 160; Grant Joint Union High School District (1982) PERB Decision No. 196.) Before implementing a non-negotiable decision, an employer has a duty to provide the union with an opportunity to meet and confer over any "reasonably foreseeable effects" of the decision on subjects within the scope of representation. (Fremont Union High School District (1987) PERB Decision No. 651 (Fremont).) However, an employer's failure to provide notice and an opportunity to bargain before implementation does not constitute an unlawful unilateral change when there is no evidence of negotiable effects resulting from the decision. (See Oakland Housing Authority (2005) PERB Decision No. 1753-M [upholding dismissal of charge because charging party failed to identify any negotiable effects resulting from respondent's non-negotiable decision].)

On appeal, BHEA acknowledges that the District had no duty to meet and confer over its decision to require teachers to provide examinations to parents upon request. Nonetheless, BHEA argues that the test release policy has the effect of increasing teachers' work hours and therefore the District had a duty to bargain over those effects before implementing the policy. It is undisputed that the District did not provide BHEA notice and an opportunity to bargain over effects of the test release policy before McVeigh issued her directive. Furthermore, work hours are an enumerated subject of bargaining under EERA. (EERA sec. 3543.2.) Thus, the alleged unilateral change violation hinges on whether the charge demonstrates that the test release policy had any negotiable effect on teachers' work hours.

When claiming that a non-negotiable decision has an effect on work hours, the charging party bears the burden of alleging facts establishing an actual impact on employees' work hours. (Salinas Union High School District (2004) PERB Decision No. 1639 (Salinas).) The impact must be "reasonably certain to occur and causally related to the nonnegotiable decision." (Fremont.) In Imperial, PERB established that an actual impact on teachers' work hours may be shown by either an increase in instructional time or a decrease in preparation time that has the effect of lengthening the workday or shortening existing duty-free time. Importantly, all of the cases on which PERB relied in Imperial involved changes to the length of instructional or preparation periods. For example, in Fountain Valley Elementary School District (1987) PERB Decision No. 625, the District increased instructional time by thirty minutes per day. The evidence showed that teachers "spent from one and one-half to two hours more per day working outside the regular school day" than before the change. (Ibid.) Likewise, in Corning Union High School District (1984) PERB Decision No. 399, the District's substitution of an instructional period for a preparation period caused teachers to work an additional four hours per week after school hours.

On the other hand, PERB has found no unilateral change in work hours when the effect on teachers' workday is "indirect and speculative." (Lake Elsinore School District (1987) PERB Decision No. 646 (Lake Elsinore).) In Lake Elsinore, the District unilaterally reduced the amount of time instructional aides spent in the classroom. The teachers' union argued that this had an effect on teachers' work hours because teachers now had to perform tasks such as grading papers and record keeping that the instructional aides had performed. The change also required teachers to prepare work to fill the time students formerly spent with the instructional aides. PERB found that these effects were not negotiable because: (1) the change did not mandate an increase in teachers' workload; and (2) the increase in several teachers' work hours

could not clearly be attributed to the policy change rather than to individual variations among teachers such as experience and class size. (Ibid.) Similarly, in Imperial PERB found no impact on teachers' work hours despite an increase in daily instructional time because the teachers could not "give even a rough estimate as to additional time expended" as a result of the schedule change.

Applying these principles to the allegations in the second amended charge, we conclude BHEA failed to allege facts demonstrating that the test release policy had an actual impact on teachers' work hours. It is undisputed that the test release policy did not lengthen instructional time, shorten preparation periods or mandate that teachers create new examinations. To establish an actual change in teachers' work hours, BHEA relies primarily on the allegation that one teacher, Zadeh, "worked additional hours outside of the normal work day rewriting examinations for his Algebra and Geometry classes because examinations for those classes were released to parents pursuant to the new District policy." The charge did not present facts establishing the length of Zadeh's workday either before or after the adoption of the test release policy. Thus, like the evidence found insufficient in Lake Elsinore and Imperial, the charge fails to allege facts showing that the teachers' workday was lengthened, or that their preparation time was shortened, by the test release policy. Further, the charge fails to establish that Zadeh's additional work was a result of the test release policy because it does not allege facts that would rule out other factors that might have contributed to Zadeh's need to work additional hours to create examinations. Accordingly, the allegation involving Zadeh fails to establish a prima facie case of unilateral change in work hours.

The charge also contended that "[t]he District did not direct teachers to cease performing any other duties normally performed during their preparation time . . . to provide time to construct new examinations." In Moreno Valley Unified School District (1982) PERB

Decision No. 206 (Moreno Valley), PERB recognized that shortening the length of a preparation period while requiring the same level of preparation as before establishes a presumption that the change has a negotiable effect on teachers' work hours. However, in Imperial PERB overruled Moreno Valley and expressly rejected such a presumption because it effectively "lifts any burden of proof from the charging party."[5] Thus, as the cases discussed above show, BHEA must allege facts demonstrating that the test release policy had an actual impact on teachers' work hours. The allegation that the District did not relieve teachers of other preparation period duties fails to meet this standard because it does not show that teachers had insufficient time to create new examinations, if needed, during their five weekly preparation periods. As a result, this allegation also fails to establish a prima facie case of unilateral change in work hours.

BHEA also argues that the Imperial "standard is not appropriate to determine if the allegations of an unfair practice charge state a prima facie case." This is so, BHEA claims, because Imperial and the cases discussed in that decision all involved whether witness testimony had established an actual effect on teachers' workday. In Imperial, PERB held that the union failed to establish a prima facie case due to "insufficient evidence of impact on nonwork time." Similarly, the Board in Salinas upheld dismissal of a charge alleging a unilateral change in work hours because the union failed to allege facts "showing the requisite impact on the workday or duty-free time." Thus, the standard for establishing a prima facie

[5]In support of its argument that the District unilaterally changed teachers' work hours, BHEA relies on San Bernardino City Unified School District (1982) PERB Decision No. 255 (San Bernardino), in which the district unilaterally adopted a policy giving each principal discretion to require teachers to prepare lesson plans. Because this had not been the practice at all schools, some teachers would have to create lesson plans upon demand from the principal. PERB held that the effects on teachers' workday were negotiable because the policy change "may necessitate the certificated employee to put in additional work time to prepare the newly required lesson plans." This case appears to apply the presumption of effect on work hours that PERB subsequently rejected in Imperial. Accordingly, we overrule San Bernardino to the extent it is inconsistent with PERB's later decision in Imperial.

case of change in work hours is the same at both the charge and hearing steps of the proceedings. For this reason, the Imperial standard is appropriately applied to determine whether a charge states a prima facie case of unilateral change in work hours.

Refusal to Bargain

An employer's duty to bargain is triggered by a union's valid demand to meet and confer over a subject within the scope of representation. (Newman-Crows Landing Unified School District (1982) PERB Decision No. 223.) When a union demands to meet and confer over the effects of a non-negotiable decision, the demand must clearly identify the negotiable effects. (Ibid.) Absent such an identification, the employer has no duty to bargain. (Ibid.)

In its December 15, 2006 memorandum to the District, BHEA demanded to bargain over "the impact and effects of requiring tests to be released." The demand did not indicate which negotiable subjects BHEA believed were impacted by the test release policy nor did it identify any specific effects on those subjects. Further, the charge alleged that BHEA "reiterated" its demand to bargain on January 9 and 11, 2007, but did not state the contents of those reiterations. Thus, the charge fails to establish that BHEA's demands clearly identified the negotiable effects over which BHEA sought to meet and confer. Accordingly, the District did not violate EERA section 3543.5(c) by failing to meet and confer with BHEA in response to its demands to bargain over "impact and effects" of the test release policy.

ORDER

The partial dismissal of the unfair practice charge in Case No. LA-CE-5034-E is hereby AFFIRMED.

Chair Neuwald and Member Wesley joined in this Decision.