STATE OF CALIFORNIA

EDUCATIONAL EMPLOYMENT RELATIONS BOARD

SAN JUAN FEDERATION OF TEACHERS, LOCAL 1743, CFT/AFT, AFL-CIO, Charging Party, and SAN JUAN TEACHERS ASSOCIATION, CTA/NEA, Respondent, and SAN JUAN UNIFIED SCHOOL DISTRICT, Respondent.	)	Case Nos. S-CO-2 S-CE-3 EERB No. 12

Appearances: Stewart Weinberg, Attorney (Van Bourg, Allen, Weinberg & Roger), for the Charging Party; Richard L. Gilbert, Attorney (Blease, Vanderlaan & Rothschild), for Respondent San Juan Teachers Association; Robert A. Galgani, Attorney (Breon, Galgani & Godino)/ for Respondent San Juan Unified School District.

Before Alleyne, Chairman; Gonzales and Cossack, Members.

OPINION

This is an appeal from the dismissal of an unfair practice charge by an Educational Employment Relations Board Hearing Officer.

On September 7, 1976, the San Juan Federation of Teachers (Federation) filed unfair practice charges against the San Juan

Teachers Association (Association) and the San Juan Unified School District. Following prehearing withdrawals and amendments, three charges remain pending for consideration, two against the Association and one against the district. The charge against the district alleges a violation of Government Code Section 3543.5(a) and (b), in that the district permitted the Association to "audit and reproduce" copies of the proof of support petition that the Federation filed with the district in a representation proceeding under Government Code Section 3544.1(b).[2/]

The first charge against the Association alleges a violation of Government Code Section 3543.6(a) and (b),[2/] in that the Association, by requesting

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* Government Code Section 3540 et seq. will be sometimes noted in this decision as Educational Employment Relations Act or EERA.

1/ Section 3543.5 provides in pertinent part: "It shall be unlawful for a public school employer to:

(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."

2/ In the representation proceeding out of which these unfair practice charges arose, the Association sought recognition from the district as exclusive representative of certain employees; the Federation intervened with a competing claim of representation. Section 3544 requires that a request for recognition "include proof of majority support on the basis of current dues deduction authorizations or other evidence such as notarized membership lists, or membership cards, or petitions designating the organization as the exclusive representative of the employees." Section 3544.1(b) requires an organization filing a competing claim of representation to support its claim with evidence of "at least 30 percent of the members of an appropriate unit...." The claim may be "evidenced by current dues deduction authorizations or other evidence such as notarized membership lists, or membership cards, or petitions signed by employees in the unit indicating their desire to be represented by the organization."

3/ Section 3543.6 provides in part: "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 or otherwise to intefere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter."

that the district permit the Association to audit and reproduce the Federation's petition, caused the district to commit the unfair practice of allowing the Association to audit and reproduce the petition. The second charge against the Association alleges that an agent of the Association used the petition received from the district to contact those who signed the petition and to "persuade" those contacted to withdraw their names from the petition. A portion of that charge, alleging harassment and intimidation in soliciting the withdrawal of names from the petition, was withdrawn by an amendment to the charge. In each pending charge, the Federation seeks a cease and desist order and other appropriate relief from this Board.

The Association filed an answer denying all essential allegations in the charges, a motion for particularization of the charges, and a motion to dismiss the charges on the ground that they "fail to state facts sufficient to constitute unfair practices...," The district filed an answer denying all essential allegations in the charge against the district, but did not move to dismiss the charge against the district.

The hearing officer granted the Association's motion to dismiss the charge against the Association. On his own motion he dismissed the charge against the district. In dismissing the charges, the hearing officer reasoned that the Federation's proof of support petition became a public record in the hands of the district; that no public interest exempts proof of support petitions from the Public Records Act [4]; and that the Association's use of the petitions was

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4/ Government Code Section 6250 et seq.

permissible organizational activity rather than illegal restraint or coercion of employees within the meaning of the EERA. This appeal by the Federation followed. After the dismissal and after the filing of the appeal, the Federation's intervention in the representation proceeding was withdrawn.[1/]

In considering a motion to dismiss on the ground that a charge fails to allege a violation of the Act, we assume, for the purpose of ruling on the motion, that the essential facts alleged in the charge are true. On that assumption, we find that the charges in this case do not allege a violation of the EERA. We accordingly sustain the hearing officer's dismissal of all charges.

The Charge Against The District

Government Code Section 3544.l(b) requires that an employee organization submitting a competing claim of recognition provide a school district with proof of 30 percent support. It is thus clear on the face of the EERA that the Legislature intended that a district should see the petition and the accompanying proof of support of an employee organization seeking recognition. The harder question is whether the Legislature, having made it mandatory that the district receive an employee organization's petition and proof of support, simultaneously intended to make it an unfair practice for a district to allow another employee organization to

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5/ The Federation's withdrawal of its intervention in the representation proceeding has prompted the Association to argue that the unfair practice charges in this case should be dismissed on grounds of mootness. We reject that argument. The unfair practice charges and the representation proceeding, while functionally related, are not interdependent. They arose under different sections of the Act and relate to different matters. On a finding that the Association violated the Act as alleged, the Federation would be entitled to a cease and desist order and other forms of relief applicable to possible future conduct of the Association, notwithstanding the fact that the Federation no longer had an interest in the representation proceeding out of which the charges in this case arose.

"audit and reproduce" that material.

The Legislature had more than one choice open to it in considering the issue of where proof of support accompanying a request for recognition or an election petition should be filed. The Legislature could have required that the EERB receive proof of support from all parties seeking to become an exclusive representative by way of voluntary recognition or an election. Alternatively, the Legislature could have required that the employer receive proof of support when the employer is asked to recognize an employee organization, and that the EERB receive proof of support when an election rather than recognition is sought. Had the Legislature followed the latter course, the EERA's representation procedures in these respects would be consistent with the National Labor Relations Act. Virtually without exception, the prevailing practice is to require an employee organization to place before an employer the proof on which the employer's decision to recognize is predicated, but to require the submission of proof of support to a neutral agency if an election is sought.[7/]

The EERA is unique among statutes of its kind, in that an employee organization seeking to protect the confidentiality of its proof of support may not do so by petitioning for an election rather

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6/ Section 9(c)(l)(A) of the National Labor Relations Act, 29 U.S.C. 159(c)(1)(A), requires that a representation petition allege that an employer "declines to recognize" the petitioner. But a Union's failure to demand recognition is not a basis for dismissing the petition, provided the employer refuses at the hearing to recognize the petitioner. "M" System, Inc., 115 NLRB 1316, 38 LRRM 1055 (1956).

7/ Among the statutes that expressly provide the option of seeking recognition or an election are Educational Employment Relations Acts in Kansas and Indiana. See Kansas Professional Negotiations Act, Section 72-5416, GERR RF-124, 51:2518-2519; Indiana Educational Employment Relations Act, Section 10(b) , GERR RF-104, 51:2314.

than seeking recognition.[8/] The EERA requires instead that an enployee organization seek voluntary recognition as the first step leading to possible recognition or an election. That, combined with the requirement that an employee organization provide the employer, not the EERB, with proof of support for voluntary recognition purposes, is what makes it mandatory that an employee organization file proof of support with the district in all EERA, representation cases,. This includes those in which the employee organization might choose an election *as* a means of protecting confidentiality, if the employee organization had that option.

We assume that the present case would not have arisen if the Legislature had provided for the submission of proof of support to the EERB rather than a school district. In that event, the proof of support would have remained in the hands of the EERB, absent a clear mandate to the contrary by the Legislature. Thus, we are unable to decide this case in favor of the charging party by reasoning that the Legislature intended to provide only the EERB with access to proof of support. Since the case may not be decided in favor of the charging party on that ground, we must next consider whether the EERA requires confidentiality of proof of support placed in the custody of a school district pursuant to the express terms of the Act.

We think that the procedural requirements of the Act in representation cases are such that each party in a representation case has an interest in the proof of support submitted by another party. This inter-party interest in proof of support in EERA representation cases stems from

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2/ Government Code Section 3544 provides in part: "An employee organization may become the exclusive representative for the employees in an appropriate unit for purposes of meeting and negotiating by filing a request with a public school employer alleging that a majority of the employees in an appropriate unit wish to be represented by such organization and asking the public school

8/(cont'd)

employer to recognize it as the exclusive representative." In lieu of recognizing an employee organization, an employer may, among other things, request an election.

But nothing in the Act authorizes an employee organization to petition for an election in lieu of seeking recognition.

In addition to an election at the request of the employer, Section 3544.l(b) of the Act requires an election if an intervening employee organization meets a showing of interest requirement of 30 percent support, as particularly described in note 2, supra. The Act requires submission of the intervenor's proof of support to the employer and not to the EERB.

Government Code Section 3544.3 permits an election without a preliminary request for recognition, but only at the request of a "majority of employees" if by January 1 of any school year, "no employee organization has made a claim of majority support in an appropriate unit...." An employee organization may intervene and appear on the ballot on meeting the showing of interest requirements of Section 3544.1 (b) of the Act, as described in note 2, supra.

the following: In an unfair practice proceeding, the voluntary recognition of a union may be defeated on a showing that the recognized enployee organization lacked majority support at the time of recognition.[2/] In a representation proceeding, voluntary recognition may be defeated if an intervening employee organization triggers a question concerning representation and an election by making a 30 percent showing of support;[12/] voluntary recognitioi may be permitted if the party initially seeking recognition is able to show that an intervenor did not meet the required 30 percent proof of support. Also, there is nothing to prevent an employer, who is an interested party in this process, from utilizing these petitions in much the same way as the Association has.

With this mutual interest the parties share in proof of support, we think that the Legislature did not intend to make it an unfair practice for a school district to provide an enployee organization with another enployee organization's proof of support. In order to ensure equal footing for all interested parties, the Legislature apparently intended that the proof of support petitions should be accessible to enployee organizations.

2/ International Ladies' Garment Workers' Union v. NLRB, 366 U.S. 731, 48 LRRM 2251 (1961), interpreting Section 8 (a) (2) of the National Labor Relations Act, 29 U.S.C. 158(a)(2). Government Code Section 3543.5(d) is in part an exact replica of NLRA Section 8(a)(2). Both sections make it an unfair practice to "[d]ominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it...." In our recent decision in Los Angeles Unified School District, EERB Decision No. 5, November 24, 1976, we said: "Where provisions of California and federal labor legislation are parallel, the California courts have sanctioned the use of federal statutes and decisions arising thereunder, to aid in interpreting the identical or analogous California legislation." See Fire Fighters' Union v. City of Vallejo, 12 C. 3rd 608, 87 LRRM 2453(1974).

10/ Government Code Section 3544.1 provides in part: "The public school employer shall grant a request for recognition filed pursuant to Section 3544 unless.

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(b) Another employee organization either filed with the public school employer a challenge to the appropriateness of a unit or submits a competing claim of representation within 15 workdays of the posting of notice of the written request." The competing claim of representation is filed when an intervening employee organization timely meets the 30 percent proof of support required by Government Code Section 3544.l(b) , note 2, supra.

Additionally, the EERB has adopted the following resolution: "An employer may not grant voluntary recognition where a question of representation exists pursuant to

Since, as we have concluded, the EERA does not require confidentiality in these respects, the EERA itself may not be viewed as an exception to the general requirements of the Public Records Act. 11/ Because no other exemptions in the Public Records Act are applicable, it follows that proof of support filed with a school board constitutes a public record within the meaning of the Public Records Act, and, as such is open to inspection by the general public.

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a petition filed under Section 3544.5 of the (Educational Employment Relations Act)." EERB Resolution No. 4, May 18, 1976.

In marked contrast to the EERA's statutory proof-of-support requirement, the NLRB has a 30 percent "representation requirement" which is not required by the National Labor Relations Act but is instead a rule of administrative convenience used to conserve the Board's resources by screening out frivolous representation petitions. O.D. Jennings & Co., 68 NLRB 41, 18 LRRM 1133 (1946). The NLRB's 30 percent rule is in NLRB Rules and Regulations and Statements of Procedure, Series 8, as amended, Section 101.18.

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Government Code Section 6252(d) defines "public records" as follows: "'Public records' includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics...."

Government Code Section 6253(a) provides: "Public records are open to inspection at all times during the office hours of the state or local agency and every citizen has a right to inspect any public record, except as hereafter provided...."

Government Code Section 6254(k) provides, among other exemptions from coverage by the Public Records Act: "Records the disclosure of which is exempted or prohibited pursuant to provisions of federal or state law, including but not limited to, provisions of the Evidence Code relating to privilege."

The Public Records Act is applicable to shcool boards. See California School Employees Assn. v. Sunnyvale Elementary School District, 36 C.A. 3d 46, 65, 66; 111 Cal. Rptr. 433 (1973).

The Charges Against the Association

Concerning the charge that the Association caused the district to violate the Act, having found that the district did not commit an unfair practice by releasing the Federation's proof of support to the Association, it follows that the Association did not violate the Act by causing the district to release it to the Association, assuming that the Association acted as alleged. We next consider the charge that the Association attempted to persuade persons to withdraw their names from the Federation's petition.

It is possible that the proof of support that the Association obtained from the district could have been used by the Association for a purpose in violation of one or more unfair practice sections in the EERA. If that had been alleged with particularity, we would have sustained the validity of the charge on its face, thus providing the Federation an opportunity to prove at a hearing the facts alleged in that charge. But the amended charge makes no such allegation. The Federation's amendment of the original charge to omit reference to harassment and intimidation in the solicitation of the withdrawals is, in effect, a concession that at a hearing on the amended charge, the Federation would not be able to satisfy its burden of proving that anyone was harassed or intimidated by the Association's attempt to solicit the withdrawal of signatures from the Federation's petition. We do not believe that an attempt to obtain the withdrawal of proof-of-support signatures is per se a violation of the EERA.[12/] Accordingly, we find no prima facie violation of the Act in the amended charge against the Association.

12/ See NLRB v. Monroe Tube Co., __F.2d___,94 LRRM 2020 (1976), reversing the NLRB and holding that an employer, by encouraging and assisting employees to withdraw their union authorization cards did not "per se" violate the National Labor Relations Act. "We have been cited no case, nor do we know of any, which holds that it is per se a violation of Section 8 (a)(1) for an employer to suggest that it is possible for his employees to withdraw their union authorization cards, or for an employer to make

In deciding this case, we are aware of the different policy considerations underlying this dispute: an employee organization's claimed interest in confidentiality, another employee organization's interest in a rival's proof of support for its own organizational purposes, and an employer's interest in valid proof of support for recognition purposes. Whatever the relative wisdom of these conflicting claims, it is the Legislature and not this Board that is empowered to decide how they should be balanced.

ORDER

1. The hearing officer's dismissal of the unfair practice charge filed by the San Juan Federation of Teachers, Local 1743, CFT/AFT, AFL-CIO, against the San Juan Unified School District, is sustained.

2. The hearing officer's dismissal of the unfair practice charges filed by the San Juan Federation of Teachers, Local 1743, CFT/AFT, AFL-CIO, against the San Juan Teachers Association, CTA/NEA, is sustained.

By: _____
Reginald Alleyne, Chairman

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Raymond J. Gonzales/Member /

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Jeri Llou Cossack, Member

March 10, 1977

12/ (cont'd)
available the address of the •• Union's headquarters for that purpose, or for the employer to engage in the limited effort observed here to assist employees in the preparation of withdrawal letters. While it is certainly true that an employer's solicitation of withdrawal letters may violate the Act under some circumstances, the propriety of such conduct must be assessed in the light of all the facts in the case, particularly the employer's prior and contemporaneous conduct in dealing with union activities."