

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



HANFORD HIGH SCHOOL FEDERATION OF TEACHERS,)
AFT, AFL-CIO,)

Charging Party,)

v.)

HANFORD JOINT UNION HIGH SCHOOL DISTRICT)
BOARD OF TRUSTEES,)

Respondent.)

Case No. S-CE-71

PERB Decision No.58

June 27, 1978

Appearances: Robert J. Bezemek, Attorney (Van Bourg, Allen, Weinberg and Roger) for Hanford High School Federation of Teachers, AFT, AFL-CIO; James B. Orton, Attorney (Kings County Counsel) for Hanford Joint Union High School District Board of Trustees.

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

OPINION

The Hanford High School Federation of Teachers, AFT, AFL-CIO (hereafter Federation) is appealing the dismissal of an unfair practice charge it filed against the Hanford Joint Union High School District Board of Trustees (hereafter District).

FACTS

The charge before the Board is the third in a related series brought by the Federation. It was filed on June 19, 1977, alleging

¹The antecedent procedural history is noteworthy. The Federation filed its original charge on May 19, 1977, alleging the same facts as in the current charge, but essentially claiming that the District failed to meet and negotiate in good faith with the Federation in violation of section 3543.5(c). The hearing officer dismissed with leave to amend on the ground that the duty to negotiate ran only to an exclusive representative. An amended charge was filed on June 15, 1977, repeating the alleged facts and violations asserted in the original charge, but adding a charge (cont.)

that the District had implemented the 1977-78 school calendar in April 1977 without meeting and conferring with the Federation at a time when there was no exclusive representative for the certificated employees. The charge asserts violation of section 3543.5(b) and 3543.1(a) of the Educational Employment Relations Act² (hereafter EERA).

On May 16, 1977, prior to the filing of the charge, the District granted voluntary recognition to the Hanford High School Faculty Association (hereafter Association) as the exclusive representative of an appropriate unit of certificated employees. The Association's request for recognition as the exclusive representative had been conspicuously posted pursuant to rule 33060 3/.

This notice provided for a period of time during which another employee organization could intervene, upon making the requisite showing of interest in the unit the Association petitioned for, or in another unit claimed to be appropriate. The Federation did not intervene, or otherwise raise a question concerning representation which would impede voluntary recognition of the Association as exclusive representative by the District.

Subsequent to recognition of the Association, the Association and the District entered into a collectively negotiated agreement for the 1977-78 school year, effective July 1, 1977.

(cont.)

against the Association which had become recognized as having "failed in its responsibilities to unit members...." This amended charge was dismissed without leave to amend for reason of late filing. The Federation filed a new charge on July 8, 1977, which seemed to duplicate the dismissed, amended charge. This was also dismissed for late filing. The Federation appealed this later dismissal to the Board itself on July 19, 1977. On the same day it filed its third charge, the subject of the current appeal. The Board sustained the dismissal of the second charge on February 1, 1978.

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Gov. Code sec. 3540 et seq.

3/ Cal. Admin. Code, tit. 8, sec. 33060 (subsequently amended on January 16, 1978) which stated:

(a) The employer shall post a notice of the request for recognition within five workdays following receipt of the request. (cont.)

The Federation alleges that the District violated EERA section 3543.5(b) by denying rights guaranteed to the Federation by section 3543.1(a).

These sections provide, in pertinent part:

Section 3543.1. (a) Employee organizations shall have the right to represent their members in their employment relations with public school employers, except that once an employee organization is recognized or certified as the exclusive representative of an appropriate unit pursuant to Section 3544.1

(cont.) (b) The notice shall be posted conspicuously on all employee bulletin boards in each facility of the employer in which members of the unit claimed to be appropriate are employed.

(c) The notice shall remain posted for 15 workdays.

(d) The notice shall contain the following information:

(1) A statement that the employer has received from the named employee organization a request to be recognized as the exclusive representative of the employees in the described unit based on a claim that a majority of the employees in the unit wish to be represented by the employee organization;

(2) The name and address of the employee organization filing the request for recognition;

(3) A description of the grouping of jobs or positions which constitute the unit claimed to be appropriate;

(4) The date the request was received by the employer;

(5) The date the notice was posted;

(6) A statement that any other employee organization desiring to represent any of the employees in the unit described in the request for recognition has the right within 15 workdays following the date of posting to file an intervention supported by at least 30 percent of the employees in a unit claimed to be appropriate.

(e) The employer shall send a copy of the notice to the regional office concurrent with the posting of the notice.

or 3544.7, respectively, only that employee organization may represent that unit in their employment relations with the public school employer. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership.

Section 3543.5. It shall be unlawful for a public school employer to:

(b) Deny to employee organizations rights guaranteed to them by this chapter.

The hearing officer, relying on San Dieguito Union High School District (9/2/77) EERB Decision No. 22, determined that a nonexclusive organization does not enjoy the right to "meet and consult," and dismissed the charge.

DISCUSSION

The authority for filing an unfair practice charge is found in section 3541.5(a).⁴ The grounds for such charges are contained

⁴Gov. Code sec. 3541.5(a) which states:

3541.5. The initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board. Procedures for investigating, hearing, and deciding these cases shall be devised and promulgated by the board and shall include all of the following:

(a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following: (1) issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge; (2) issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery (cont.)

in section 3543.5.⁵ The Federation specifically alleges a violation

(cont.)

of the agreement, if it exists and covers the matters at issue, has been exhausted, either by settlement or binding arbitration. However, when the charging party demonstrates that resort to contract grievance procedure would be futile, exhaustion shall not be necessary. The board shall have discretionary jurisdiction to review such 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 such 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.

- ⁵ Gov. Code sec. 3543.5. which states:
3543.5. 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.
 - (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.
 - (d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.
 - (e) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).

of 3543.5(b). In turn, the right the Federation claims was denied them is that provided by section 3543.1(a) quoted above.

It is unarguable that section 3543.1(a) grants some representation rights to a **nonexclusive employee** organization prior to the time an exclusive representative is recognized or certified. The nature and extent of those rights have not been clearly articulated by the Board in any of its decisions to date. In San Dieguito, a majority of the Board as then constituted did hold that the representation rights of a nonexclusive-representative complainant under section 3543.1(a), do not include the right to "meet and consult." It was this particularization which led the hearing officer to his conclusion in this case.

Since this appeal deals only with the new charge filed on July 19, 1977, the issue raised is whether the Federation has a right to bring an unfair practice charge based on a denial of its representational rights at a time when another organization has already been established as the exclusive representative of the employees. Under the plain meaning of 3543.1(a), the Federation after May 16, 1977, no longer had the right to represent these members in their employment relations with the employer.

We find no ambiguity in the statutory language: "Employee organizations shall have the right to represent their members in their employment relations with public school employers, except that once an employee organization is recognized or certified as the exclusive representative of an appropriate unit pursuant to section 3544.1 or 3544.7, respectively, only that employee organization may represent that unit in their employment relations with the public school employer." (Emphasis added.)

Whatever representation rights the Federation may have had with respect to these members prior to the establishment of an exclusive representative, it was ousted of those rights which obtained solely to the exclusive representative. Among those rights, we believe, is the right to file an unfair practice charge over matters involving wages, hours of employment, and other terms and conditions of employment.

Such a conclusion is consistent with the principle of exclusive representation set forth in section 3540 of the EERA which states the legislative purpose to be "to promote the improvement of personnel management and employer-employee relations in the State of California by providing a uniform basis for recognizing the right of public school employees to "...select one employee organization as the exclusive representative of the employees in an appropriate unit." (Emphasis added.)

To hold that the Federation in this instance could pursue a representation-oriented charge after the establishment of the Association as the exclusive representative would tend to undermine the right of the employees to negotiate collectively through a representative of their own choice.⁶ Furthermore, the need for stability in employee organizations precludes encouraging the rivalry among various employee organizations that would be the inevitable consequence of a requirement that the employer deal with an organization other than the exclusive representative.⁷ As the United States Supreme Court has said, the obligation of dealing with the exclusive representative "exact[s] the negative duty to treat with no other."⁸ Thus the PERB has even excused employers from the duty to permit a minority organization to process an individual grievance⁹, though the statute has given the right to the individual employee to represent himself.¹⁰¹⁰

⁶J.I. Case v. NLRB (1944) 321 U.S. 332. See also Gorman, Labor Law, pp. 374-381

⁷Town of Manchester (1968) Connecticut State Board of Labor Relations, No. 813; City of Milwaukee (1968) Wisconsin Employment Relations Board, No. 8622; City of Grand Rapids (1968) Michigan Employment Relations Commission, No. 194; Emporium Capwell Co. v. Western Addition Community Organization (1975) 420 U.S. 50; Lullo v. Fire Fighters Local 1066 (1970) 55 N.J. 409.

⁸Medo Photo Supply Corporation v. NLRB (1944) 321 U.S. 678.

⁹Mount Diablo Unified School District, Santa Ana Unified School District, Capistrano Unified School District (12/30/77) EERB Decision No. 44, and cases cited therein.

¹⁰Gov. Code sec. 3543.

We do not believe that section 3541.5(a) gives unlimited rights to an employee organization to file an unfair practice charge. The statute considers certain limitations on that right. Some of those limitations are found within section 3541.5(a) itself. Thus, the Board may not issue a complaint on an alleged practice occurring more than six months prior to the filing of the charge or issue a complaint against conduct prohibited by a collective negotiating agreement until the grievance machinery of that agreement, if it exists, has been exhausted.

We consider the provisions of section 3543.1(a), which restricts representational rights to a certified or recognized organization, as yet another limitation on the broad authority to file an unfair charge. The two sections should be read as mutually complementary. Since the principle of exclusivity is vital to the viable negotiating relationship and is an underlying basic tenet of the EERA, such a construction would be in harmony with the legislative intent.

There would still remain in the recognized or certified organization an opportunity to remedy a past act of the employer either through a charge of its own, if timely, or through the collective negotiating process. On the other hand, permitting the intercession of a minority organization raises not only the possibility of the type of mischief referred to earlier, but could very well interfere with the right of the exclusive representative to determine, in its own best judgment, those matters on which it decides to negotiate.

The Federation relies on the fact that the employees in the unit did not have an exclusive representative at the time the acts complained of occurred. However, this argument misses the point. The Federation did not assert its rights at that time. This charge was not filed until after another organization had been granted exclusivity. It was this act of accession that constituted the bar to the current action.

The dismissal of the charge filed by the Federation should be sustained.

We expressly refrain from commenting on the extent to which a minority organization may otherwise participate in the unfair

practice process, and this opinion should not be construed to go beyond the nature of the case presented by these facts.

ORDER

The hearing officer's dismissal of the unfair practice charge filed by the Hanford High School Federation of Teachers, AFT, AFL-CIO, against the Hanford Joint Union High School District Board of Trustees, alleging violation of Government Code sections 3543.1(a) and 3543.3(b) is sustained.

~~Harfy Gluck~~, Chairperson ~~Raymond J. Gonzales~~, Member

Jerilou Cossack Twohey, Member, dissenting:

My colleagues hold that selection of an exclusive representative bars a minority organization from thereafter filing an unfair practice charge about a prior infringement of its right to represent its members. I disagree.

I share the concern of my colleagues that a minority organization will use the Board's processes to undermine a duly selected exclusive representative. However, I do not agree that the way to prevent such an abuse is to bar a minority organization from asserting that rights granted it by the statute have been abridged. The graveman of my disagreement with my colleagues' decision is that it ignores the more general obligation of the Board to protect access to its enforcement powers. In addition, such a bar is unnecessary.

The view of the majority will not foster the prerogatives of the exclusive representative, is unneeded to police infringements of the prerogatives of the exclusive representative, either creates an illogical cleavage between charges filed before and after determination of the exclusive representative or has no practical effect, is unsupported by labor precedent elsewhere, raises serious constitutional questions, and strains the clear language of the EERA.

The ability of the exclusive representative to represent the negotiating unit is not fostered by this decision. If the instant charge were meritorious, the employer here will have been permitted to trample rights guaranteed by the EERA. No benefit accrues to an exclusive representative whose initial dealings with the employer occur immediately after the employer has been permitted to flout statutory rights with impunity. Rather, the employer will be encouraged to treat its negotiating obligations with the exclusive representative with similar disregard. The decision today discourages the employer from dealing in good faith with the very exclusive representative my colleagues seek to protect. Parties are shown that they may shirk their responsibilities if they can discover a technicality to escape the consequences of their violation.

The prerogatives of an exclusive representative may be protected without sacrificing other rights granted by the EERA. The danger to the exclusive representative to be avoided is two-fold: First, permitting a minority organization to undermine the exclusive organization by utilizing the Board's processes; and second, permitting an employer to negotiate, or even treat, with a minority organization once the exclusive representative has been selected. The first danger may be avoided if either the employer or the exclusive representative, or the conduct of the minority organization itself, demonstrates that the unfair practice charge is an improper attempt to negotiate with the employer, or is a political platform from which to harass the exclusive representative. Dismissal of such a specious charge would be readily forthcoming. The second danger may be avoided by fashioning a remedy to any meritorious unfair practice charge filed by a minority organization which would require acknowledgement by the employer of its wrongdoing but stop short of compelling the employer to treat with the minority organization.

The majority does not discuss what should or will be done about charges over infringement of a minority organization's right to represent its members filed prior to the selection of an exclusive representative. Processing a charge entails preparation of the

testimony and argument to a hearing officer, and appeal of an unfavorable decision to the Board. The necessary involvement of a minority organization with members of the negotiating unit in processing a case is the same regardless of whether the charge is filed before or after the selection of an exclusive representative. To avoid this involvement, which the majority considers undesirable, the reasoning of the majority requires that selection of an exclusive representative would trigger dismissal of all pending charges over negotiable matters brought by minority organizations. Such a result leaves minority organizations with rights for which there is no effective protection and that is tantamount to no rights at all. Conversely, if the majority intends to permit such charges to be processed, the pressing need for today's decision is wholly unclear, since it will have little practical effect.

The majority reasons that mere charges filed by minority organizations after determination of the exclusive representative derogate the right of the exclusive representative to be sole representative of the unit. However, the majority is unable to cite federal or state authority holding that in particular, filing charges of unfair practices threatens exclusivity, or, in general, that an employer is precluded from every type of dealing with employees or employee organizations other than the exclusive representative.¹ In fact, federal precedent is to the contrary. In Alfred M. Lewis,

¹The cases relied upon by the majority are not on point. J. I. Case holds only that an employer violates the NRA by disregarding the exclusive representative and negotiating with individual employees on wages, hours and working conditions. Macb Photo Supply Corporation applies J. I. Case to a situation in which the employer recognized a union as bargaining agent and then proceeded to bargain directly with employees. In Emporium Capwell Co. the Court held an exclusive representative would be unduly hampered by allowing a group of minority employees to bargain with their employer on issues of employment discrimination. In Lullo it was held that a statute providing for exclusive representation of public employees chosen by majority vote does not violate the New Jersey State Constitution authorizing public employees to organize and present grievances through representatives "of their own choosing." Grand Rapids determined that registered nurses are true professionals entitled to separate representation from non-professionals. Manchester held that an election petition filed within one month of the time contract negotiations normally begin is timely.

Inc.² individual employees prevailed in their allegations that the employer had unlawfully refused to bargain with the exclusive representative notwithstanding the fact that their exclusive representative had arbitrated the issue, lost, and did not pursue the matter with the National Labor Relations Board.

The majority's failure to balance competing rights is subject to serious constitutional challenge. The United States Supreme Court recognizes that exclusive representation for purposes of negotiating and administering collective agreements unavoidably infringes First Amendment rights to be free of forced or prohibited association.³ Consequently, application of the principle of exclusivity can only be justified where it is demonstrably required to secure the important government interest in labor peace.⁴ The United States Supreme Court has consistently struck down extension of the exclusivity principle where it is not necessary to foster stable collective negotiations.⁵ It can hardly be argued that a prohibition on filing of unfair charges by minority organizations is required to secure labor peace when the National Labor Relations Board permits "any person" to bring "[a] charge that any person has engaged in or is engaging in any unfair labor practice...."⁶

The decision of the majority runs counter to the clear and simple language of the EERA. Minority employee organizations have the right to represent their members in their employment relations until an exclusive representative is selected.⁷ They may protect

²(1977) 229 NLRB No. 116.

³See Abood v. Detroit Bd. of Education (1977) 431 U.S. 209, 234.

⁴Abood, supra, at 222, 224.

⁵Abood, supra, at 232, 234, 235 (union shop clause in public school collective agreement may not constitutionally compel contributions to an ideological cause; constitutional application limited to service charge for collective bargaining, contract administration, and grievance adjustment).

⁶Rules and Regulations and Statements of Procedure, Series 8, of the National Labor Relations Board (1973) section 102.9.

⁷Section 3543.1(a).

that right by filing an unfair practice charge subject only to the constraints of a six month statute of limitations and a deference to arbitration provision.⁸

For the reasons set forth above, I would reverse the general counsel's dismissal of this unfair practice charge.


By: Jerilou Cossack Twohey, Member

⁸Section 3541.5(a)