STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

UNITED ADMINISTRATORS OF SAN FRANCISCO, Charging Party, v. SAN FRANCISCO UNIFIED SCHOOL DISTRICT, Respondent.	)	Case No. SF-CE-87 PERB Decision No. 75 October 3, 1978

Appearances: Reynold H. Colvin and Robert D. Links, Attorneys (Jacobs, Blackenburg, May and Colvin) for United Administrators of San Francisco; Corrine Lee, Assistant Legal Advisor for San Francisco Unified School District.

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

DECISION

The United Administrators of San Francisco (hereafter UASF) is appealing a hearing officer's dismissal of its unfair practice charge against the San Francisco Unified School District (hereafter District).

On May 2, 1977, the United Administrators of San Francisco filed an unfair practice against the San Francisco Unified School District, alleging that the District violated sections 3543.5(a), (b) and (c) of the

Educational Employment Relations Act (hereafter EERA)[1] by preparing individual employment contracts for employees in a proposed supervisory negotiating unit for which UASF had requested recognition.[2] UASF alleged that the District's preparation of those contracts was a coercive tactic designed to fragment the employees in the unit, and that the contracts would resolve major issues relating to the terms and conditions of employment of such employees. On May 17, 1977, UASF amended the charge to allege that the District had designated certain UASF members as representatives on the District's negotiating team for nonsupervisory certificated employees. UASF alleged that the employees could not decline to serve on the negotiating team without prejudice to their employment, and that the District's act was intended to undermine the

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[1]The Educational Employment Relations Act is codified at Government Code, sec. 3540 et seq. Hereafter, all statutory references are to the Government Code unless otherwise indicated.

Section 3543.5 states, 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.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative....

[2]The proposed unit included principals, assistant principals, supervisors, assistant supervisors, directors and administrative assistants.

position of UASF. The District admitted certain of the factual allegations, but denied that it had committed an unfair practice. The District claimed that the parties were engaged in the preparation of individual contracts pursuant to the requirements of a provision in the San Francisco City Charter.

A formal hearing was held before a hearing officer of the Educational Employment Relations Board[3] on July 1, 1977. The hearing officer dismissed the alleged violation of section 3543.5 (c) at the time of the hearing on the ground that since no exclusive representative yet had been certified to represent the proposed employee unit, the District was under no obligation to meet and negotiate. On August 29, 1977, the hearing officer issued the attached recommended decision dismissing the remaining portion of UASF's charge.

FACTS

On April 1, 1976, UASF filed with the District a request for recognition as the exclusive representative of a unit of supervisory employees. The International Brotherhood of Teamsters, Local 960 (hereafter Teamsters), filed a timely intervention.[4] The District doubted the appropriateness of

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[3]The Educational Employment Relations Board was renamed the Public Employment Relations Board (hereafter PERB) effective January 1, 1978.

[4]Section 3544.l(b) states:

> The public school employer shall grant a request for recognition filed pursuant to

the proposed unit, claiming that all of the employees for whom UASF had petitioned were managerial and therefore should not have negotiating rights under the EERA.[5] The case was set for a unit determination hearing by the San Francisco Regional Office of the Educational Employment Relations Board.

In late March 1977, the District initiated a series of meetings with representatives of both UASF and the Teamsters

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(Continued footnote 4)

> Section 3544 unless:
> .....
> (b) Another employee organization either files with the public school employer a challenge to the appropriateness of the unit or submits a competing claim of representation within 15 workdays of the posting of notice of the written request. The claim shall be evidenced by current dues deductions 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. Such evidence shall be submitted to the board, and shall remain confidential and not be disclosed by the board. The board shall obtain from the employer the information necessary for it to carry out its responsibilities pursuant to this section and shall report to the employee organizations seeking recognition and to the public school employer as to the adequacy of the evidence. If the claim is evidenced by the support of at least 30 percent of the members of an appropriate unit, a question of representation shall be deemed to exist and the board shall conduct a representation election pursuant to Section 3544.7, unless subdivision (c) or (d) of this section apply;...

[5]Section 3543.4 states:

> No person serving in a management position or a confidential position shall be represented by an exclusive representative. Any person serving in such a position shall

for the purpose of discussing terms of individual contracts of employment for employees within the proposed supervisory unit. According to the District, it had been advised by the "Riles Commission"[6] in the fall of 1976 to prepare such contracts in accordance with a 1971 amendment to the city charter.[7] Three

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(Continued footnote 5)

> have the right to represent himself individually or by an employee organization whose membership is composed entirely of employees designated as holding such positions, in his employment relationship with the public school employer, but, in no case, shall such an organization meet and negotiate with the public school employer. No representative shall be permitted by a public school employer to meet and negotiate on any benefit or compensation paid to persons serving in a management position or a confidential position.

[6]The Riles Commission was an ad hoc group of citizens in San Francisco concerned with reform of District policies. Contrary to the findings of the hearing officer in this case, it had no formal relation either with California Superintendent of Public Instruction Wilson Riles or with the State Department of Education.

[7]The San Francisco City Charter was amended in 1971 to provide:

> All ... vice principals, principals, supervisors and directors who are appointed on or after July 1, 1971, or who are otherwise determined not to be permanent employees shall be employed pursuant to four year contracts with the Board of Education, which contracts shall be subject to renewal based upon achieving and maintaining standards of performance, which standards of performance shall be governed by rules and regulations as promulgated by the Board of Education.

new members had been elected to the school board to take office in January 1977, and the new school board had directed the administration to prepare the contracts.

Six such meetings took place, and the Teamsters and UASF attended all of them. However, UASF continually maintained that it was attending the meetings under protest and that negotiation over employment terms should be postponed until an exclusive representative had been selected. UASF wrote to the District on April 13, 1977, objecting to the specific provisions of the draft contracts and stating further:

> The reason that we are specifically raising this question at this time is because your draft must be read against the background of the present proceeding before the Educational Employment Relations Board (EERB). You will recall that UASF applied for representation prior to April 1, 1976; that a hearing on unit determination was held and was concluded on December 15, 1976; that a transcript was prepared, the matter briefed, and that it is presently under submission before EERB for a decision on unit determination. We are inclined to view that the presentation of a draft of the particular type of Agreement which I have outlined above constitutes an unfair labor practice within the meaning of the Rodda Bill and it is our present intent to make such a representation to EERB.

At the first meeting, the District presented a draft of its proposed contract. Provisions covered pay grades, pay adjustments, work calendar, fringe benefits, evaluation procedures, and termination of the contract by the superintendent for non-performance of duties. The contract term was to be four years. UASF had objections to many of these

provisions, and specifically objected to those relating to work calendar, fringe benefits, evaluations and termination of the contract. UASF contended that the latter provision conflicted with the city charter requirement of a four-year contract.

At a school board meeting in April, a board member stated that implementation of the contracts was important because the mandate of the city charter had not been complied with. One of the District's negotiators responded to the effect that, "You give me permission and I'll have a contract on the desk in the morning. Either you sign it or else."

During the course of the meetings, the contract went through six drafts. There were changes in the areas of work calendar and evaluations, and a general guarantee of due process in conformity with the Education Code was added to the provision governing termination. There also was a new provision concerning contract renewal, a guarantee that nothing in the contract would abridge rights granted by the city charter or the Education Code, and a reservation for future discussion of additional provisions. This provision stated:

> It is anticipated by the parties that additional provisions governing the public school employer/employee relationship, including the establishment of an administrator's grievance procedure, specific notice and hearing procedures, and other relevant matters shall be the subject of future discussions between the parties. In the event the herein Administrator becomes a part of the bargaining unit as a result of the EERB decision, the word "discussion" in this section shall be construed to mean "negotiation."

District representatives prepared a memorandum to other management personnel that recorded certain matters discussed at the final meeting of June 8, 1977. The memorandum characterized certain objections raised by UASF as being that "...this contract is premature insomuch as District and employees are awaiting decision of the EERB."

The final draft of the proposed contract was placed on the agenda of the school board for adoption on June 14, 1977. The contract was removed from the board's agenda, however, and the District took no action with respect to it. There is no evidence explaining why the item was removed from the agenda. At no later time was the contract discussed or approved by the District.

During May 1977, the District asked six principals, who were included in UASF's petition, to join the District's negotiating team for the nonsupervisory certificated unit. These employees apparently consented to taking part in negotiations.

The hearing officer in the representation case rendered his proposed decision on June 10, 1977, holding that the supervisory unit for which UASF petitioned was appropriate. The principals on the District's negotiating team resigned after that decision was issued.

The Teamsters appealed the hearing officer's proposed decision, which the Board itself affirmed in

San Francisco Unified School District (9/8/77) EERB Decision No. 23. An election was held on November 15, 1977. A majority of votes was cast for UASF. The parties subsequently negotiated a collective agreement for employees within the unit.

DISCUSSION

A fundamental right guaranteed to public school employees by EERA is the freedom to join an employee organization of their choice and to select an exclusive representative in their employment relationships with the school employer. The scope of such representation includes matters relating to wages, hours and terms and conditions of employment as defined by the EERA.[8]

Patently, these rights might well be meaningless if some protection were not afforded against an employer's interference with their exercise. Thus, section 3543.5(a) prohibits reprisals, discrimination, interference or coercion, or threats, by employers against employees because of the exercise of these rights.

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[8]Section 3543.2, as amended September 7, 1977, which states:

> The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to

In the present case, the totality of the District's conduct shows a violation of section 3543.5(a). First, the District had not followed the mandate of the six-year-old charter provision until 1977, after employees signed authorization cards expressing their interest in being represented by an employee organization pursuant to the newly enacted EERA. A reasonable inference may be drawn from this timing that the proposed contracts, as well as the District's holding of meetings to address them, were intended as a threat of reprisal against the employees because they sought to exercise their rights under EERA.

Second, the wording of the proposed contracts permits a similar inference to be drawn. The scope of the coverage

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(Continued footnote 8)

> Section 3546, procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8, and the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code....

of the individual contracts was in excess of that required by the city charter.[9] In addition, the contracts only permitted renegotiations over "additional provisions governing the public school employer/employee relationship, including the establishment of an administrator's grievance procedure, specific notice and hearing procedures, and other relevant matters." (Emphasis added.) Through this clause, the District acknowledged that in the event an employee organization were to be certified or recognized as the exclusive representative of employees of the negotiating unit, the District would be required to negotiate with it on matters within the scope of representation.[10] However, by this clause future

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[9]The provision of the city charter is set forth at footnote 7, supra.

[10]Section 3543.2, as amended September 7, 1977, is set forth at footnote 8, supra.

Section 3543.3 states:

> A public school employer or such representatives as it may designate who may, but need not be, subject to either certification requirements or requirements for classified employees set forth in the Education Code, shall meet and negotiate with and only with representatives of employee organizations selected as exclusive representatives of appropriate units upon request with regard to matters within the scope of representation.

negotiations under the EERA were limited to subjects not addressed by the contracts, and were precluded with respect to items which were addressed. The contracts, therefore, did not allow negotiations on all matters within the scope of representation which is the right of employees through their exclusive representative. This is further evidence of a violation of section 3543.5(a) of the EERA.[11]

This infringement of the employees' rights is not redeemed by the fact that the individual contracts of employment were not adopted by the governing board of the

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[11]Chairman Gluck notes that our dissenting colleague argues that UASF itself proposed the clause in question, and that this clause therefore is not evidence of a District intent to interfere with the rights of employees. This argument relies on the testimony of the District's sole witness that the clause in dispute was proposed, prepared and submitted by UASF. This argument, however, disregards the facts as they exist and were found by the hearing officer. First, the hearing officer held, and the record shows, that UASF objected consistently to the District's decision to draft individual employment contracts, to the holding of meetings with respect to them, and to the contents of the contracts at each stage. Second, the initial appearance in the record of the disputed clause is in Draft Agreement #6, which, according to the District's witness, was prepared and proposed by the District itself. No exhibit on file in this case supports the dissent's factual contention. Since the testimony of even the District's witness is in part inconsistent with the dissent's interpretation of the facts, the opening statement of the District's counsel aids in clarifying them. The District's counsel stated:

> We included and incorporated in a number of our drafts ... a provision in our contract that we would renegotiate the terms and conditions of employment as required by the Rodda Act.
>
> And our position is the the fact that we incorporated that provision within our draft, that we had not in fact interfered with employee rights. (Emphasis added.)

District. The EERA prohibits threatened acts of reprisal and discrimination as well as acts that achieve those objectives. Section 3543.5(a).

The District's attempt to include on its management negotiating team members of the petitioned-for negotiating unit is further evidence of an intent to interfere with the employees' free choice of a representative. A request by an employer to an employee to take part on its negotiations team is not one that an employee can refuse lightly. Further, in view of the fact that the alleged managerial status of employees was the very issue in the representation proceeding, the District's act of appointing them to the negotiating committee was a direct attack on their right to organize and seek representation.

We disagree with two specific aspects of the hearing officer's analysis. First, we reject his conclusion that the record supplies "no evidence that the District communicated directly with members of the unit with regard to the possibility of requiring individual contracts." UASF and the Teamsters were involved directly in meetings with the District, and their knowledge of the District's design may be attributed to their members. Second, the hearing officer's finding that NLRB v. J.I. Case Co. (1944) 321 U.S. 332 [14 LRRM 501] is inapplicable to this charge is inaccurate.[12] J.I. Case upheld the finding

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[12]The EERB takes cognizance of cases decided under the National Labor Relations Act (hereafter NLRA), 29 U.S.C. sec. 151 et seq., when the language of the EERA and NLRA is identical or similar. Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608; Sweetwater Union High School District (11/23/76) EERB Decision No. 4.

of the National Labor Relations Board (hereafter NLRB) that the employer's outright refusal to bargain with the exclusive representative of the employees involved, based on previously executed individual contracts of employment, constituted an unlawful refusal to bargain, and that the employer's urging employees to bargain individually on the basis of such contracts rather than through a collective agent interfered with and impeded the employees' rights under the National Labor Relations Act. In the underlying case, the NLRB had held that an employer cannot offer contracts of employment to employees "for the purpose of infringing rights under the [National Labor Relations] Act." J.I. Case Co. (1942) 42 NLRB 85, 96 [10 LRRM 172] .

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The District's contention that its meeting and conferring with respect to the individual contracts of employment was excusable because the District was under a charter obligation to make such contracts is rejected. The evidence supports the conclusion that the District was otherwise motivated. At the very least, the District has failed to prove that business reasons prompted its conduct.[13] Moreover, at the time the District claimed that it was under an obligation to follow the charter's mandate, it

[13] See, e.g., NLRB v. Great Dane Trailers, Inc. (1967) 388 U.S. 26 [65 LRRM 2465].

was under a further legal obligation to comply with the mandate of the EERA. Given the timing of the District's conduct, the District's justification is not convincing.

In summary, considering the totality of the District's conduct, the Board finds that conduct violated section 3543.5(a) of EERA.

We uphold the hearing officer's dismissal of the alleged violation of section 3543.5(b) of the EERA. While the record establishes that the District interfered with the rights of the employees to join the employee organization of their choice and to select an exclusive representative, it does not show that the District interfered with any right guaranteed to UASF by the EERA.

We also uphold the hearing officer's dismissal of the alleged violation of section 3543.5(c) of the EERA. Only an exclusive representative has a right to meet and negotiate with the public school employer.

REMEDY

The District tabled the individual contracts and UASF—now the exclusive representative—has entered into a collective negotiations agreement with the District covering the subject employees in question. Consequently, it is unnecessary to order the District not to implement the individual contracts.

ORDER

Upon the foregoing Decision and the entire record in this case, IT IS ORDERED that the San Francisco Unified School District shall:

1. Cease and desist from in any manner restraining, discriminating against, or otherwise interfering with the rights of employees under the Educational Employment Relations Act; and specifically section 3543.5(a).

IT IS FURTHER ORDERED that the alleged violations of sections 3543.5(b) and (c) of the Educational Employment Relations Act are hereby DISMISSED.

By: Harry Gluck, Chairperson Raymond J. Gonzales Member

Jerilou Cossack Twohey, Member, dissenting:

I disagree with the majority's determination that the District violated section 3543.5(a) of the EERA by drafting individual

employment contracts for some supervisory employees and by requesting certain supervisory employees to serve on its negotiating team for nonsupervisory certificated employees. I agree with the majority that the District did not violate sections 3543.5(b) and (c)

The majority relies on the "totality" of the District's conduct to conclude that it violated section 3543.5(a). This "totality" is comprised of three events: (1) the timing of the District's attempt to comply with the charter requirements; (2) the wording of the proposed contracts; and (3) the District's attempt to include some of the petitioned for employees on its negotiating team for nonsupervisory certificated employees.

I

In order to establish that an employer has threatened an employee with reprisal, it must first be established that the employee has been threatened with something adverse. However, in the instant case the majority does not contend, nor does the evidence establish, that the proposed contracts would have imposed more onerous terms and conditions of employment on the affected employees. In fact, it would appear that the proposed contracts merely incorporated existing terms and conditions of employment. There is no dispute that the charter does mandate that these employees have employment contracts with the District. It is difficult to see how contracts which do not adversely change the employees' existing terms and conditions' of employment could be construed as reprisals.

However, assuming for the purposes of argument, that such contracts could be coercive, nothing in the timing of the proposed contracts warrants the inference that they were intended as reprisals against employees. If employees are to understand that the employer is taking an action in retaliation for their exercise of protected rights, the employer's action must be related to the protected activity either by words or time. In this case, neither occurred. UASF filed its request for recognition in April 1976. The Riles Commission report and recommendations issued subsequently, in August or September 1976. The Riles Commission recommended that the District meet its legal obligations by complying with the charter provision. In January 1977, coincidental with the arrival of three newly elected governing board members, the governing board determined to implement the recommendation of the Riles Commission. Thus, the decision to draft individual contracts is more closely related in time to the issuance of the Riles Commission report and the election of three new governing board members. Moreover, the District hardly attempted to implement this policy unilaterally. In fact, far from ignoring UASF or the Teamsters, the District solicited their participation in its efforts to comply with the charter requirements.

Section 3543.1(a) of the EERA itself expressly contemplates a hiatus between the raising and resolution of a question of representation.[1] The District attempted to comply with the city

[1] Sec. 3543.1(a) providing in pertinent part:

> Employee organizations shall have the right to represent their members in their

(cont.)

charter requirements and the EERA by inviting all interested employee organizations to participate in the development of individual contracts. The United States Supreme Court, in interpreting the National Labor Relations Act, has specifically held:

> Care has been taken in the opinions of the Court to reserve a field for the individual contract, even in industries covered by the National Labor Relations Act, not merely as an act or evidence of hiring, but also in the sense of a completely individually bargained contract setting out terms of employment, because there are circumstances in which it may legally be used, in fact, in which there is no alternative. Without limiting the possibilities, instances such as the following will occur:.... The conditions for collective bargaining may not exist; thus a majority of the employees may refuse to join a union or to agree upon or designate bargaining representatives, or the majority may not be demonstrable by the means prescribed by the statute.... As the employer in these circumstances may be under no legal obligation to bargain collectively, he may be free to enter into individual contracts.[2]

This is a classic case in which there are two explanations for an employer's conduct, one of which is lawful and the other unlawful. The majority has chosen to "infer" the unlawful explanation. I am unable to do so. The majority's decision

> employment relations with public school employers, except that once an employee organization is recognized or certified as the exclusive representative of an appropriate unit...only that employee organization may represent that unit....

[2] J. I. Case v. NLRB (1944) 321 U.S. 332, 336-7, [14 LRRM 501].

virtually requires a public school employer to suspend all matters affecting the terms and conditions of employment of its employees during the pendency of a question of representation. Such a result was not contemplated by the EERA and defies common sense and public responsibility. This is particularly true in a case such as this where approximately 20 months elapsed between the time UASF filed its request for recognition—thus raising a question of representation—and a PERB conducted election was held--thus resolving the question of representation.

II

The majority concludes the wording of the proposed contracts was also intended as a threat of reprisal because the scope of the contracts was in excess of that required by the city charter and the contracts would have precluded negotiation about some matters within the scope of representation if and when an exclusive representative was selected. Assuming without deciding that the terms of the proposed contracts were broader than required by the city charter, there is no evidence that the terms were more onerous than those under which the affected employees were working. Furthermore, the majority's reading of the clause is misplaced. This clause was proposed, prepared and submitted by UASF, not the District. Further, it is susceptible to more than one interpretation, including one which would require negotiation of all matters within the scope of representation. Even assuming, however, that the majority's restrictive interpretation is accurate, this is not evidence that the District would

refuse to negotiate about all matters within the scope of representation when negotiations were requested by a duly selected exclusive representative. Nor is it even a threat to refuse to negotiate. To hold, as the majority does, that this ambiguous language portends future violations is to attempt a prospective remedy of an uncommitted wrong and wholly outside the Board's authority. More importantly, since the clause in question was proposed by UASF, the majority has ingenuously concluded that the rights of the employees UASF purported to represent have been abridged by a clause UASF proposed. This permits a charging party to manufacture and then complain of an unfair practice charge of its own making and to receive redress for its own transgressions.

III

Finally, the majority finds the District's request that some of the employees petitioned for as supervisors by UASF serve on its negotiating team for negotiations with nonsupervisory certificated employees as further evidence of the District's intent to interfere with the employees' free choice of a representative. While their argument is unclear, there are two assumptions indispensable to the majority's conclusion: first, that service on the negotiating team, by itself, confers managerial status on an employee; and second, that an employer is prohibited from enlisting the aid of its supervisor when it negotiates with rank and file employees.

The majority has not expressly articulated its basis for either assumption. This Board has never held that management status is conferred upon an employee solely by that employee's participation on a District's negotiating team for negotiations with rank and file employees. There are sound reasons for protecting a district's access to its supervisors in negotiating with rank and file employees. Supervisors are, by definition, those "...having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees...."[3] (Emphasis added.) They are the persons with the first hand knowledge of the actual conditions of the employment relationship. Moreover, they are the very persons who must, daily and directly, implement the terms of any agreement negotiated. To deprive the employer of their first hand knowledge is tantamount to requiring the employer to negotiate in the dark. There is no evidence in this case concerning what the District requested these employees to do when it sought their participation on the negotiating team. Needless to say, they could serve in a variety of ways which would not result in sufficient alignment with management so as to create a conflict of interest in their own negotiating concerns. Absent any indication of the function they were requested to perform in negotiations, the majority's conclusion here is pure speculation.

[3]See Gov. Code sec. 3540.l(m).

In conclusion, the majority has sought to cloak individual events, each of which is in and of itself innocuous, with the mantle of "totality of conduct" and thus to create a violation out of whole cloth. This is not one of those cases in which the whole is greater than the sum of its parts. Accordingly, I dissent.

Jerilou Cossack Twohey, Member

EDUCATIONAL EMPLOYMENT RELATIONS BOARD
OF THE STATE OF CALIFORNIA

In the Matter of	)	
	)	
UNITED ADMINISTRATORS OF SAN FRANCISCO,	)	Case No. SF-CE-87
	)	
Charging Party,	)	
vs.	)	
	)	
SAN FRANCISCO UNIFIED SCHOOL DISTRICT,	)	
	)	
Respondent.	)	
	)	

Appearances; Reynold H. Colvin and Robert D. Links, Attorneys (Jacobs, Blackenburg, May and Colvin), for United Administrators of San Francisco; Corrine Lee, Assistant Legal Advisor, for San Francisco Unified School District.

Before Franklin Silver, Hearing Officer.

STATEMENT OF THE CASE

On May 2, 1977, the United Administrators of San Francisco ("UASF") filed an unfair practice charge against the San Francisco Unified School District alleging violations of Government Code Sections 3543.5(a), (b), and (c)[1] based on the preparation of a draft of individual employment contracts for employees within a proposed supervisory unit for which UASF had requested recognition. It was alleged that the proposed contracts would resolve

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[1] Hereafter, all statutory references are to the Government Code unless otherwise noted.

Section 3543.5 provides as follows:

> 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.

major issues relating to the terms and conditions of employment and that the preparation of the contracts was a coercive tactic designed to fragment the employees in the unit.

On May 17, 1977, UASF amended the charge, adding an allegation that the District had designated certain UASF members to serve as representatives on the District's negotiating team. It was alleged that this action created the possibility that those employees would then be designated as confidential employees, removing them from the unit requested by UASF, and that this action was intended to weaken and undermine the position of UASF as potential exclusive representative.

While admitting certain of the facts alleged, the District denied that it had committed any unfair practices. The District specifically alleged that the individual employment contracts were being prepared pursuant to the requirements of Section 5.101 of the San Francisco City Charter.

This matter was heard on July 1, 1977 in San Francisco. At the time of hearing, the allegation that the District had violated Section 3543.5(c) was dismissed on the ground that no exclusive representative had yet been certified to represent the proposed supervisory unit, and that therefore the District was not under an obligation to meet and negotiate within the meaning of that section. Motions by the District to dismiss the charges based on Sections 3543.5(a) and (b) were taken under submission and are decided in accordance with this recommended decision.

FINDINGS OF FACT

I. The Proposed Individual Contracts Of Employment.

In 1971, the San Francisco City Charter was amended to provide (in Section 5.101):

> All....vice principals, principals, supervisors, and directors who are appointed on or after July 1, 1971 or who are otherwise determined not to be permanent employees shall be employed pursuant to four year contracts with the Board of Education, which contracts shall be subject to renewal based upon achieving and maintaining standards of performance, which standards of performance shall be governed by rules and regulations as promulgated by the Board of Education.

Although 40 percent of the employees occupying the positions enumerated above (or 114 employees) were hired after July 1, 1971, these employees have not at any time been required to sign the contracts provided for in the charter section. In the fall of 1976, the Riles Commission, which had been formed by the State Superintendent of Instruction to review the operation and management of the District, recommended among other things that the District prepare contracts in accordance with the charter section. Three new members of the District Board of Education were elected to take office in January, 1977, and the new school board thereafter directed the administration to prepare the contracts.

At the time the Riles Commission report was issued and the school board directed that the contracts be prepared, and continuing to the present time, a question of representation has existed with regard to a supervisory unit in the District.[2] On April 1, 1976, the UASF filed a request

[2]At the hearing, notice of the official documents on file in the related representation case (file number SF-R-419) was taken without objection.

for recognition for a unit comprised of principals, assistant principals, supervisors, assistant supervisors, directors, and administrative assistants. The International Brotherhood of Teamsters, Local 960, filed an intervention, and an extended unit determination hearing was conducted from October through December of 1976. A proposed decision by a hearing officer was issued on June 10, 1977, and that decision is presently on appeal to the EERB.

In late March, 1977, the District initiated a series of meetings with representatives of both the UASF and the Teamsters. The purpose of these meetings was to discuss the terms of the contracts to be signed by individual employees within the proposed supervisory unit. Representatives of both organizations participated in these discussions, but the UASF at all times stated that it was participating under protest. The objections of the UASF were directed both at the terms of the proposed contract drafted by the District and at the timing of the discussions. It was the position of the UASF that negotiations over the individual contracts should be postponed until an exclusive representative had been certified. On April 13, 1977, the attorney for UASF wrote to the District objecting to specific provisions of the draft contract and stating further:

> The reason that we are specifically raising this question at this time is because your draft must be read against the background of the present proceeding before the Educational Employment Relations Board (EERB). You will recall that UASF applied for representation prior to April 1, 1976; that a hearing on unit determination was held and was concluded on December 15, 1976; that a transcript was prepared, the matter briefed, and that it is presently under submission before EERB for a decision on unit determination. We are inclined to view that the presentation of a draft of the particular type of Agreement which

> I have outlined above constitutes an unfair labor practice within the meaning of the Rodda Bill and it is our present intent to make such a representation to EERB.

The testimony of Saul Madfes, the executive director of the UASF, was that he participated in these discussions because it was apparent to him that a contract would be prepared and presented to the school board in spite of his protests, and he therefore felt it necessary to provide input on behalf of his organization.

At the first meeting, the District presented a draft of the proposed contract. In accordance with the city charter, this draft stated that the term of the contract was to be four years. In addition, the draft contained provisions relating to pay grade, pay adjustment, work calendar and fringe benefits, evaluation procedures, and termination of the contract by the superintendent for non-performance of duties. The UASF had substantive objections to many of these provisions, and specifically objected to the provisions relating to work calendar, fringe benefits, evaluations, and termination of the contract. Apparently the major objection of the UASF was to the provision allowing the superintendent to terminate the contract. It was the position of the UASF that this provision was in conflict with the charter requirement of a four-year contract.

During the course of the meetings the contract went through six drafts. The final draft reflected changes in many of the areas where the UASF had expressed concern. There were changes in the provisions relating to work calendar and evaluations. A general guarantee of due process in conformity with the Education Code was added to the provision on termination of the contract. In addition, there was a new provision on contract renewal, a guarantee that nothing in

the contract would abridge rights granted by the Education Code or city charter, and a reservation for future discussion of additional provisions.[3] UASF, however, remained opposed both to the substance of the contract and to its being prepared prior to the certification of an exclusive representative.

A memorandum prepared by representatives of the District records certain matters discussed at the final meeting on June 8, 1977. The memorandum characterizes the objections raised by the UASF as being that "... .this contract is premature insomuch as District and employees are awaiting decision of EERB." This memorandum was directed only to other management personnel of the District and UASF first became aware of it at the hearing during cross-examination of Mr. Jungherr. There is no indication that it was ever distributed or intended to be distributed to non-management employees of the District.

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[3]This provision was added specifically in response to the objection of the UASF that there should be no negotiations prior to the certification of an exclusive representative which would foreclose the ability to negotiate a collective agreement establishing terms and conditions of employment for the entire unit. The provision stated:

> It is anticipated by the parties that additional provisions governing the public school employer/ employee relationship, including the establishment of an administrator's grievance procedure, specific notice and hearing procedures, and other relevant matters shall be the subject of further discussions between the parties. In the event the herein Administrator becomes a part of a bargaining unit as a result of the EERB decision, the word "discussion" in this section shall be construed to mean "negotiation."

The final draft was placed on the school board agenda for adoption on June 14, 1977. During the meeting, however, the contract was taken off the agenda, and the school board did not take any action on it. No evidence was presented on the reason for the removal of the contract from the school board agenda. At the time of the hearing in the present proceeding, the contract had not been adopted and the school board had not indicated whether it would move to adopt it.

The District's business manager, Anton Jungherr, participated in most of the discussions of the contract on behalf of the District. He testified that the purpose of the discussions was to meet the requirements of the city charter and not to preclude negotiations under the EERA. Although there was some evidence that Mr. Jungherr was impatient with the objections to the contract raised by the UASF,[4] the record does not indicate that the management employees of the District were motivated by a desire to discourage organizational activity. The facts that the District notified the competing employee organizations of the proposed contract and consulted with them over a two-month period support an inference that the preparation of the contract was not undertaken to discourage organizational activity. There is no evidence that the District communicated directly with members of the proposed unit with regard to the possibility of requiring individual contracts.

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[4] Mr. Madfes testified that at a school board meeting in April, ". . .one of the board members pressed the issue that we should have a contract on the basis that we haven't had one for six years, and that was the meeting that Mr. Jungherr stated, you know, 'You give me permission and I'll have a contract on the desk in the morning. Either you sign it or else,' or words to that effect."

II. Use Of UASF Members In Negotiations With Teacher Unit.

The evidence related to this charge is extremely-limited. Mr. Madfes testified that following the certification of an exclusive representative for the classroom teachers unit in the District, six employees who were members of the proposed supervisory unit participated in the teachers' negotiations on behalf of the District.[5] Five of the six employees were members of UASF, although one of those five was also a member of the Teamsters.

ISSUES

1. Was the preparation of a draft of individual four-year employment contracts under the general authority of the San Francisco City Charter, at a time when a question of representation existed with regard to employees to be affected by the contract, an unfair practice?

2. Was the designation of employees within the proposed supervisory unit as members of the District's negotiating team for the classroom teachers unit an unfair practice?

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[5] Mr. Madfes also testified over a hearsay objection that those six employees were "called to serve" as opposed to their volunteering. Under EERB regulations, hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. (Tit. 8, Cal. Admin. Code sec 35026(a)). This is the normal rule in administrative hearings. (See Gov. Code sec. 11513) Since the testimony is hearsay which would be inadmissible in a civil action and is not supported by direct evidence, no finding can be made on whether or not the employees were required to serve on the negotiating team.

CONCLUSIONS OF LAW

The final draft of the individual employment contract, which was taken off the agenda during the June 14 school board meeting, includes subject matter which is within the scope of representation.[6] The draft contains provisions relating to wages and fringe benefits, and detailed provisions on evaluation procedures, all of which without question are within the scope of representation. Section 5.101 of the city charter does not require such a detailed contract. It merely requires four year employment contracts ". . .subject to renewal based upon achieving and maintaining standards of performance, which standards of performance shall be governed by rules and regulations as promulgated by the Board of Education." (Emphasis added.) The charter section does not contemplate, for instance, that evaluation procedures will be contained in the contracts, and to the extent that evaluation procedures are related to maintaining standards of performance, the school board could properly adopt regulations in this area rather than write the procedures into individual contracts.[7] Thus, the

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[6] Section 3543.2 provides in part:

> The scope or representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave and transfer policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, and procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8

[7] Rules and regulations may be changed at any time by the school board, and Section 3540 of the EERA provides that rules and regulations may be superseded by lawful collective agreements. It would be much more difficult to change the provisions of individual contracts based upon negotiations with an exclusive representative, especially since the individual contracts would have four year terms and in all likelihood would not run concurrently.

final draft of the individual employment contracts substantially overlaps with subject matter within the scope of representation although not required to do so by the charter. In addition, EERA Section 3540.l(h) provides that the maximum term of a collective agreement shall be three years, and the four year term of the individual contracts could conceivably create a real impediment to negotiating with an exclusive representative over matters within the scope of representation.

The relationship between individual and collective agreements under the National Labor Relations Act has been authoritatively analyzed in J.I. Case Co., v. NLRB, 321 U.S. 332, 14 LRRM 501 (1944). There it was stated that while individual contracts of hire are proper and even necessary in the context of collective bargaining, the general terms and conditions of employment will be contained in the collective agreement, and the benefits contained in a collective agreement may not be waived by the terms of individual contracts.

> Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement. (Emphasis added.) 14 LRRM at 504.

The circumstances in J.I. Case Co. v. NLRB were, however, significantly different than the present circumstances. There the employer had refused to bargain with a newly certified exclusive representative on the grounds that the terms and conditions of employment were controlled by existing individual contracts. It was explicitly found that

the individual contracts were not coerced or obtained by unfair labor practices. Nevertheless, the Supreme Court ordered the employer to cease giving effect to the individual contracts to forestall collective bargaining.

In the present case, the problems caused by individual contracts in J.I. Case have not yet occurred. First of all, there is not yet an exclusive representative with the authority to meet and negotiate with the District. Secondly, and more fundamentally, the contracts have not yet been adopted by the school board. If the contract which has been prepared were placed before the school board, the board might change the terms of the contract or reject it altogether. Apparently, the District management has not itself settled on the contract since the draft was removed from consideration by the school board. Although the consistent objection of the UASF has been that the contract would impair the ability of the exclusive representative to meet and negotiate under the EERA, it is speculative at this juncture to assume that the contract which may be ultimately adopted will infringe upon matters within the scope of representation or will be used to forestall meeting and negotiating.

Therefore, the question is whether the District has committed an unfair practice merely by proposing an individual contract and asking the UASF (and the Teamsters) to discuss the contract prior to its being presented to the school board. It has been found that there was no intent on the part of District management to discourage organizational activity among its employees, and there is no evidence that there was any direct communication with individual employees with respect to the individual contracts or that employees felt coerced in any way. UASF contends, however, that the timing of the District's proposal -- six years after the city charter was amended to provide for individual contracts and at a time when a unit determination for affected employees was pending before the EERB -- constitutes coercive conduct by the District. It must be concluded from the record, however,

that the contract was proposed in response to the recommendation by the Riles Commission rather than the fact that a request for recognition for a supervisory unit had been made.[8] The mere proposal of a contract under these circumstances with full notice and opportunity to consult provided to the competing employee organizations cannot be construed as a coercive tactic by the District.

The question remains whether the UASF has been denied any right guaranteed to employee organizations by the EERA.[9] The UASF makes various contentions in this regard. It is contended that the District has created an atmosphere of intimidation which will interfere with the conduct of a representation election and that the District has violated its bbligation to remain neutral between competing employee organizations. These contentions are wholly unsupported by the record. There is no evidence of an atmosphere of intimidation and the District has remained scrupulously neutral with respect to the competing organizations.[10] It might be argued that the UASF, as an organization competing to become an exclusive representative, has a prospective and contingent

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[8] It might be argued that the inclusion in the proposed contract of subject matter within the scope of representation is itself evidence of the District's intent to interfere with organizational activity. It does not appear from the record, however, that the UASF ever objected specifically on this basis. Rather, the objections were based on the alleged unfairness of certain provisions and on the District's preparation of any contract while the unit determination was pending.

[9] Section 3543.5(b). See n. 3, supra.

[10] In its brief, the UASF mentions the June 8 management memorandum as indicating a lack of neutrality. Assuming that the obligation of neutrality might in some circumstances apply to speech, the memorandum on its face is totally neutral, and the memorandum was never made available to employees.

right that the District will take no action to preclude full negotiations once the exclusive representative is certified. The District at this point, however, has taken no action which would preclude full negotiations, and therefore no right of the UASF has been denied.

The one final issue involves the use of employees within the proposed supervisory unit as District negotiators in dealing with the teachers unit. Again, the UASF argues that this is a coercive tactic designed to undermine the UASF. It is argued further that the possibility exists that the support for the UASF in the representation election will be diminished because the employees involved in negotiations might be considered confidential employees, ineligible to vote. These contentions are not supported by the record. There is no evidence that the District put any pressure on these employees to become members of the negotiating team, and it may well be that their participation was entirely voluntary. In addition, there is no factual basis to demonstrate that the employees functioned during negotiations in a way to make them confidential employees. Finally, of the six employees, one was not a member of the UASF and one held dual membership in the UASF and the Teamsters. There has been no discrimination against the UASF.

RECOMMENDED ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record of this case, it is hereby ordered that the unfair practice charge filed by the United Administrators of San Francisco against the San Francisco Unified School District be dismissed.

Pursuant to Title 8, California Administrative Code Section 35029, this recommended decision and order shall become final on September 16, 1977, unless a party files a timely statement of exceptions. See 8 Cal. Admin. Code sec. 35030.

Dated: August 29, 1977

Franklin Silver
Hearing Officer