STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SAN FRANCISCO FEDERATION OF TEACHERS, AFT LOCAL 61, Charging Party,	)	Case No. SF-CE-654
v.	)	PERB Decision No. 317
SAN FRANCISCO UNIFIED SCHOOL DISTRICT, Respondent.	)	June 8, 1983

Appearances: Stewart Weinberg, Attorney (Van Bourg, Allen, Weinberg & Roger) for San Francisco Federation of Teachers, AFT Local 61; Celia Ruiz, Attorney (Breon, Galgani, Godino & O'Donnell) for San Francisco Unified School District.

Before Gluck, Chairperson; Tovar and Morgenstern, Members.

DECISION

MORGENSTERN, Member: The San Francisco Federation of Teachers, AFT Local 61 (AFT or Charging Party) appeals the dismissal of its unfair practice charge by the regional attorney of the Public Employment Relations Board (PERB or Board). The Charging Party alleged that the San Francisco Unified School District (District) violated subsection 3543.5(a) of the Educational Employment Relations Act (EERA or Act)[1] when School Board President Rosario Anaya sent a letter to all District employees which concerned certain remarks of James E. Ballard, AFT Local 61 president.

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[1]EERA is codified at Government Code section 3540

FACTS

AFT Local 61 is the exclusive representative of a unit of paraprofessional employees. On Tuesday, March 16, 1982, the San Francisco Examiner published an article referring to the parties' negotiations. Ballard was extensively quoted. He indicated, inter alia, that, as a member of the San Francisco Labor Council, he would not agree to endorse Board President Anaya.

Thereafter, on March 17, 1982, Anaya responded to Ballard's points in a letter prepared using District facilities and resources and sent to every District employee. The letter set forth Anaya's record concerning her opposition to layoffs and her fear that wage increases could cause staff cutbacks.

Anaya criticized Ballard and expressed confidence that her own labor relations record would demonstrate her commitment to proper wages and working conditions for all District employees.

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et seq. All statutory references are to the Government Code unless otherwise specified.

Subsection 3543.5(a) states:

> 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.

On June 2, 1982, PERB's regional attorney dismissed AFT's charge and concluded that Anaya's letter was not violative of EERA. PERB advised the charging party:

> Anaya's letter cannot be seen as constituting a threat or promise to employees. It does not, for example, promise to condition her support of the paraprofessional contract on Labor Council endorsement, nor does it threaten any action absent endorsement. Absent evidence of a prohibited threat, or promise, the letter itself does not constitute a violation of the Act.
>
> While facially non-coercive speech, such as Anaya's letter, does not constitute a prima facie violation of the Act, such speech may constitute a violation when considered as part of a total course of conduct aimed at interfering with guaranteed rights. (Citations omitted.) Your charge contains no facts which would indicate that Anaya's March 17 letter was anything more than an isolated expression of her views regarding issues important to District employees. Therefore, no prima facie violation is stated.

On June 21, 1982, AFT appealed the dismissal of the charge arguing that an employer's conduct or speech can interfere with rights of employees "even though it may not contain a threat of reprisal or force or promise of benefit." AFT also urges that Anaya's letter impliedly promises a benefit to her employee supporters. It also argues that Anaya's letter is improper because permissible employer expressions must relate to the District's position relevant to matters of legitimate employer concern. Additionally, AFT claims that Anaya's letter was an

effort to communicate directly with the employees and thereby bypass the exclusive representative and interfere with the union's intimate relationship with its members.

The District's response to AFT's appeal was submitted on July 7, 1982, and characterizes Anaya's letter as permissive free speech consistent with PERB precedent.

DISCUSSION

In Muroc Unified School District (12/15/78) PERB Decision No. 80, the Board first announced that the public school employer is not precluded from freely expressing its views despite the fact that EERA does not expressly protect employer speech.

Thereafter, in Antelope Valley Community College District (7/18/79) PERB Decision No. 97, the Board found that statements made by the employer violated EERA because they were "calculated to interfere with, restrain and coerce the employees" and "created a threatening and coercive climate . . . ."

In Rio Hondo Community College District (5/19/80) PERB Decision No. 128, the Board expressly adopted the free speech standard of the National Labor Relations Board and held:

> . . . that an employer's speech which contains a threat of reprisal or force or promise of benefit will be perceived as a means of violating the Act and will, therefore, lose its protection and constitute strong evidence of conduct which is prohibited by section 3543.5 of the EERA.

The regional attorney's dismissal of the charge accurately referred to the above-mentioned cases and appropriately concluded that Anaya's letter was not coercive or threatening to employees. On appeal, however, AFT asserts that an employer's communication can interfere with employees' rights even though it contains no threat of reprisal or force or promise of benefit. AFT cites the Chairperson's concurrence in Rio Hondo which states:

> . . . it is conceivable that under certain circumstances employer speech may be free of such explicit character and yet so impliedly intimidating or coercive as to interfere with the exercise of employee rights.

The regional attorney's dismissal did not speak in terms of "implied" intimidation. It did, however, expressly consider and reject the possibility that, while facially noncoercive, Anaya's letter was coercive when considered as a part of a total course of conduct. In this regard, the regional attorney found that no factual allegations were included in the charge and thus no inference could be drawn. We agree.

In this appeal, AFT also asserts that a condition precedent to affording free speech protection to an employer's communication is that the comment must be a permissible expression of the District's position relevant to matters of legitimate employer concern. It argues that the District has no legitimate interest in securing Anaya's reelection. In light of the factual circumstances in this case, we disagree.

We find that Anaya's letter was directly relevant to the ongoing negotiations and the school board's role in rejecting the Charging Party's pay raise proposal.

Finally, AFT argues that the regional attorney failed to find that Anaya's letter was an improper effort to bypass the exclusive representative. In Modesto City Schools (3/8/83) PERB Decision No. 291, the Board perceived the district's Staff Update as communication which was intended to derogate the exclusive representative's authority. The Board viewed the newsletter as representing to employees that an offer had been made to the union. Since no offer had been made, the newsletter, in effect, directly presented an offer to employees which had not been presented to their representative. Anaya's letter makes no offer to employees nor does it appear directed to undermine AFT's authority to negotiate on behalf of the unit employees. Thus, while we affirm the conclusion noted in Rio Hondo, supra, that under certain circumstances an employer's communication will not be protected if it evidences an attempt to bypass the exclusive representative, we find no such purpose in Anaya's letter.

ORDER

Upon the foregoing decision and the entire record in this case, the Public Employment Relations Board ORDERS that the regional attorney's dismissal of the unfair practice charge in Case No. SF-CE-654 is hereby AFFIRMED.

Chairperson Gluck and Member Tovar joined in this Decision.

STATE OF CALIFORNIA — EDMUND G. BROWN JR., Governor

PUBLIC EMPLOYMENT RELATIONS BOARD
San Francisco Regional Office
177 Post St., 9th Floor
San Francisco, California 94108
(415) 557-1350

June 2, 1982

Stewart Weinberg
Van Bourg, Allen, Weinberg & Roger
875 Battery Street
San Francisco, CA 94111

Re: San Francisco Unified School District, Charge No. SF-CE-654

Dear Mr. Weinberg:

Your charge alleges that School Board President Rosario Anaya violated the EERA by sending District employees a letter responding to remarks made by Union President James Ballard.

I indicated to you in a letter dated May 10, 1982 that the charge did not state a prima facie violation of the EERA. (Gov't. Code 3540 et seq.) Your letter of May 12, 1982 did not cure the deficiencies in your charge. The fact that Ms. Anaya may have improperly expended public funds in mailing the letter does not necessarily mean that her conduct interfered with rights guaranteed under the EERA. Moreover, I have found no case authority for the proposition that the misuse of public money serves to remove the conduct complained of here from the realm of employer free speech. Therefore, for the reasons stated in my letter of May 10, and reiterated here, I am dismissing your charge with leave to amend.

Anaya's letter was written in response to a San Francisco Examiner article of March 16, 1982. The article concerned pending negotiations between San Francisco Federation of Teachers CFT/AFT (hereafter Union) and the District over salary increases for District paraprofessionals. Union President James Ballard was quoted in the article as saying:

> "When there are three members of the school board saying they're anxious to have it," said Ballard, "then there's something that can be done. Anaya will be running for re-election. She will want an endorsement from the San Francisco Labor Council. The fact that I'm sitting on the San Francisco Labor Council Board means it would not be surprising if I would not be at all anxious for the Labor Council to endorse her."

In response to this article, the next day Anaya wrote an open letter to all San Francisco Unified School District staff. The first paragraph of the letter stated that Anaya had been a long-term supporter of "proper wages and working conditions" and that she was "distressed" by Ballard's threat to withhold labor endorsement of her school board election bid on the basis of her position during paraprofessional negotiations. The letter went on to detail (1) Anaya's voting record on teacher layoff issues; (2) her position in the paraprofessional negotiations; (3) her voting record on other collective bargaining agreements that have come before the board. Finally, the letter criticized Ballard's attempts to block her endorsement by the Labor Council and urged the staff to consider her performance as school board member before making an endorsement.

Based on the contents of this letter, and relevant case precedent, your charge as currently written does not state a prima facie violation of the EERA. In a series of cases, PERB has concluded that, despite the fact that the EERA does not contain specific language guaranteeing employer free speech, a free speech right is implied in the language and purpose of the Act. Rio Hondo Community College District (5/19/80) PERB Decision No. 128; Antelope Valley Community College District (7/18/79) PERB Decision No. 97; Muroc Unified School District (12/15/78) PERB Decision No. 80. In Rio Hondo, the Board held that under the EERA, employer speech will be analyzed according to the standards adopted by the NLRB in interpreting section 8(c) of the NLRA.[1]

Under the NLRA, employer speech which contains a threat of reprisal or force or promise of benefit will lose the protection of section 8(c). Absent such a threat, even speech which is highly critical of a particular union will not constitute a violation of the Act. (See, e.g., The Nestle Company (1980) 248 NLRB 732 (no violation found where employer told employees that union was "a loser").

Anaya's letter cannot be seen as constituting a threat or promise to employees. It does not, for example, promise to condition her support of the paraprofessional contract on Labor Council endorsement, nor does it

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[1]Section 8(c) of the NLRA provides:

> The expressing of any views, argument, opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

threaten any action absent endorsement. Absent evidence of a prohibited threat, or promise, the letter itself does not constitute a violation of the Act.

While facially non-coercive speech, such as Anaya's letter, does not constitute a prima facie violation of the Act, such speech may constitute a violation when considered as part of a total course of conduct aimed at interfering with guaranteed rights. Antelope Valley Community College District, supra; NLRB v. Virginia Electric and Power Co. (1941) 314 U.S. 459 [19 LRRM 4051]. Your charge contains no facts which would indicate that Anaya's March 17 letter was anything more than an isolated expression of her views regarding issues important to District employees. Therefore, no prima facie violation is stated.

Pursuant to Public Employment Relations Board regulation section 32630(b) (California Administrative Code, title 8, part III), you may either (1) amend the unfair practice charge, or (2) appeal the refusal to issue a complaint to the Board itself.

Right to Amendment

If you choose to amend, the amended charge must be filed with the San Francisco Regional Office Regional Office of the PERB before the close of business (5:00 p.m.) on June 22, 1982, in order to be timely filed (section 32135).

Right to Appeal

If you choose not to amend the charge, you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this Notice (section 32630(b)). Such appeal must be actually received by the executive assistant to the Board before the close of business (5:00 p.m.) on June 22, 1982, in order to be time filed (section 32135) at the following address:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

If you file a timely appeal of the refusal, any other party may file with the executive assistant to the Board an original and four (4) copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal (section 32630(c)).

Service

All documents authorized to be filed herein except for amendments to the charge must also be "served" upon all parties to the proceeding, and

a "proof of service" must accompany the document filed with the Regional Office of the Board itself (sections 32655(a), 32630(b) and 32140 for the required contents and a sample form). The document will be considered properly "served" when personally delivered or deposited in the first-class mail postage paid and properly addressed.

Extension of Time

A request for an extension of time in which to file a document with the Board itself must be in writing and filed with the executive assistant to the Board at the previously noted address. A request for an extension in which to file a document with the Regional Office should be addressed to the Regional Attorney. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the subject document. The request must indicate good cause for and the position of each other party regarding the extension and shall be accompanied by proof of service of the request upon each party (section 32132).

Final Date

If no amended charge or appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Very truly yours,

DENNIS M. SULLIVAN
General Counsel

PETER HABERFELD
Regional Attorney

By
ELAINE FEINGOLD
Legal Counsel

cc: General Counsel