STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CHARLENE FANNING, et al., Charging Parties, v. SACRAMENTO CITY TEACHERS ASSOCIATION, Respondent.	)	Case No. S-CO-97 PERB Decision No. 428 November 6, 1984

Appearances; McMaster & Lobel, by Loren E. McMaster for Charlene Fanning, et al.; Priscilla Winslow for Sacramento City Teachers Association.

Before Hesse, Chairperson; Tovar and Jaeger, Members.

DECISION

HESSE, Chairperson: Charlene Fanning and four other employees (Charging Parties) of the Sacramento City Unified School District (District) appeal the determination of a regional attorney of the Public Employment Relations Board (PERB) that a complaint should not issue on their charge that the Sacramento City Teachers Association (Association) breached its statutory duty to represent fairly all members of the bargaining unit.[1]

[1]Section 3544.9 of the Educational Employment Relations Act (EERA) (Gov. Code sec. 3540, et seq.) provides in relevant part:

> The employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating shall

For the reasons set forth below, we affirm the regional attorney's dismissal of the charge.

PROCEDURAL HISTORY AND FACTS

The Association is the exclusive representative for teachers employed by the Sacramento City Unified School District, including teachers in the Adult Education Department. Adult Education teachers fall into two groups: those who have 176-day contracts, and those who have 230-day contracts. The former group of teachers, which includes Charging Parties, is paid on a contract basis for 176 days per school year. Any work performed by these teachers beyond 176 days is paid on a "per session" basis. The latter group of teachers, known as "U contract" teachers, are also paid on a contract basis, but the length of their school year is set at 230 days.

A dispute arose because the 176-day contract teachers (for clarity, referred to hereinafter as per session teachers) were

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> fairly represent each and every employee in the appropriate unit.

In Kimmet v. SEIU, Local 99 (10/19/79) PERB Decision No. 106, PERB made allegations of a violation of section 3544.9 actionable through EERA section 3543.6(b). That section reads in relevant part:

> It shall be unlawful for an employee organization to:
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> . . . . . .
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> (b) Impose or threaten to impose reprisals

given the opportunity to work longer than 176 days per year. The teachers who choose to do so, usually teaching through the summer session, are paid two different rates: they are paid a contract rate for 176 days, and a "per session" rate for any days thereafter. The per session rate is less than the contract rate, when measured on a per day basis.

The per session teachers who work in excess of 176 days nearly always work 230 days, the same as the U contract teachers. But the U contract teachers are paid on a contract basis for the entire 230 days. Being paid on a contract basis for 230 days results in a higher earnings for the U contract teachers than to the per session teachers. Because these two groups of teachers perform identical work, and yet one group is paid more than the other group, the per session teachers filed a grievance with the District, asking that they receive the same amount of money as the U contract teachers.

The District denied the grievance, and complied with the appropriate contractual grievance procedure by forwarding the grievance and its denial to the Association's grievance committee. The Association's grievance committee studied the matter and recommended to the Association Board of Directors that the matter be sent to arbitration.

> on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of the exercise of rights guaranteed by this chapter.

On November 23, 1982, the Association Board of Directors voted not to take the grievance to arbitration. At this session, which was open to all members, arguments were advanced both in favor of and opposed to pursuing the grievance. The Charging Parties, themselves, however, were not in attendance. Although the Association recognized the desire of the per session teachers to receive the same amount of money as the U contract teachers, the grievance was not taken to arbitration because the contract language providing for this dual method of payment was felt to be unambiguous, and therefore the Association was not likely to prevail at arbitration. Furthermore, if the Association were to win the grievance for the per session teachers, the resulting higher cost to the District could bankrupt the program in question and could cause a possible loss of jobs for both per session and U contract teachers. Finally, the Association Board of Directors noted that the U contract teaching positions were an anomaly, having been grandfathered into the 1976 collective bargaining agreement and were being phased out by the District through attrition.

Of the 14 members of the Board of Directors present and voting at the meeting, two were U contract teachers. The vote was 12 to 2 against taking the grievance to arbitration, with the two U contract teachers voting with the majority.

In its letter of November 24, 1982, to the Charging

Parties, the Association stated that the decision was based upon two specific requirements that needed to be met before the Association would consent to appeal a denied grievance to arbitration. These requirements were that: (1) there was potential success of the grievance in arbitration; and (2) there were no serious potential negative implications for other bargaining unit members raised by the grievance. Neither requirement was met by the Charging Parties' grievance. The letter further stated that, although the Board had voted not to refer the grievance to arbitration, Charging Parties could appeal the decision at the next meeting.

At the November 30 meeting of the Association Board of Directors, the Charging Parties were present to appeal the refusal to take their grievance to arbitration. The Charging Parties were given an opportunity to speak at that meeting, and at the end of the presentation by the Charging Parties, the Association Board of Directors voted again whether to take the grievance to arbitration. Again, the motion was defeated on a vote of 12 to 2, with the two U contract teachers again voting with the majority.

After the Board of Directors voted for the second time not to take the grievance to arbitration, Charging Parties sought to convince the Board of Directors to negotiate a specific proposal in a successor collective bargaining agreement with the District that would result in the per session teachers

being paid at a contract per diem rate for all days worked in excess of 176 days. This would result in any pay inequity between the U contract and the per session teachers being eliminated. This bargaining proposal was presented to the Association Representative Council, a group of one representative for every twenty teachers at any one site in the District. The two U contract teachers who were on the Association Board of Directors also served on the Representative Council.

The Charging Parties' proposal was presented by their representative, and argument was received both for and against the insertion of the bargaining proposal into the Association's bargaining package. At the conclusion of argument, a voice vote was taken of the Representative Council as to whether or not this proposal should be included in the package. The proposal was turned down by a majority of those present, with the two U contract teachers abstaining in the vote.

After notifying the Association that the Charging Parties considered the Association's action to be a possible breach of the duty of fair representation[2] for failing to negotiate a contract proposal favorable to the per sesssion teachers, the Charging Parties were notified by the Association that the Representative Council would reconsider its earlier decision on the bargaining proposal. This reconsideration took place

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[2]See footnote 1, supra.

May 12, 1983. There is a factual dispute as to whether the Charging Parties sought recognition to speak but were not called upon, or whether they simply never sought recognition at all. In any case, the Council again considered the motion to include the Charging Parties' proposal in the bargaining package, and again the voice vote was not favorable to the Charging Parties. The two U contract teachers on the Representative Council again abstained.

On May 25, 1983, Charging Parties filed the instant charge, alleging breach of the duty of fair representation.

DISCUSSION

The Board's standard in duty of fair representation cases is that, in order for the charging party to state a prima facie violation of that duty, it must state facts that tend to show that the respondents acted arbitrarily, discriminatorily, or in bad faith. (See Fremont Unified School District Teachers Association (Janet King) (4/21/80) PERB Dec. No. 125; Rocklin Teachers Professional Association (Thomas A. Romero) (3/26/80) PERB Dec. No. 124; Laguna Salada Union School District (Therese M. Dyer) (9/2/84) PERB Dec. No. 342.) The regional attorney dismissed this charge because, in his opinion, it failed to allege facts sufficient to show that the Association's decisions were arbitrary, discriminatory or made in bad faith.

In their appeal of the dismissal, the Charging Parties allege that the regional attorney essentially failed to

distinguish between two separate issues, that is, the Association's refusal to take the grievance to arbitration, and its refusal to negotiate or offer a proposal regarding contract language favorable to Charging Parties.[3] While the regional attorney should have addressed these issues separately, we find that his failure to do so did not prejudice the Charging Parties since, for the reasons set forth below, we find that their allegations do not state a prima facie violation of the Act.

The Association's major reasons for refusing to pursue arbitration, as advanced in its letter to the Charging Parties on November 24, 1982, were that the potential success at arbitration was doubtful and that there were potential negative implications for other bargaining unit members. Whether or not this judgment by the Association was correct is not at issue. Our inquiry focuses on whether the Association's judgment had a rational basis, or was reached for reasons that were arbitrary or based upon invidious discrimination. At no time did Charging Parties allege facts which tend to show that the decision reached by the Association was based upon any of these

[3]Charging Parties attempt in their appeal to discredit the theory that, even if the Association were to win the arbitration, such a "win" would bankrupt the program. This attempt is made by filing an exhibit with their appeal showing that the grievance, even if sustained, would have cost the District only $20,000. As this is a factual matter, it is inappropriate for the Board to consider any such exhibit on appeal.

unlawful motives. Therefore, PERB will not stand in judgment as to the relative merits of the decision made by the Association when it refused to take the grievance to arbitration.[4]

The Charging Parties also appeal the regional attorney's dismissal on the basis that he did not consider separately whether the Association breached its duty of fair representation when it failed to present negotiating proposals favorable to Charging Parties in their bargaining package. Under Redlands Teachers Association (9/25/78) PERB Decision No. 72, the standard for a duty of fair representation case in presentation of contract matters was adopted from the standard in contract interpretation cases. In other words, in order to establish a case that the Association did not fairly represent them in contract negotiations, Charging Parties must again show that the Association's action was arbitrary, discriminatory or made in bad faith.

When the Representative Council voted not to adopt the Charging Parties' proposal, the arguments for and against the proposal were given a full hearing. Although the Charging Parties are treated differently in the collective bargaining agreement from U contract teachers, the basis for this difference is not based upon an invidious classification scheme or motives hostile to the Charging Parties. Rather, this

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[4]See Vaca v. Sipes (1967) 386 U.S. 171, [64 LRRM 2369].

difference arises out of a negotiated response to ameliorate the impact of the employer's decision to change staffing (that is to phase out U contract positions). Although the Charging Parties would have benefited from a change in contract language raising their salaries, the Association had no obligation to take such a proposal to the table, as long as it had legitimate non-discriminatory and non-arbitrary reasons for refusing to do so. The Board noted in Rocklin, supra, at page 9, that "A union's duty to fairly represent employees during negotiations does not encompass an obligation to negotiate any particular item."

As the Charging Parties have not been able to show that the two-tiered payment system was the result of an invidious classification scheme, negotiated for improper purposes or in an arbitrary manner, a prima facie case has not been shown.

ORDER

For the reasons cited herein, Charge No. S-CO-97 is hereby DISMISSED in its entirety without leave to amend.

Members Tovar and Jaeger joined in this Decision.