STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

BEVERLY LINN,	)	
	)	
Charging Party,	)	Case No. SF-CE-891
	)	
v.	)	PERB Decision No. 445
	)	
SAN FRANCISCO UNIFIED SCHOOL DISTRICT,	)	November 29, 1984
	)	
Respondent.	)	
	)	

Appearances: Carroll, Burdick & McDonough by David P. Clisham, Attorney for Beverly Linn; Kirsten L. Zerger, Attorney for San Francisco Classroom Teachers Association, CTA/NEA.

Before Hesse, Chairperson; Jaeger and Morgenstern, Members.*

DECISION

This case is before the Public Employment Relations Board on an appeal by Beverly Linn of the Board agent's dismissal, attached hereto, of her charge alleging that the San Francisco Unified School District violated sections 3543.5(a), (b), (c) and 3543 of the Educational Employment Relations Act (Government Code section 3540 et seq.).

We have reviewed the dismissal and, finding it free from prejudicial error, adopt it as the Decision of the Board itself.

ORDER

The unfair practice charge in Case No. SF-CE-891 is DISMISSED WITHOUT LEAVE TO AMEND.

By the BOARD

*Members Tovar and Burt did not participate in this Decision.

PUBLIC EMPLOYMENT RELA ONS BOARD
San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, California 94108
(415) 557-1350

June 1, 1984

David P. Clisham

Albert Cheng
San Francisco Unified
School District
135 Van Ness Avenue
San Francisco, CA 94102

Re: REFUSAL TO ISSUE COMPLAINT AND DISMISSAL OF UNFAIR PRACTICE CHARGE
Beverly Linn v. San Francisco Unified School District
Charge No. SF-CE-891

Dear Parties:

Pursuant to Public Employment Relations Board (PERB) Regulation section 32620(5), a complaint will not be issued in the above-referenced case and the pending charge is hereby dismissed because it fails to allege facts sufficient to state a prima facie violation of the Educational Employment Relations Act (EERA).[1] The reasoning which underlies this decision follows.

On March 29, 1984 Ms. Beverly Linn, charging party, filed an unfair practice charge against the San Francisco Unified School District (District) alleging violation of EERA section 3543.5, subdivisions (a), (b) and (c). More specifically, charging party appears to allege that the District and the San Francisco Classroom Teachers Association (Association) agreed to an interpretation of section 13.5.8 of the then-effective collective bargaining agreement in a manner that elevated the interests of a co-worker, Ms. Corvino, at the expense of charging party. This assertion is described in more detail as follows. Charging party has slightly more seniority than Ms. Corvino. As a consequence, Ms. Corvino, rather than charging party, has been involuntarily transferred on two occasions. First, at the beginning of the September 1982 school year, she was transferred from her regular school assignment at Longfellow Elementary School. Subsequently, Ms. Corvino was transferred back to Longfellow after a mere nine-day absence. In September 1983, Ms. Corvino

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[1]References to the EERA are to Government Code sections 3540 et seq. PERB Regulations are codified at California Administrative Code, Title 8.

was again transferred from Longfellow. She filed a grievance, contending that this was the second time within two years that she had been transferred, and that such conduct on the part of the District was in violation of article 13, section 13.5.6, which provides:

> No employee shall be involuntarily transferred two (2) years in a row without consent or special circumstances equivalent to school closure or elimination of program.

The District and the Association concluded that the contract provision protected Ms. Corvino against these two transfers, reasoning that being sent from Longfellow for nine days during 1982 met the definition of "involuntary transfer" contained in the collective bargaining agreement. Mrs. Corvino will return to Longfellow, and the District is barred by the contract from subjecting her to an involuntary transfer within the following two years. Charging party complains that, as a consequence of the interpretation, she will now be subjected to involuntary transfer in the subsequent school year.

On May 9, 1984 the regional attorney discussed the charge with charging party's attorney, Mr. David P. Clisham. The regional attorney explained that the charge, as presently set forth, fails to state a prima facie violation of EERA section 3543.5, subdivisions (a), (b) and/or (c). Mr. Clisham was invited to either withdraw or amend the present charge to cure the present deficiencies. Mr. Clisham stated that, if he was able to find legal authorities to support his position that, as stated, the charge states a prima facie violation, he would submit them within one week's time. To date, no communication has been received from Mr. Clisham or any other persons on charging party's behalf subsequent to the telephone conversation of May 9, 1984.

PERB applies one of two tests in evaluating alleged violations of section 3543.5(a). The proper test to be applied depends upon the nature of the conduct alleged. When the case involves alleged acts of discrimination or reprisal, such as disciplinary action alleged to have occurred because of an employee's exercise of rights under the statute, the test is whether the employer would have taken the action "but for" the employee's exercise of rights. Novato Unified School District (4/30/82) PERB Decision No. 210. When the case involves alleged acts of "interference" (e.g., threats, coercion), a prima facie case is stated only if the facts establish a nexus, or connection, between the employer's conduct and an exercise of a right guaranteed under the EERA. The test involves a balancing of the harm to employee rights against the employer's justification. A violation will be found when the harm to employee rights outweighs the employer's justification. Carlsbad Unified School District (1/30/79) PERB Decision No. 89; Novato Unified School District, supra.

The charge, as presently stated, fails to state a prima facie violation of section 3543.5(a). No discrimination or interference is alleged. Nor are there allegations that charging party engaged in activity protected by EERA.

In evaluating whether or not a school district has committed a violation of section 3543.5(b), PERB analyzes whether there has been an interference with rights of an employee organization as defined by EERA. Section 3543.1(a) grants employee organizations the right to represent their members in their employment relations with public school employers. Section 3543.1(b) sets forth the organization's right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mail boxes, and other means of communication, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of rights guaranteed by this chapter to employees. Section 3543.1(c) guarantees that a reasonable number of representatives of an exclusive representative shall have the right to receive reasonable periods of release time without loss of compensation when meeting and negotiating and processing grievances on behalf of the organization.

The charge, as presently set forth, fails to state a prima facie violation of section 3543.5(b). There are no allegations in the charge which purport to describe an exercise of right guaranteed by EERA to the exclusive representative.

PERB applies either of two tests when evaluating conduct alleged to violate section 3543.5(c). The standard generally applied to determine whether good faith bargaining has occurred has been called the "totality of conduct" test. The test looks to the entire course of negotiations to determine whether the employer has negotiated with the "requisite subjective intention of reaching an agreement." Pajaro Valley Unified School District (5/22/80) PERB Decision No. 51. Some types of conduct, however, have a substantial potential to frustrate negotiations and are therefore considered "per se" violations without any determination being necessary concerning good or bad faith motivation. See Sierra Joint Community College District (11/5/81) PERB Decision No. 179 (absolute refusal to discuss issue); Ross School District (2/21/78) PERB Decision No. 48 (conditional bargaining insisting on non-mandatory subjects); San Francisco Community College District (10/12/79) PERB Decision No. 105 (unilateral act prior to negotiation).

The charge, as presently set forth, fails to state a prima facie violation of section 3543.5(c). There are no allegations to support a claim of bad faith bargaining. The allegations indicate that the District and the Association settled the contract dispute in a manner that enhanced, rather than undermined, the protection accorded all unit members. As a consequence, the District's right to transfer unit members involuntarily is narrowed. To the

extent there are adverse consequences for charging party, at present anticipated rather than real, they result from the operation of the seniority system in effect. Accordingly, the allegations are dismissed and no complaint will issue thereon.

Pursuant to Public Employment Relations Board regulation section 32635 (California Administrative Code, title 8, part III), you may appeal the refusal to issue a complaint (dismissal) to the Board itself.

Right to Appeal

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 32635(a)). To be timely filed, the original and five (5) copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) on June 21, 1984, or sent by telegraph or certified United States mail postmarked not later than June 21, 1984 (section 32135). The Board's address is:

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

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five (5) copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal (section 32635(b)).

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany the document filed with the Board itself (see section 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 Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, 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 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

By _____
PETER HABERFELD
Regional Attorney

cc: General Counsel