STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

BUTTE COLLEGE EDUCATION ASSOCIATION, CTA/NEA. Charging Party, v. BUTTE COMMUNITY COLLEGE DISTRICT, Respondent.	)	Case No. S-CE-703
	)	PERB Decision No. 555
	)	December 30, 1985
FRANK FLORIO. Charging Party, v. BUTTE COMMUNITY COLLEGE DISTRICT, Respondent.	)	Case No. S-CE-705

Appearances: Brislain, Zink & Lenzi by Albert J. Lenzi, Jr. for Frank Florio; Brown & Conradi by Penn Foote for the Butte Community College District.

Before Morgenstern, Burt and Porter, Members.

DECISION

BURT, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Frank Florio (Charging Party)[1] to the proposed decision of an

[1]Complaint No. S-CE-703 and complaint No. S-CE-705 were consolidated for hearing before the ALJ. However, because only Charging Party Frank Florio excepted to the ALJ's proposed decision, we address only complaint No. S-CE-705.

administrative law judge (ALJ) dismissing an unfair practice complaint in which Charging Party alleged that the Butte Community College District (District) had violated the Educational Employment Relations Act (EERA or Act)[2] by, inter alia, unilaterally changing a transfer procedure and denying him a sabbatical leave.

Florio initially charged that the District had unilaterally changed both its transfer procedure and its grievance procedure in violation of EERA section 3543.5(c) and. derivatively, subsections (a) and (b). His charge also alleged that he had been denied a postponement of a sabbatical leave in retaliation for his exercise of rights protected under the EERA. On February 24, 1984, the regional attorney dismissed the charge regarding the grievance procedure for failure to state a prima facie case, but issued a complaint on the remaining allegations. A hearing was held on June 14. 1984, and the ALJ issued his proposed decision on September 7. 1984 dismissing the complaint. Florio excepts to the ALJ's finding that the phrase "administrative requirements" in the transfer section of the parties' collective bargaining agreement gave the District "a great deal of latitude" in reassigning employees and. thus, that the District's transfer of Florio did not constitute a unilateral change.

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[2]The EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

For the reasons that follow, we affirm the ALJ's finding that the District did not unilaterally change its transfer procedure in violation of the EERA.

FACTS

Charging Party was employed by the District as a counselor from 1977 until 1984 and has been in the certificated employee unit for which the Butte College Education Association, CTA/NEA (Association) has been the exclusive representative since 1978.

Charging Party's unfair practice complaint stems from his involuntary transfer by the District in January 1984 from a counseling position to an instructional position as acting coordinator of the campus learning resource center. At the time of his transfer, Florio ranked third in seniority among six full-time counselors. Prior to his transfer, he had occasionally volunteered to teach classes in addition to counseling. Over the last 14 years, six counselors had voluntarily transferred to teaching positions.

In the fall of 1982, Florio applied for a sabbatical leave to extend through the fall and winter quarters of the 1983-84 school year. During his sabbatical, Florio planned to develop a system of electronic instruction for use in District classrooms located in areas remote from the campus. The college's Advisory Sabbatical Leave Committee, chaired by Ernie Matlock, vice-president for instruction, reviewed Florio's application and voted to approve his sabbatical in December 1982.

Florio testified that there had been some discussion of his teaching as a condition to receiving the sabbatical, but that he had understood he would teach only one class in conjunction with the sabbatical project and it would be "the prototype class" for the project. Florio wrote to Matlock on December 15. 1982 to request that the sabbatical be postponed, saying he was concerned that teaching was a condition for his receiving the sabbatical. Florio subsequently spoke to Matlock and decided to seek a reduction of the sabbatical from two quarters to one. rather than ask for postponement. The one-quarter sabbatical was approved by the school board on February 23, 1983. and that approval was not expressly conditioned upon Florio's teaching a class following his return from sabbatical.

On June 9. 1983, Florio met with Kenneth Lucas. District vice-president for student personnel services and supervisor of college counselors, in order to discuss Florio's job performance. Lucas testified that he told Florio he was considering a recommendation to transfer Florio from counseling to a teaching position. Lucas testified that students had complained of dissatisfaction with Florio and that an inordinate number of students had switched from Florio to other counselors. Lucas said there were also faculty members who refused to send students to Florio and coordinators who had complained about him, and that he had spoken to Florio about these complaints on some five to seven occasions since 1978.

Florio's testimony regarding the June 9 meeting presented a somewhat different version of his conversation with Lucas. Florio testified that Lucas said he would be discussing Florio's job performance with the District superintendent and that there was some possibility counselors would have to teach. However, Florio said there had been no direct statement that he would be assigned to an instructional position.

Nonetheless, on June 22, 1983, Florio received a letter from District Superintendent Wendell Reeder stating that he would be transferred to instruction upon his return from sabbatical.

On July 13, 1983, an attorney retained by Florio wrote to Reeder stating that Florio strongly objected to being reassigned. Matlock met with Florio and told him that his impending transfer was unrelated to the sabbatical leave. On August 16, 1983, Florio wrote to the board of trustees asking for a one-year postponement of his sabbatical. At a board of trustees meeting on August 31, 1983, Florio gave health problems as the reason for his request, but the board rejected the request and directed him to either take the sabbatical as formerly approved or abandon it.

On September 6, 1983, Florio notified the District that he wished to cancel his sabbatical. Dean of Administrative Services James Mitchell advised Florio that he would be temporarily assigned to counseling only for the fall quarter of 1983, and that in the winter quarter he would be assigned as a

full-time instructor. In January 1984. Florio was assigned to be acting coordinator of the campus learning resource center. As of the date of the hearing on this case. Florio had not been advised about his assignment for 1984 except that it would involve instruction.

It was agreed by all the witnesses at the hearing that, prior to Florio's transfer, no other counselor had ever been involuntarily reassigned to an instructional position. The Association and the District had negotiated a transfer provision in their collective bargaining agreement effective July l, 1978 through June 30, 1981. With the elimination of four words, the transfer provision was carried over in the successor agreement effective July 1. 1982 through June 30, 1985. The transfer provision reads as follows with the words removed from the current version underlined:

ARTICLE IX
TRANSFERS

9.1 Voluntary Transfer - A notice of all open positions within the unit shall be circulated and posted on appropriate bulletin boards. Unit members shall have the right to request transfer to any open positions for which they are qualified.

9.2 Administrative Transfer - Where due to changing student preferences or administrative requirements it becomes necessary to transfer unit members, such transfer shall be made only after consultation between the member and the supervisor.

9.3 Transfer shall be considered on <u>but not limited to</u> the following non-ordered criteria:

9.3.1 The qualification and competency of the unit members to perform the required services.

9.3.2 The length of service in the District.

9.3.3 Affirmative action goals of the District.

DISCUSSION

When an employer unilaterally changes an established policy regarding a negotiable subject matter without affording the exclusive representative a reasonable opportunity to bargain over the change, the employer is held to have violated its duty to negotiate in good faith. Pajaro Valley Unified School District (1978) PERB Decision No. 51. (See also NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177].) Established policy may be embodied in the terms of a collective bargaining agreement (Grant Joint Union High School District (1982) PERB Decision No. 196) or. where a contract is silent or ambiguous, it may be determined from past practice or bargaining history (Rio Hondo Community College District (1982) PERB Decision No. 279). An alleged violation of a collective bargaining agreement does not violate the Act unless it is also a unilateral change having a generalized effect or a continuing impact.[3] Grant Joint Union High School District, supra.

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[3]Section 3541.5(b) provides that:

(b) The board shall not have authority to enforce agreements between the parties, and

In the instant case, Charging Party Florio excepts to the ALJ's finding that, in light of the transfer section of the parties' collective bargaining agreement, the District did not make a unilateral change in its transfer policy when it transferred Florio. Much of the testimony at hearing dealt with the transfer section and, in particular, with the meaning of the phrase "administrative requirements" therein.

Article IX contains provisions for "voluntary" and "administrative" transfers, and the parties agree that the administrative transfer section refers to involuntary transfers. Administrative transfers are permitted for either of two reasons: "changing student preferences" or "administrative requirements." The District relied on the latter provision in transferring Florio.

The ALJ found that, although the parties each offered witnesses who testified as to the meaning of the term "administrative requirements," their testimony consisted entirely of opinion. He also found that, since the parties apparently never discussed the term across the bargaining table, there was no negotiating history to aid in the interpretation of the phrase. "One therefore can only ascribe the ordinary, dictionary meaning to the words," the ALJ wrote.

> shall not issue a complaint on any charge based on alleged violation of such an agreement that would not also constitute an unfair practice under this chapter.

He then drew on Webster's Third New International Dictionary. Unabridged to find that an "administrative requirement" is an action "wanted or needed" in the "management (or) direction" of the District.

The ALJ found that this interpretation of "administrative requirements" gave the District great leeway in transferring employees to different positions, but that it still had to comply with the contractual criteria in sections 9.3.1, 9.3.2 and 9.3.3, requiring consideration of the transferee's qualifications, competency and length of service with the District, and the affirmative action goals of the District. The ALJ found that the competency factor was not limited to competency for the position to be transferred to, but also encompassed competency in the position already held.

Vice-president Lucas testified at length on the performance problems which he said prompted the decision to transfer Florio. The ALJ found it irrelevant whether or not that evaluation was justified so long as the District had considered Florio's competency and other criteria and transferred Florio because of them. He found that the District had considered those factors and thus had made a transfer because of "administrative requirements" within the dictionary meaning of the term: an action "wanted or needed" in the "management (or) direction" of the District. He found that the transfer was therefore permissible under the collective bargaining agreement and was not an unlawful unilateral change.

Charging Party excepts to the ALJ's interpretation of the phrase "administrative requirements." Although he does not specifically except to the finding that there was no bargaining history from which to determine what the parties believed the term to mean. Florio asserts:

> Even if there is no bargaining history concerning the meaning of a particular term in an education employment contract, it is logical to apply the definition that would be given by persons and entities who must operate under such a contract, rather than some abstract or lay person's definition.

In the area of contract interpretation. Civil Code section 1644 provides:

> The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed.

While Charging Party seems to be alleging that the phrase "administrative requirements" carries some special meaning in usage among school districts and teachers' associations, he presented no evidence indicating any such usage. Nor was there any proof of what the parties intended it to mean as evidenced by bargaining history.

Out of a total of eight witnesses, only two purported to testify as to the meaning of the phrase as the parties at the bargaining table understood it. The ALJ found that an Association witness on that issue testified only as to his opinion of its meaning and not as to the bargaining history.

The ALJ credited a District witness who testified that the phrase "administrative requirements" had not been discussed at all in either the original negotiations of Article IX or during the negotiations for the successor agreement. Thus, the problem of what the parties meant by the phrase remains.

Charging Party also contends that, under Civil Code section 1654,[4] the contract language on administrative transfers should be construed against the District since the District drafted the original version of Article IX. However, the uncertainty can be resolved under the rule of section 1644 because, as the ALJ correctly found, there was no bargaining history indicating that the parties intended the words to have any special meaning and no evidence was presented on any special usage giving the words a meaning other than their ordinary one. In any event, the reported cases pertaining to section 1654 indicate that when the contract language is arrived at through the process of negotiations, section 1654 does not apply and the contract provisions in question should not then be construed against either party. Goldman v. Ecco-Phoenix Elec. Corp. (1964) 62 C.2d 40 [4] Cal.Rptr. 73]. (See, also, Indeco. Inc. v. Evans (1962) 201 Cal.App.2d 369

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[4]Civil Code section 1654 provides:

> In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist.

[20 Cal.Rptr. 90] and Dunne & Gaston v. Keltner (1975) 50 Cal.App.3d 560 [123 Cal.Rptr. 430].)

Charging Party also excepts to the ALJ's interpretation of the phrase "administrative requirements," contending that ". . .no education employees' union would ever allow such language to stand in a contract if it could be so interpreted." However, no authority was offered to support such a basis for overturning the ALJ's interpretation.

In Marysville Joint Unified School District (1983) PERB Decision No. 314, the teachers' association charged that the district had made a unilateral change when it required teachers to supervise students at noon break. Although the teachers were given a 30-minute, duty-free lunch break as the parties' contract required, past practice had been to give many of the teachers a 55-minute lunch break.

In reversing the hearing officer's finding that there had been a unilateral change, the Board held:

> . . . The hearing officer's finding that the plain meaning of the contract was superseded by the parties' past practice is based on an inference unsupported by the record . . . . Absent any evidence of bargaining history, we cannot infer that the parties' intended to attach a meaning to the hours provision of their agreement contrary to its plain meaning.

Similarly, in the instant case there was no bargaining history which showed that the parties agreed to any meaning of the term "administrative requirements" other than its ordinary meaning. Nor was the District precluded from exercising its

contractual rights merely because it had not done so in the past. Marysville Joint Unified School District, supra.

Charging Party had the burden of proof of showing that the phrase "administrative requirements" restricted District actions on transfers, and that the District had thus acted unlawfully in transferring him to an instructional position. However, based on the evidence presented. Charging Party has not satisfied that burden. Absent any proof to the contrary, the ALJ was correct in applying the dictionary meaning to the term used in the parties' agreement.

ORDER

For the above reasons, we find that the Butte Community College District did not implement a unilateral change in its transfer procedure in violation of the EERA. We therefore ORDER that the charge and complaint numbered S-CE-7O5 be DISMISSED. Mr. Florio's request for oral argument is hereby DENIED.

Members Morgenstern and Porter joined in this Decision.