STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, FRESNO CLERICAL CHAPTER #125,	)	
Charging Party,	)	Case No. S-CE-1277
v.	)	PERB Decision No. 779
FRESNO UNIFIED SCHOOL DISTRICT,	)	November 27, 1989
Respondent.	)	

Appearances: William Corman, Attorney, for California School Employees Association, Fresno Clerical Chapter #125; Finkle, Davenport & Barsamian by Raymond W. Dunne, Attorney, for Fresno Unified School District.

Before Craib, Shank and Camilli, Members.

DECISION

CRAIB, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the California School Employees Association, Fresno Clerical Chapter #125 (CSEA), of a Board agent's dismissal (attached hereto) of its charge that the Fresno Unified School District (District) violated section 3543.5, subdivisions (a) and (b), of the Educational Employment Relations Act (EERA).[1] The District

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.5, subdivisions (a) and (b) state:

> 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

allegedly retaliated against Janet Kincade Wood by failing to promote her to the position of Office Manager and by refusing her request for out-of-class pay. Wood had held a series of offices within CSEA and, at the time in question, was Second Vice-President and in charge of CSEA's "Site Representative" program. The Board agent dismissed the charge because she concluded that it must be deferred to binding arbitration pursuant to Lake Elsinore School District (1987) PERB Decision No. 646.

We have reviewed the dismissal, CSEA's appeal and the District's response thereto and, finding the dismissal free of prejudicial error, adopt it as the decision of the Board itself.[2] We write separately in order to address the content of CSEA's appeal.

DISCUSSION

The parties' collective bargaining agreement, which covers the period from July 1, 1987 to June 30, 1990, contains the following provision, at Article 16 (Organizational Rights), section 8(B):

> 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.

[2]For the reasons stated in his dissent in Eureka City School District (1988) PERB Decision No. 702, at pp. 9-14, Member Craib would condition deferral on the willingness of the District to waive procedural defenses. However, the majority of the panel, consistent with the majority opinion in Eureka, places no such condition on deferral of this case to binding arbitration.

> . . . . It is acknowledged by the district that unit representatives may participate in any legal and appropriate CSEA activities without threat of reprisals or discrimination.

Though section 8(B) is entitled "Job Stewards," CSEA acknowledges that the use of the words "unit representatives" refers to union officials and site representatives, as well as to job stewards. The contract contains a grievance procedure culminating in binding arbitration (Article 10). Article 10 lists those articles of the contract that may be grieved by CSEA and this list includes Article 16.

Finding that the retaliation allegations were covered by the contractual grievance machinery, the Board agent concluded that the charge must be deferred to arbitration. The Board agent rejected CSEA's argument that the charge should not be deferred because the alleged conduct also violated the Promotion and Classification articles of the contract (Articles 18 and 19), which CSEA has no right to grieve. She found that, although Articles 18 and 19 were arguably violated, CSEA failed to explain how such contract breaches also constituted unfair practices pursuant to Grant Joint Union High School District (1982) PERB Decision No. 196 (Grant).

In its appeal, CSEA admits that the conduct at issue here could have been the subject of a grievance alleging a violation of Article 16, subdivision 8(B). It also admits that "the gist of this charge is that the District refused to promote Ms. Wood or compensate her for out-of-class work because of Ms. Wood's

activities on behalf of CSEA." However, CSEA insists that the charge should not be deferred because the same conduct violated Articles 18 and 19, which are not included in the enumerated articles that are subject to grievances filed by CSEA.

Had CSEA successfully stated a prima facie case of a unilateral change involving Articles 18 and/or 19, its argument against deferral would be worthy of consideration. However, CSEA has provided no facts, in either its charge or its appeal, that would illuminate its unilateral change theory. Though the articles on promotion and reclassification could have been breached by the District's alleged retaliation against Wood, logically, such a breach would be of a one-time nature that would not meet the requirement under Grant that a contract breach, to be an unfair practice within PERB's jurisdiction,[3] must constitute a change in policy. A change in policy is defined as having "a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members." (Grant, at p. 9.)

CSEA's appeal simply states that the charge should not be deferred because the alleged conduct also breached Articles 18 and 19 of the parties' agreement. It does not address the Board

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[3]EERA section 3541.5, subdivision (b) states:

> The Board shall not have authority to enforce agreements between the parties, and 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.

agent's conclusion that such breaches would not constitute unfair practices. Consequently, CSEA has provided no argument that challenges this critical portion of the Board agent's analysis.[4] Nor is there any information in CSEA's charge or the Board agent's dismissal that supports the unilateral change theory. Accordingly, there is no basis on which we could conclude that the Board agent was in error.

ORDER

The unfair practice charge in Case No. S-CE-1277 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Shank and Camilli joined in this Decision.

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[4]PERB Regulations are codified at California Administrative Code, title 8, section 31001 et seq. Regulation 32635, governing review of dismissals, states, in pertinent part:

> The appeal shall:
>
> (1) State the specific issues of procedure, fact, law or rationale to which the appeal is taken;
>
> . . . . . .
>
> (3) State the grounds for each issue stated.

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916) 322-3198

August 23, 1989

William Corman
California School Employees Association
Fresno Clerical Chapter #125
P.O. Box 640
2045 Lundy Ave.
San Jose, California 95106

Raymond W. Dunne
Finkle, Davenport & Barsamian
2344 Tulare Street, Suite 400
P.O. Box 1752
Fresno, California 93717-1752

Re: California School Employees Association, Fresno Clerical Chapter v. Fresno Unified School District
Unfair Practice Charge No. S-CE-1277
DISMISSAL LETTER

Dear Mr. Corman:

The California School Employees Association (CSEA or Association) filed a charge against the Fresno Unified School District (District) in which it alleged that the District took two adverse actions against unit member Janet Kincade Wood because of her exercise of protected activities. These adverse actions were the District's failure to promote Ms. Wood to the position of office manager[1], and its refusal to grant Ms. Wood's request for out-of-class pay. By this conduct, the Association alleged that the District violated sections 3543.5(a) and (b) of the Educational Employment Relations Act (EERA).

I indicated to you in my attached letter dated August 8, 1989, that the above-referenced charge, as currently alleged, must be dismissed and deferred to arbitration. You were advised that if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, you should amend the charge accordingly. You were further advised that unless you amended the charge to state a prima facie case, or withdrew it prior to August 16, 1989, the charge would be dismissed.

[1] The charge, in addition, refers to the District's unlawfully motivated refusal to promote Ms. Wood to the position of help-desk operator. However, inasmuch as Ms. Wood was notified that she was not selected for this position on July 19, 1988, and the charge was not filed until March 22, 1989, this allegation is clearly untimely. PERB further lacks jurisdiction on the basis that this allegation also must be deferred to arbitration.

On August 11, 1989, I received from you information supplementing the merits of the above-referenced charge. In sum, this information concerned Ms. Wood's qualifications for the positions of help-desk operator, and office manager, as well as facts helping to show a nexus between Ms. Wood's exercise of protected activity and the District's refusal to grant her promotions to positions for which she interviewed. The supplementary information also included additional facts relevant to the District's alleged discriminatory denial of out-of-class pay.

On August 16, 1989, you requested and I granted an extension of the dismissal deadline to August 23, 1989. On this occasion we also discussed the additional facts I received from you on August 11, 1989. In addition, you indicated to me that you objected to footnote 1 of the warning letter, to the extent that it indicates that the charge failed to allege facts establishing how those articles in the parties' contract governing Promotion and Reclassification were violated, and under what theory this constituted an unfair practice.

During our conversation on August 16, 1989, your elaboration on the additional facts previously submitted to me helped establish potential violations of the contractual articles dealing with Promotion (Article 18)[2] and Reclassification (Article 19). However, the charge and your communication to me of additional facts still do not show how such possible violations constituted an unfair practice within the parameters of PERB's jurisdiction. See EERA section 3541.5(b) and Grant Joint Union High School District (1982) PERB Decision No. 196. The essence of the timely portion of the instant charge remains that Ms. Wood was denied the promotional position of office manager, and out-of-class pay, because of her exercise of protected activity. Inasmuch as such conduct is prohibited by Article 16 of the contract, and the grievance machinery, culminating in binding arbitration covers the matter at issue, PERB lacks jurisdiction to entertain the allegations of this charge. For these reasons, the allegations of this charge are dismissed.

[2] The warning letter erroneously refers to Article 16 as covering Promotion. Promotion is actually contained at Article 18.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, 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 dismissal (California Administrative Code, title 8, section 32635(a)). To be timely filed, the original and five copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing (California Administrative Code, title 8, section 32135). Code of Civil Procedure section 1013 shall apply. 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 copies of a statement in opposition within twenty calendar days following the date of service of the appeal (California Administrative Code, title 8, 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 each copy of a document served upon a party or filed with the Board itself. (See California Administrative Code, title 8, 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 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 (California Administrative Code, title 8, 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.

Sincerely,

CHRISTINE A. BOLOGNA
General Counsel

By
Jennifer A. Chambers
Regional Attorney

Attachment

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916) 322-3198

August 8, 1989

William Corman
California School Employees Association
Fresno Clerical Chapter #125
P.O. Box 640
2045 Lundy Ave.
San Jose, CA 95106

Re: California School Employees Association, Fresno Clerical Chapter #125 v. Fresno Unified School District
Unfair Practice Charge No. S-CE-1277
WARNING LETTER

Dear Mr. Corman:

The California School Employees Association (CSEA or Association) has filed a charge against the Fresno Unified School District (District) in which it alleges that the District took two adverse actions against unit member Janet Kincade Wood because of her exercise of protected activities. These adverse actions were the District's failure to promote Ms. Wood to the position of Office Manager, and its refusal to grant Ms. Wood's request for out-of-class pay. By this conduct, the Association alleges that the District violated sections 3543.5(a) and (b) of the Educational Employment Relations Act (EERA).

The charge and my investigation revealed the following facts. Ms. Wood has been employed by the District since 1978, in the position of Clerk-Typist. She has held numerous offices in the Association throughout the years of her employment with the District. For example, she was the Association's Chapter President in 1982-83, and in 1984-85 held the office of Junior Past Chapter President. In 1987-88 and 1988-89 Ms. Wood held the office of Second Vice-President, and was in charge of the Association's "Site Representative" program. During the time Ms. Wood served in the latter capacity, her name was posted on bulletin boards in numerous District facilities identifying her in this position.

Since approximately 1984, Ms. Wood has sought, but has not been selected for, approximately eighteen promotional positions. In September 1988, Ms. Wood interviewed for the promotional position of Office Manager. She was notified on September 23, 1988, that she was not selected for this position because she did not speak Spanish. However, fluency in Spanish had never been stated by the District as a qualification for the job.

Charging Party also alleges that for a long while, Ms. Wood has been entitled to compensation for performing out-of-class work. On or about November 17, 1988, a representative of the Association, Lloyd Ramirez, met with Patricia Hogan-Newsome, a District administrator in charge of Classified Personnel, to discuss Ms. Wood's performance of out-of-class duties. On December 13, 1988, the parties met again to discuss the issue. At this time, the District's Assistant Superintendent in charge of personnel, Jack Stewart, was in attendance, and said that he would favorably consider Ms. Wood's request for out-of-class pay. At a subsequent meeting on the same issue on January 25, 1989, however, Ms. Wood's request for out-of-class pay was refused. In refusing to compensate Ms. Wood, the District asserted that she had never been requested to work out of classification, and had even been requested to refrain from performing such work. The Association disputes the District's contentions, and asserts that its refusal to pay Ms. Wood constituted an unlawfully motivated adverse action.

The parties' collective bargaining agreement covering the period July 1, 1987 through June 30, 1990, provides at Article 16(8)(B) [Organizational Rights] in pertinent part:

> CSEA activities of Job Stewards shall be conducted before and after working hours, or during lunch and rest periods. . . . It is acknowledged by the district that unit representatives may participate in any legal and appropriate CSEA activities without threat of reprisals or discrimination.
> (Emphasis added.)

The Association acknowledges that the parties' use of the words, "unit representatives," refers not only to job stewards, but also to union officials and site representatives.

The parties' agreement contains a grievance-arbitration procedure which culminates in binding arbitration. A grievance is defined at Article 10(1)(A) as:

> [A] formal written allegation by a grievant that he/she has been adversely affected by a violation of the specific provisions of [the] Agreement.

Further, CSEA had a right to grieve certain articles, including Article 16 governing Organizational Rights.

Discussion

Section 3541.5(a)(2) of EERA states, in pertinent part, that PERB,

> shall not. . . issue a complaint against conduct also prohibited by the provisions of the. . . [collective bargaining agreement in effect] between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted either by settlement or binding arbitration.

In Lake Elsinore School District. (1987) PERB Decision No. 646, PERB held that this section established a jurisdictional rule requiring that a charge be dismissed and deferred if: (1) the grievance machinery of the agreement covers the matter at issue and culminates in binding arbitration; and, (2) the conduct complained of in the unfair practice charge is prohibited by the provisions of the agreement between the parties. PERB Rule 32620(b)(5) (California Administrative Code title 8, section 32620(b)(5)) also requires the investigating board agent to dismiss a charge where the allegations are properly deferred to binding arbitration.

These standards are met with respect to this case. First, the grievance machinery of the agreement covers the dispute raised by the unfair practice charge and culminates in binding arbitration.[1] Second, the conduct complained of in this charge is that the District unlawfully discriminated and took reprisals against Ms. Wood by failing to promote her, and by refusing to grant her request for out-of-class compensation, because of her activities on behalf of the Association. This conduct is prohibited by Article 16(8)(B) of the contract.

It should finally be mentioned that the Charging Party, in addition to asserting that EERA section 3543.5(a) was violated, also alleged a violation of section 3543.5(b). The latter

[1] The Association's representative has asserted, in conversations with the regional attorney, that the true underlying basis of the instant unfair is that the District violated Article 16 [Promotion] and Article 19 [Reclassification]; articles which the Association has no ability to grieve. However, the charge fails to allege facts establishing how these articles were violated. Moreover, the charge does not indicate how such violations, assuming that they can be found to exist, constitute unfair practices under EERA.

allegation must be deferred also. An examination of the charge does not reveal facts establishing how there occurred a denial of employee organization rights. Further, this charge must be deferred even assuming that Charging Party could supply facts establishing that it has been denied rights as a consequence of the District's conduct toward Ms. Wood. Deferral is appropriate because any harm to CSEA would flow from the same set of operative facts establishing the District's alleged misconduct toward Ms. Wood, namely, its failure to promote her, and to pay her for out-of-class work, because of her exercise of protected activity.

Accordingly, this charge must be deferred to arbitration and will be dismissed. Such dismissal is without prejudice to the Charging Party's right, after arbitration, to seek a repugnancy review by PERB of the arbitrator's decision under the Dry Creek criteria. See PERB Regulation 32661 (California Administrative Code, title 8, section 32661); Los Angeles Unified School District (1982) PERB Decision No. 218; Dry Creek Joint Elementary School District, (1980) PERB Order No. Ad-81a.

If you feel that there are any factual inaccuracies in this letter or any additional facts which would require a different conclusion than the one explained above, please amend the charge accordingly. This amended charge should be prepared on a standard PERB unfair practice charge form clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must be served on the respondent and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before August 16, 1989, I shall dismiss your charge without leave to amend. If you have any questions on how to proceed, please call me at (916) 322-3198.

Sincerely,

Jennifer A. Chambers
Regional Attorney

JAC:djt