



STATE OF CALIFORNIA
 DECISION OF THE
 PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, Local 2229,))))	Case No. LA-CE-2860
Charging Party,)	Request for Reconsideration
v.)	PERB Decision No. 831
ABC UNIFIED SCHOOL DISTRICT,)	PERB Decision No. 831b
Respondent.)))	March 27, 1991

Appearances: Reich, Adell & Crost by John Rubin, Attorney, for American Federation of State, County and Municipal Employees, AFL-CIO, Local 2229; Atkinson, Andelson, Loya, Ruud & Romo by James C. Romo, Attorney, for ABC Unified School District.

Before Hesse, Chairperson; Shank and Camilli, Members.

DECISION

HESSE, Chairperson: On November 16, 1990, the Public Employment Relations Board (PERB or Board) issued an interim order granting the ABC Unified School District's (District) request for reconsideration. The Board has now considered the District's opposition the American Federation of State, County and Municipal Employees, AFL-CIO, Local 2229's (AFSCME) request to withdraw the underlying unfair practice charge.¹

The District's opposition to the withdrawal of the underlying charge is summarized as follows: (1) the District never agreed to the withdrawal in the first instance; (2) AFSCME's claim of a settlement of the dispute as a basis for requesting withdrawal did not include an agreement to settle the

¹The Board issued PERB Decision No. 831 on August 3, 1990, granting the charging party's request that it be permitted to withdraw its underlying unfair practice charge.

issue of whether a contractual waiver survives the expiration of an agreement; (3) PERB has no authority to vacate that portion of the administrative law judge's (ALJ) proposed decision that had become final; and (4) PERB should decide an unsettled area of law. AFSCME, on the other hand, urges the Board to use its discretionary authority to allow the withdrawal because the settlement between the parties provided a satisfactory remedy to AFSCME.

For the reasons stated below, we reaffirm the order in PERB Decision No. 831.

DISCUSSION

When dealing with a request to withdraw a charge, the Board is guided by two separate regulations, PERB Regulations 32625 and 32320.² Regulation 32625 states, in pertinent part:

If the complaint has issued, the Board agent shall determine whether the withdrawal shall be with or without prejudice. If, during hearing, the respondent objects to withdrawal, the hearing officer may refuse to allow it. [Emphasis added.]

²PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The District, in its points and authorities, relies on Regulation 35015, which was repealed in 1978, and which provided, in pertinent part:

If the formal hearing has commenced, the withdrawal shall be with or without prejudice according to the discretion of the Board. The withdrawal shall be allowed; except if the formal hearing has commenced, the respondent may file objections to the withdrawal on the basis of which the Board may refuse to allow the withdrawal. [Emphasis added.]

This section allows the Board agent discretion to rule on the request, and, therefore, differs from its predecessor in that the request may never be heard by the Board itself, absent an administrative appeal. After exceptions have been filed, the Board is guided by PERB Regulation 32320, which states, in pertinent part:

(a) The Board itself may:

(1) Issue a decision based on the record of hearing, or

(2) Affirm, modify or reverse the proposed decision, order the record reopened for the taking of further evidence, or take such other action as it considers proper.

(Emphasis added.)

Regardless of which regulation is relied on, it is clear that the Board, or its agent, has the discretion to grant or deny the request. The Board has generally permitted a charging party to withdraw an underlying charge. (See Norwalk-La Mirada Unified School District (1978) PERB order No. Ad-38; Gridley Union High School District (1989) PERB Order No. Ad-182; Eureka City School District (1989) PERB Order No. Ad-184; San Francisco Unified School District (1989) PERB Order No. Ad-200; Compton Community College District (1988) PERB Decision No. 704; and California State University (CFA) (1990) PERB Decision No. 848-H.)

The District argues that some portions of the proposed decision are final inasmuch as it filed exceptions to only two of the three essential findings by the ALJ. The District claims that the only matters before the Board were: (1) whether a clear and unequivocal waiver of the right to bargain survives the

expiration of the contract, and (2) whether changing the benefit levels was covered by the contractual waiver.

In support of its argument, the District cites San Francisco Community College District (1990) PERB Decision No. 703(c) for the proposition that "[t]he Board . . . does not have jurisdiction to nullify or vacate a final decision."³ The District's position is totally without merit. The Board, in an early decision, held that while a party's failure to except to an issue serves as a waiver of that party's right to except, it does not preclude the Board from reviewing unappealed matters. (Rio Hondo Community College District (1979) PERB Decision No. 87.) Because the proposed decision was appealed to the Board by the District, it was not final. Furthermore, the Board, when reviewing the cases before it on exceptions, may, in accordance with Regulation 32320(a)(2):

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Affirm, modify or reverse the proposed decision, order the record reopened for the taking of further evidence, or take such other action as it considers proper.
(Emphasis added.)

Therefore, the Board clearly has discretion to allow the withdrawal of the charge and to vacate the underlying proposed decision. Furthermore, where all the issues determined by the proposed decision are inextricably intertwined, the Board will not be precluded from deciding any issue in the appealed decision which relates to the appealed matters.

³In Decision No. 703(c), the Board was referring to its holding in Decision No. 703(b). However, in both cases, the decision was final in that neither party sought judicial review.

In this case, the District asserts that the contractual provision at issue remains unchanged in the current contract between the District and AFSCME. Therefore, the District wishes to continue in the participation of the litigation to allow "the parties to continue their relationship without unnecessary arguments over the correct legal interpretation" of the disputed contract section. However, despite the continuation of the same contract language, the parties have settled the dispute over health benefits that gave rise to the filing of the charge.

The evidence that the parties settled their dispute over health insurance benefits is uncontradicted. The District's declaration in support of its opposition to AFSCME's motion to withdraw clearly states that the parties' settlement resulted in an agreement which was incorporated into the current contract with AFSCME. The Board, in determining whether to grant a party's motion to withdraw, will not ignore a common sense approach. The Board will not decide these matters in a vacuum and in this case, the parties' settlement removes an essential element of controversy.

ORDER

For the reasons stated above, the Board hereby REAFFIRMS the decision and order in PERB Decision No. 831.

Members Shank and Camilli joined in this Decision.