STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

DR. KATHRYN JAEGER AND THE ELK GROVE PSYCHOLOGISTS AND SOCIAL WORKERS ASSOCIATION,	)	
Charging Parties,	)	Case No. S-CE-1347
v.	)	PERB Decision No. 856
ELK GROVE UNIFIED SCHOOL DISTRICT,	)	December 17, 1990
Respondent.	)	

Appearances: Mullen, Sullivan & Newton by James V. DeMera, III, Attorney, for Dr. Kathryn Jaeger; Kronick, Moskovitz, Tiedemann & Girard by Ann M. Freers, Attorney, for Elk Grove Unified School District.

Before Hesse, Chairperson; Shank and Cunningham, Members.

DECISION

SHANK, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Dr. Kathryn Jaeger (Jaeger) of a Board agent's dismissal of an amended unfair practice charge. In the amended unfair practice charge, Jaeger and the Elk Grove Psychologists and Social Workers Association (Association) allege that the Elk Grove Unified School District (District) violated section 3543.5(a) and (c) of the Educational Employment Relations Act (EERA or Act).[1] Specifically, charging

[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(a) and (c) states, in pertinent part:

> It shall be unlawful for a public school employer to do any of the following:

parties allege that: (1) the District discriminated against Jaeger by dropping her from step 7 to step 4 of the salary schedule; (2) the District failed to meet and negotiate in good faith during the 1989-90 reopener negotiations; and (3) the District unilaterally reduced Jaeger's salary level.

For the reasons stated below, the Board affirms the Board agent's dismissal of the alleged violation of section 3543.5(a) and (c).

FACTS

On April 6, 1990, Jaeger filed an unfair practice charge alleging that the District violated section 3543.5(c) of the EERA. In her unfair practice charge, Jaeger alleged she was a part-time school psychologist employed by the District. When Jaeger was initially hired in September, 1983, she was placed at step 4 on the salary schedule. During the 1983-84 school year, she worked three days per week and was paid 60 percent of a full-time salary. In the 1984-85 school year, Jaeger was moved to step 5 on the salary schedule. She worked one day per week and was paid 20 percent of a full-time salary. In the 1985-86 school year, Jaeger was moved to step 6. She worked two days per week

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> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

and was paid 40 percent of a full-time salary. During the 1986-87 and 1987-88 school years, Jaeger was on leave in Germany. In the 1988-89 school year, Jaeger was moved to step 7 on the salary schedule. She worked two and one-half days per week and was paid 50 percent of a full-time salary. During the 1989-90 school year, Jaeger has worked the same two and one-half days per week at the same salary level.

According to the charge, during the 1989-90 school year, the District reviewed the placement of its certificated employees on the salary schedules and determined that Jaeger had been improperly advanced on the salary schedule. Pursuant to section 16.2.5[2] of the parties' collective bargaining agreement and the District's review of its certificated employees, the District dropped Jaeger from step 7 to step 4 of the salary schedule.

During the reopener negotiations during the 1989-90 school year, the District proposed that section 16.2.5 of the collective bargaining agreement be modified to provide that part-time employees shall advance on the salary schedule one year only after their part-time allocation had accumulated to 100 percent.

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[2]Section 16.2.5 of the collective bargaining agreement states:

> Step advancement for current members of school psychologist and social workers unit shall be awarded on the basis of one consecutive step per year for each school year (75% of the number of days in the work year) of service in the Elk Grove Unified School District. Part-time employees shall move on the schedule according to past practice. (Emphasis added.)

The District also refused to change Jaeger's step placement from step 4 to step 7 unless the Association agreed to the District's request to modify section 16.2.5. The Association rejected the District's proposal. Subsequently, the parties reached an agreement to leave section 16.2.5 unchanged in the collective bargaining agreement.

On May 24, 1990, the Board agent sent a warning letter to Jaeger. The Board agent stated that, pursuant to Oxnard School District (1988) PERB Decision No. 667, an individual employee does not have standing to file an unfair practice charge alleging a violation of section 3543.5(c).

On June 1, 1990, an amended unfair practice charge was filed by both Jaeger and the Association alleging a violation of section 3543.5(a) and (c). The addition of the Association as a charging party eliminated the standing problem regarding the section 3543.5(c) violation. In addition to the section 3543.5(c) violation, the amended unfair practice charge alleged that the District discriminated against Jaeger in violation of 3543.5(a) by reducing her salary level from step 7 to step 4.

On June 6, 1990, the Board agent sent the charging parties a dismissal letter wherein he dismissed the entire amended unfair practice charge. In his discussion of the alleged section 3543.5(a) violation, the Board agent found that the charging parties failed to allege any facts which established that Jaeger engaged in protected activity. As there were no facts that Jaeger exercised her rights under EERA, the Board agent

determined that the amended unfair practice charge failed to state a prima facie violation of section 3543.5(a) of EERA.

In his analysis of the alleged section 3543.5(c) violation, the Board agent concluded the charging parties failed to allege any facts to establish that the District failed to meet and negotiate in good faith with the Association. In dismissing this allegation, the Board agent limited his analysis to the District's conduct during the reopener negotiations.

On June 25, 1990, Jaeger filed an appeal of the dismissal. Although the appeal is somewhat unclear, it appears to challenge the dismissal of both the violation of section 3543.5(a) and (c). Notably, the Association did not join in the appeal. The Board agent failed to address the allegation of unilateral change set forth in the original and amended unfair practice charge.

DISCUSSION

1. Section 3543.5(a) Violation

In Novato Unified School District (1982) PERB Decision No. 210, the Board set forth the test for discrimination and retaliation. In order to establish a prima facie case, the charging party must prove: (1) the employee engaged in protected activity; (2) the employer had knowledge of such protected activity; and (3) adverse action was taken against the employee as a result of such protected activity. In the instant case, there are no facts that Jaeger engaged in protected activity. Accordingly, the Board affirms the Board agent's dismissal of the discrimination allegation.

2. Section 3543.5(c) Violation:

As the Board agent pointed out in dismissing Jaeger's original charge filed solely in her name, under Oxnard School District, supra, PERB Decision No. 667, an individual employee does not have standing to pursue an unfair practice charge alleging a violation of section 3543.5(c). Thus, Jaeger has no standing to pursue an appeal of the dismissal of the section 3543.5(c) violation. The Association, the only party with the standing to pursue an appeal of the dismissal of the section 3543.5(c) violation, has declined to do so. Therefore, technically, that portion of the dismissal dealing with the 3543.5(c) violation is not before us.

Our dissenting colleague argues the Board has previously held that once an appeal is filed, the Board is not constrained from considering sua sponte legal issues not raised by the parties when necessary to correct a mistake of law. The cases cited to support this proposition[3] are distinguishable from the case under consideration. In those cases, the parties affected by the Board's resolution of the issues were parties to the appeal. In the instant case, the sole party with standing to pursue the dismissal of the 3543.5(c) violation has declined to do so. While the Board may have discretion to examine the propriety of the dismissal of the 3543.5(c) violation, we find no

[3]Chairperson Hesse relies on the following cases: Apple Valley Unified School District (1990) PERB Order No. Ad-209a; Mt. Diablo Unified School District (1983) PERB Decision No. 373; Fresno Unified School District (1982) PERB Decision No. 208.

compelling interest to do so in a case where the only party with any interest in pursuing the issue has indicated no such inclination.

ORDER

The unfair practice charge in Case No. S-CE-1347 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Member Cunningham joined in this Decision.

Chairperson Hesse's concurrence/dissent begins on page 8.

Hesse, Chairperson, concurring and dissenting: While I agree with the majority's dismissal of the alleged violation of section 3543.5(a) of the Educational Employment Relations Act (EERA or Act)[1], I cannot agree with the majority's dismissal of the alleged violation of section 3543.5(c) based on procedural grounds. Instead, I would reverse the Public Employment Relations Board (PERB or Board) agent's dismissal and find that the allegations in the amended unfair practice charge state a prima facie violation of section 3543.5(c) based on a unilateral change theory.

In dismissing the alleged violation of section 3543.5(c), the Board agent's analysis was limited to the Elk Grove Unified School District's (District) conduct at the reopener negotiations. While the Board agrees with the Board agent's analysis that the District's conduct during reopener negotiations does not constitute a refusal or failure to negotiate in good faith, I find the Board agent failed to address the alleged unilateral change in the original and amended unfair practice charge. In the original and amended unfair practice charge, Dr. Kathryn Jaeger (Jaeger) and the Elk Grove Psychologists and Social Workers Association (Association) allege:

> The District's conduct in unilaterally reducing Dr. Jaeger's salary level from step 7 to step 4 and express condition that Dr. Jaeger would be recognized at step 7 only if Section 16.2.5 was changed in contract negotiations, constitutes the District's refusal or failure to meet and negotiate in

[1]EERA is codified at Government Code section 3540 et seq.

good faith as required by Government Code Section 3543.5.

In determining whether a party has failed or refused to bargain in good faith, there are two applicable tests: (1) the per se test; and (2) the totality of the circumstances test. While the totality of the circumstances test looks to the entire course of negotiations to see whether the parties have negotiated with the required subjective intent to reach agreement, certain acts have such potential to frustrate negotiations and undermine the exclusivity of the bargaining agent that they are held to be unlawful without any finding of subjective bad faith. These acts are considered per se violations. (Pajaro Valley Unified School District (1978) PERB Decision No. 51.) An implementation of a unilateral change in working conditions without notice and opportunity to bargain is an example of a per se violation. (Id.) While a unilateral change may involve the breach of a collective bargaining agreement, PERB is concerned with those unilateral changes in established policy which represent a conscious or apparent reversal of a previous understanding, whether the latter is embodied in a collective bargaining agreement or evident from the parties' past practice. (Grant Joint Union High School District (1982) PERB Decision No. 196, p. 8.) Here, a prima facie case will be stated if the charging parties' unfair practice charge alleges facts sufficient to show: (1) the District breached or otherwise altered the parties' collective bargaining agreement with regard to the salary levels

of part-time employees; and (2) those breaches amounted to a change of policy. A change of policy has, by definition, a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members. (Id, at pp. 8-10.)

In the present case, charging parties allege that from 1983 through 1989, Jaeger was moved from step 4 to step 7 of the salary schedule. Jaeger progressed through the salary schedule each year despite the fact that she worked less than full time and was paid at 60 percent salary during the 1983-84 school year, 20 percent salary during the 1984-85 school year, and 40 percent salary during the 1985-86 school year.[2] During the 1988-89 school year, Jaeger was moved to step 7. She worked half time and was paid at a 50 percent salary level. Consistent with this past history and pursuant to section 16.2.5 of the collective bargaining agreement, charging parties allege Jaeger should remain at the same salary level during the 1989-90 school year. Charging parties also allege the District unilaterally reduced Jaeger's salary level from step 7 to step 4 in violation of the collective bargaining agreement.[3] Based on these facts and the Association's allegation that the District has refused or failed to meet and negotiate with the Association regarding this

[2]During the 1986-87 and 1987-88 school years, Jaeger was on leave in Germany.

[3]As the parties' collective bargaining agreement does not include a provision for binding arbitration, deferral to arbitration is not appropriate.

unilateral change, I find the allegations state a prima facie violation of section 3543.5(c).

Although the amended unfair practice charge involves only one part-time employee, the Board has held that a change in terms and conditions of employment which affects only one or two employees will be considered a breach of the duty to bargain if the change reflects a change in policy with respect to employees generally. (Jamestown Elementary School District (1990) PERB Decision No. 795.) Here, the alleged change in policy affects the past practice with regard to all part-time employees. Therefore, I find the amended unfair practice charge states a prima facie violation of section 3543.5(c) based on a unilateral change theory.

Although the amended unfair practice charge was filed jointly by Jaeger and the Association, the appeal of the Board agent's dismissal was filed by Jaeger. As Jaeger did not have standing to file an unfair practice charge alleging a violation of section 3543.5(c), the majority also argues that Jaeger does not have standing to file an appeal of the Board agent's dismissal of the alleged 3543.5(c) violation. However, once an appeal is filed, the Board has held that it is not constrained from considering sua sponte legal issues not raised by the parties when necessary to correct a mistake of law. (Apple Valley Unified School District (1990) PERB Order No. Ad-209a; Mt. Diablo Unified School District (1983) PERB Decision No. 373; Fresno Unified School District (1982) PERB Decision No. 208.)

EERA section 3541.3(i) provides that the Board shall have the power and duty to investigate unfair practice charges and take such action and make such determinations as the Board deems necessary to effectuate the policies of EERA. Additionally, PERB Regulation 32320(a) provides that the Board may take such other action as it considers proper in reaching a decision. The language of these provisions provides authority that the Board is not precluded from reviewing unappealed matters. (See Rio Hondo Community College District (1979) PERB Decision No. 87.)

The present case involves the review of a Board agent's dismissal, which is governed by PERB Regulation 32635.[4] In

[4]PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB Regulation 32635 states:

> (a) Within 20 days of the date of service of a dismissal, the charging party may appeal the dismissal to the Board itself. The original appeal and five copies shall be filed in writing with the Board itself in the headquarters office, and shall be signed by the charging party or its agent. Except as provided in section 32162, service and proof of service of the appeal on the respondent pursuant to section 32140 are required.
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> The appeal shall:
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> (1) State the specific issues of procedure, fact, law or rationale to which the appeal is taken;
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> (2) Identify the page or part of the dismissal to which each appeal is taken;
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> (3) State the grounds for each issue stated.
>
> (b) Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence.

contrast to PERB Regulation 32300[5] governing exceptions to a Board agent's proposed decision, PERB Regulation 32635 does not contain a provision that "an exception not specifically urged

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> (c) If the charging party files a timely appeal of the refusal, any other party may file with the Board itself an original and five copies of a statement in opposition within 20 days following the date of service of the appeal. Service and proof of service of the statement pursuant to section 32140 are required.

[5]PERB Regulation 32300 states:

> (a) A party may file with the Board itself an original and five copies of a statement of exceptions to a Board agent's proposed decision issued pursuant to section 32215, and supporting brief, within 20 days following the date of service of the decision or as provided in section 32310. The statement of exceptions and briefs shall be filed with the Board itself in the headquarters office. Service and proof of service of the statement and brief pursuant to section 32140 are required. The statement of exceptions or brief shall:
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> (1) State the specific issues of procedure, fact, law or rationale to which each exception is taken;
>
> (2) Identify the page or part of the decision to which each exception is taken;
>
> (3) Designate by page citation or exhibit number the portions of the record, if any, relied upon for each exception;
>
> (4) State the grounds for each exception.
>
> (b) Reference shall be made in the statement of exceptions only to matters contained in the record of the case.
>
> (c) An exception not specifically urged shall be waived.

shall be waived." The difference in these regulations reflect the inherent differences between the Board procedures for proposed decisions and dismissals. In an appeal of a Board agent's proposed decision, the parties may file exceptions to a Board agent decision (PERB Regulation 32300), a motion for reconsideration (PERB Regulation 32410), and an appeal to the appropriate court of appeal (EERA Section 3542). In an appeal of a Board agent's dismissal, however, the parties may file an appeal to a Board agent dismissal (PERB Regulation 32635)[6] and a motion for reconsideration (PERB Regulation 32410). However, unlike an appeal of a proposed decision, the parties to the Board's decision not to issue a complaint cannot appeal the decision to the court of appeal. (EERA section 3542(b).)

Pursuant to EERA section 3541.3(i) and PERB Regulations 32320(a) and 32635, the Board's review of an appeal of a Board agent's dismissal is not limited by the language in the appeal or the party filing the appeal.[7] Rather, the Board's review is de novo. (See Los Angeles School District Peace Officer's

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[6]Pursuant to PERB Regulation 32640(c), the decision of a Board agent to issue a complaint is not appealable to the Board itself except in accordance with section 32200, which states that the Board itself will not accept the appeal unless the Board agent joins in the appeal.

[7]However, in United Teachers - Los Angeles (1989) PERB Decision No. 738, the charging parties filed an appeal solely to assure that they had exhausted their administrative remedies. In fact, the charging parties' appeal stated that the dismissal was proper on the grounds that the charge failed to state a prima facie case. As the charging parties were requesting the Board affirm the dismissal of their charge, the Board held that the appeal was not in compliance with PERB Regulation 32635.

Association (1987) PERB Decision No. 627.) The Board may, and should, examine the entire unfair practice charge(s) to determine whether the allegations state a prima facie violation of the Act. (See Riverside Unified School District (1986) PERB Decision No. 562a.)

In reviewing the amended unfair practice charge, I find that the allegations state a prima facie violation of section 3543.5(c) based on a unilateral change theory. Finally, as an individual employee does not have standing to file an unfair practice charge alleging a violation of section 3543.5(c), the complaint should name the Association as the proper charging party. (See Oxnard School District (1988) PERB Decision No. 667.)