STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

REYNALDO HERNANDEZ,	)	
	)	
Charging Party,	)	Case No. LA-CE-3084
	)	
v.	)	PERB Decision No. 901
	)	
SAN DIEGO UNIFIED SCHOOL DISTRICT,	)	September 19, 1991
	)	
Respondent.	)	
	)	

Appearances: Reynaldo Hernandez, on his own behalf; Jose A. Gonzales, Attorney, for San Diego Unified School District.

Before Hesse, Chairperson; Shank and Carlyle, Members.

DECISION AND ORDER

CARLYLE, Member: This case is before the Public Employment Relations Board (Board) on appeal by Reynaldo Hernandez (Hernandez) of a Board agent's dismissal (attached hereto) of his charge that the San Diego Unified School District violated section 3543.5(a) and (b)[1] of the Educational Employment Relations Act (EERA).[2] We have reviewed the Board agent's dismissal and, finding it to be free of prejudicial error, adopt it as the decision of the Board itself.

The unfair practice charge in Case No. LA-CE-3084 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairperson Hesse and Member Shank joined in this Decision.

[1]Hernandez does not appeal the dismissal of an alleged violation of 3543.5(b) as he states that he withdrew the alleged violation of this section.

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

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Boulevard, Suite 650
Los Angeles, CA 90010-2334
(213) 736-3127

May 30, 1991

Reynaldo Hernandez

Re: DISMISSAL AND REFUSAL TO ISSUE COMPLAINT, Unfair Practice Charge No. LA-CE-3084, Reynaldo Hernandez v. San Diego Unified School District

Dear Mr. Hernandez:

I indicated to you in my attached letter dated May 23, 1991, that the above-referenced charge did not state a prima facie case. 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 May 30, 1991, the charge would be dismissed.

I have not received either a request for withdrawal or an amended charge. On November 29, 1991, however, I received from you a written Statement in response to my May 23 letter. The Statement raises only one new issue: it asserts that it would be futile for you to use the grievance procedure to challenge the District's alleged breach of the collective bargaining agreement with respect to academic class size. Neither the Statement nor the charge, however, contains factual allegations that demonstrate such futility. For example, there is no allegation that you ever even attempted to file a grievance on this issue. I am therefore dismissing the charge based on the facts and reasons contained in my May 23 letter.

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 Code of Regulations, 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 Code of Regulations, 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 Code of Regulations, 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 Code of Regulations, 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,

JOHN W. SPITTLER
General Counsel

By _____
Thomas J. Allen
Regional Attorney

Attachment

cc: Jose A. Gonzales

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3S30 Wilshire Boulevard, Suite 650
Los Angeles, CA 90010-2334
(213) 736-3127

May 23, 1991

Reynaldo Hernandez

Re: WARNING LETTER, Unfair Practice Charge No. LA-CE-3084, Reynaldo Hernandez v. San Diego Unified School District

Dear Mr. Hernandez:

In the above-referenced charge, you allege that the San Diego Unified School District (District) interfered with your rights under the Educational Employment Relations Act (EERA), in alleged violation of Government Code sections 3543.5(a) and (b) of the EERA.[1]

My investigation of this charge reveals the following facts.

You are employed by the District as a teacher of Spanish and physical education at the secondary level, in a bargaining unit for which the San Diego Teachers Association (Association) is the exclusive representative. On July 1, 1989, the District and the Association entered into a collective bargaining agreement for a three-year period ending June 30, 1992.[2] The agreement provides in Article VII ("Wages"), Section 1 ("Salary Schedule"), Paragraph A, that the salary schedule shall be increased each year based on "the cost-of-living, COLA, (inflation) adjustment funded by the state each year." The agreement also provides, in Article XIII ("Class Size"), Section 4 ("Secondary"), Paragraph B, "Academic classes will average no more than thirty-six (36) pupils each," but in Paragraph C of the same section it provides, "Classes in . . . physical education may exceed the average size established for other classes." The agreement further provides,

[1]It is not clear why you allege that the District violated Government Code section 3543.5(b), which makes it unlawful to deny employee organizations their rights under the EERA. No denial of an employee organization's rights under the EERA is alleged.

[2]According to records of the Public Employment Relations Board, of which official notice may be taken, the agreement was ratified on November 29, 1988.

in Article XV ("Grievance Procedure"), Section 5 ("Step Four - Arbitration"), for binding arbitration of grievances.

You allege that the operation of the agreement impinged on your freedom as a citizen to vote your conscience in the state-wide general election on November 6, 1990. Apparently your conscience impelled you to vote for one gubernatorial candidate, who had not promised a cost-of-living adjustment, while the operation of the agreement impelled you to vote for another candidate, who had promised such an adjustment. You also allege that the agreement's failure to limit physical education class sizes creates an unsafe situation. Furthermore, you allege that the District breached the agreement in the 1989-90 school year, by requiring you to teach two academic classes in excess of the 36-pupil limitation, one of them a Spanish class with 44 pupils.

You filed your unfair practice charge on May 6, 1991.

The unfair practice charge does not state a violation of the EERA within the jurisdiction of the Public Employment Relations Board (PERB), for the reasons that follow.

Government Code section 3541.5(a) forbids PERB to "issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." Your charge alleges that the District committed unfair practices by entering into the current collective bargaining agreement in 1989 and by breaching that agreement in 1989-90. These alleged unfair practices occurred more than six months before you filed your charge on May 6, 1991. The allegations are therefore untimely.

Even if your allegations about the agreement had been timely, they would not state a violation of the EERA. Government Code section 3543 of the EERA defines the rights of employees under the EERA. The EERA does not guarantee employees the right to vote in general elections free from the influence of financial self-interest. Also, the EERA does not in itself guarantee employees a safe working situation, although it does give employees the right to raise and to collectively bargain issues that concern their safety.

Similarly, even if your allegation about the breach of the agreement had been timely, it would not state a violation of the EERA that you have standing to allege. Government Code section 3541.5(b) of the EERA forbids PERB to "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 [the EERA]." The alleged violation of the agreement here would constitute an unfair practice only if it amounted to an unbargained change of policy. Grant Joint Union High School District (1982) PERB Decision No. 196. An unbargained change of policy would violate Government Code section 3543.5(c) of the EERA, but only the exclusive representative has standing to allege such a violation; individual employees do not. Oxnard School District (1988) PERB Decision No. 667.

There is yet one more reason why your allegation about the breach of the agreement fails to state a violation of the EERA within PERB's jurisdiction. Government Code Section 3541.5(a)(2) of the 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 Code of Regulations, 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. Second, the conduct complained of in this charge, that the District required you to teach academic classes with more than 36 pupils, is arguably prohibited by Article XIII, Section 4, Paragraph B, of the agreement.

For all these reasons, the charge as presently written does not state a prima facie case within PERB's jurisdiction. 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 May 30, 1991, I shall dismiss your charge without leave to amend. If you have any questions on how to proceed, please call me at (213) 736-3127.

Sincerely,

Thomas J. Allen
Regional Attorney

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