

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



COMPTON COMMUNITY COLLEGE)
FEDERATION OF EMPLOYEES, LOCAL)
3486 AND FLOYD SMITH,)
)
Charging Party,) Case No. LA-CE-3096
)
) PERB Decision No. 915
v.)
) December 20, 1991
COMPTON COMMUNITY COLLEGE DISTRICT,)
)
Respondent.)

Appearance: Lawrence Rosenzweig, Attorney, for Compton Community College Federation of Employees, Local 3486 and Floyd Smith.

Before: Hesse, Chairperson; Shank and Carlyle, Members.

DECISION

HESSE, Chairperson: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Compton Community College Federation of Employees, Local 3486 and Floyd Smith (Federation and Smith or Charging Parties) to a Board agent's dismissal (attached) of its original and amended unfair practice charge. In its charge, the Federation and Smith allege that the Compton Community College District (District) failed to negotiate in good faith in violation of section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA).¹ We

¹EERA is codified at Government Code section 3540, et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.5 states in pertinent part:

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

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 consistent with the following discussion addressing Charging Parties' appeal.

CHARGING PARTIES' APPEAL OF DISMISSAL

Charging Parties argue that the District's Board of Trustees' (Trustees) ratification of a contract on October 30, 1990, did not give actual or constructive notice that the Trustees were not going to ratify the retirement bonus. As the Trustees have neither ratified nor rejected the retirement bonus, Charging Parties argue there is a continuing violation.

Charging Parties also assert that the Board agent, in his dismissal letter, failed to address the allegation in the amended unfair practice charge, that the District has not fulfilled its obligation in accordance with the ground rule for the ratification of tentative agreements reached between the parties. Since the District has never acted on the tentative agreement to

(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.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

give a retirement bonus, the District's failure to act is a continuing violation.

Charging Parties next allege the Trustees never acted upon the retirement bonus when it ratified the contract on October 30, 1990. Charging Parties note that even the District's letter of January 28, 1991, rejecting Smith's request for a retirement bonus, does not make any reference to the Trustees' action on October 30, 1990, when it ratified a contract. Further, Charging Parties dispute the Board agent's citation to Inglewood Unified School District (1984) PERB Decision No. 401. Rather, Charging Parties rely on The Regents of the University of California (1983) PERB Decision No. 359-H as a better comparison.²

DISCUSSION

Charging Parties argument that the Trustees' ratification of the contract on October 30, 1990, did not give actual or constructive notice that the Trustees were not going to ratify the retirement bonus is without merit. As noted by the Board agent in his warning letter, the collective bargaining agreement (CBA) did not include the retirement bonus. Additionally, the CBA included a provision that the CBA:

[s]hall constitute the full and complete commitment between the parties and shall supersede and cancel all previous agreements both written and oral.

The CBA also provided that:

²The District did not file a response to the Federation and Smith's appeal of the Board agent's dismissal.

[p]ast practices, standards, obligations and commitments of the District to its employees relating to this Agreement are rejected mutually as a condition of entering into this Agreement, except as they are expressly stated herein.

The Board finds the Board agent was correct in concluding that the October 30, 1990 ratification of the CBA constituted notice to the Federation and Smith that the District failed to ratify the retirement bonus.

Charging Parties' next argument that the Trustees' alleged inaction regarding the retirement bonus constituted a continuing violation is without merit. First, the Trustees' ratification of a complete contract failed to include a provision for a retirement bonus. Additionally, the contract language stated that the contract was the full and complete agreement between the parties and superseded any other previous agreements. Clearly, the contract constituted a rejection of the retirement bonus tentative agreement.

Second, even assuming that the Trustees' ratification of a contract did not constitute an approval or rejection of the retirement bonus, there is still no evidence of a continuing violation. Generally, a violation is a continuing one if the violation has been revived by subsequent unlawful conduct within the six-month statute of limitations. (San Dieguito Union High School District (1982) PERB Decision No. 194.) In San Dieguito Union High School District, supra, the school district was charged with having unilaterally changed a prior practice when it enforced on a daily basis a policy that required teachers to sign

out before leaving campus. The Board found there was no continuing violation even though the employer's sign-out policy was enforced on a continuing basis well into the statute of limitations period. In El Dorado Union High School District (1984) PERB Decision No. 382, the Board followed San Dieguito Union High School District and determined that:

. . . a continuing violation would only be found where active conduct or grievances occurred within the limitations period that independently constituted an unfair practice. (Citation omitted.) However, a continuing violation would not be found where the employer's conduct during the limitations period constituted an unfair practice only by its relation to the original offense. (Citation omitted.) Where the underlying theory of the charge is an alleged unilateral change occurring outside the limitations period, the employer must engage in conduct during the limitations period "such as reimplementation or subsequent refusals to negotiate . . . [which] revive[s] the viability of the unfair practice." (Citation omitted.) (Id., at pp. 4-5.)

In El Dorado Union High School District, supra, the school district unilaterally instituted a new policy requiring all teachers hired by the district to sign an addenda to their teaching contract agreeing to coach at least two school sports teams during the year. The Board held that the sole violation occurred when the school district adopted the new policy. Requiring new teachers to sign the addenda during the limitations period did not satisfy the requirement that the employer's subsequent conduct constitute a "reimplementation or revival of the policy."

In the present case, Smith retired and made inquiries as to his retirement bonus. In a memorandum dated February 26, 1990, the District informed Smith that the retirement bonus could not be implemented until final ratification of the full contract by the Federation and District. On October 30, 1990, the full contract, without the retirement bonus provision, was ratified by the Trustees. After filing a grievance relating to the denial of the retirement bonus, Smith received a letter dated January 28, 1991, informing him that the District was denying his grievance. The denial of subsequent requests for Smith's retirement bonus does not constitute a continuing violation. (See California State Employees' Association (Calloway) (1985) PERB Decision No. 497-H, where the denial of subsequent requests for representation did not constitute a continuing violation; UCLA Labor Relations Division (1989) PERB Decision No. 735-H, where the university's failure to change its position did not constitute a continuing violation; and Oakland Education Association. CTA/NEA (Mingo) (1984) PERB Decision No. 447, where subsequent requests that the association file grievances, and the association's refusal to file a grievance, did not constitute a continuing violation.) Rather, when the Trustees ratified the full and complete contract on October 30, 1990, the Federation and Smith knew or should have known that the ratification of the contract was, in essence, a rejection or denial of the tentative agreement on retirement bonuses. As the original unfair practice charge was filed on June 18, 1991, more than six months after the District's

ratification of the full and complete contract, the Board agent properly dismissed the unfair practice charge on the basis of Untimeliness.

Finally, the argument that the District has not fulfilled its obligation in accordance with the ground rule regarding the ratification procedures of tentative agreements has no effect on the timeliness issue. The alleged ground rule states:

Each party shall be responsible for fulfilling its respective procedures for ratification of the tentative agreement reached between the negotiating teams.

There is no evidence as to the procedures for ratification, or how the District failed to follow these ratification procedures. Instead, the amended unfair practice charge simply alleges that:

[t]he District has not fulfilled its obligations because the retirement bonus has not been taken to the Board for consideration or ratification.

Even if the District violated the ground rule or failed to follow the procedures for ratification, this allegation would be considered a mere breach of contract. It is well-established that PERB does not have jurisdiction to resolve pure contract disputes. (See EERA section 3541.5(b); Victor Valley Joint Union High School District (1981) PERB Decision No. 192; and Grant Joint Union High School District (1982) PERB Decision No. 196.)

Finally, Charging Parties disagreement with the Board agent's reliance on Inglewood Unified School District, supra,

PERB Decision No. 401 is without merit.³ In Inglewood Unified School District, supra. the Board discussed the timeliness of an unfair practice charge, and determined that the charging party-should have known that the school district was proceeding against an employee in a dismissal action because of excessive absences. Similarly, in the instant case, the Board agent determined that Charging Parties should have known on October 30, 1990, that the District was not going to adopt the tentative agreement on retirement bonuses. Charging Parties' assertion that The Regents of the University of California, supra, PERB Decision No. 359-H is a better comparison to the instant case is incorrect. In The Regents of the University of California, supra. the Board found that the university failed to give advance notice of its reduction of the maximum duration of full-time lecture positions. In the present case, there was notice that the tentative agreement on retirement bonuses had not been ratified. As discussed above, the Board agent correctly determined that on October 30, 1990, the Federation and Smith should have known that the tentative agreement on retirement bonuses had not been ratified.

³Charging Parties discussion of the Board agent's use of "Cf." when referring to Inglewood Unified School District, supra, PERB Decision No. 401 is in error. Charging Parties assert that "Cf." means that the case cited is contrary to the situation being discussed. Section 101 of the California Style Manual (1986) Third Edition states that the citation should be preceded by the abbreviation "Cf." when the cited case deals with an analogous situation, as when there is a similar statute, and a decision is in accord.

ORDER

The original and amended unfair practice charge in Case No. LA-CE-3096 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Shank and Carlyle joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



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



August 28, 1991

Lawrence Rosenzweig
2001 Wilshire Blvd., Suite 600
Santa Monica, California 90403

Re: DISMISSAL AND REFUSAL TO ISSUE COMPLAINT, Unfair
Practice Charge No. LA-CE-3096, Compton Community
College Federation of Employees, Local 3486, and Floyd
Smith v. Compton Community College District

Dear Mr. Rosenzweig:

I indicated to you in my attached letter dated August 9, 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 August 16, 1991, the charge would be dismissed.

On August 23, 1991, I received from you an amended charge. The amended charge makes explicit what was implicit in the original charge: that the District's letter of January 28, 1991, was "the first notice received by charging party that the District did not intend to act upon or ratify the retirement bonus."¹ The amended charge does not, however, address the key issue raised by my letter of August 9: whether charging party knew or should have known on (at the latest) October 30, 1990, when the District ratified a complete contract without the retirement bonus, that the District was not going to consider ratifying the retirement bonus, which had been tentatively agreed to on June 23, 1988. (Cf. Inglewood Unified School District (1984) PERB Decision No. 401.) I am therefore dismissing the charge based on the facts and reasons contained in my August 9 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

¹The letter, attached to the amended charge, actually said nothing about ratification; it merely denied Floyd Smith's request for a retirement bonus.

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appeal to the Board itself within twenty (20) calendar days after service of this dismissal (California Code of Regs., tit. 8, sec. 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 Code of Regs., tit. 8, sec. 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 Regs., tit. 8, sec. 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 Regs., tit. 8, sec. 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 Regs. tit. 8, sec. 32132).

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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: Urrea C. Jones, Jr.

PUBLIC EMPLOYMENT RELATIONS BOARD



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



August 9, 1991

Lawrence Rosenzweig
2001 Wilshire Blvd., Suite 600
Santa Monica, CA 90403

Re: WARNING LETTER, Unfair Practice Charge No. LA-CE-3096,
Compton Community College Federation of Employees, Local
3486, and Floyd Smith v. Compton Community College District

Dear Mr. Rosenzweig:

In the above-referenced charge, the Compton Community College Federation of Employees, Local 3486 (Federation) and employee **Floyd Smith** (Smith) allege that the Compton Community College District (District) failed to negotiate in good faith, in alleged **violation** of Government Code sections 3543.5(a), (b) and (c) of **the** Educational Employment Relations Act (EERA).¹

My investigation of the charge reveals the following facts.

During the 1987-88 school year, the Federation and the District **began** negotiations on a new collective bargaining agreement. On **June 23, 1988**, the Federation and the District reached tentative **agreement** on a new "Article X" on "Retirement Options" that **included** a retirement bonus for unit members retiring on or **before** July 29, 1988. Unit member Smith had retired on June 17, **1988**. The tentative agreement, however, was never taken to the District's Board of Trustees for ratification, and this is what is alleged to constitute a failure to negotiate in good faith.

Sometime in 1990 the Federation and the District reached agreement on a complete contract, which the District Board ratified on October 30, 1990. The contract does not include the retirement bonus or any other provision concerning the period prior to July 1, 1989. (The term of the contract is July 1, 1989, through June 30, 1992.) The Federation signed the contract on May 9, 1991. Article XXIII of the contract ("General Provisions") provides in relevant parts as follows:

¹As an individual employee, Smith actually does not have standing to allege that the District failed to negotiate in good faith. Oxnard School District (1988) PERB Decision No. 667. The charge does not contain allegations of any other independent violation of the EERA.

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23.1 This Agreement shall constitute the full and complete commitment between the parties and shall supersede and cancel all previous agreements both written and oral. This Agreement may be altered, changed, added to, deleted from or modified only through the voluntary, mutual consent of the parties by a written and signed amendment to this Agreement.

23.4 The parties agree that past practices, standards, obligations and commitments of the District to its employees relating to this Agreement are rejected mutually as a condition of entering into this Agreement, except as they are expressly stated herein.

Meanwhile, back in November 1989, Smith had applied for the tentatively agreed-upon retirement bonus (stating that he had learned of his eligibility "only last Thursday, November 9"). In a letter dated February 26, 1990, the District replied that "in order to implement any compensation items we have agreed upon, there must be final ratification of the full contract by the Union and the District."

On or about August 21, 1990, Smith submitted to the District a grievance form, again requesting the retirement bonus. In a letter dated October 4, 1990, the District informed Smith that as a retired employee he could not avail himself of the employee grievance process. The District went on to state that Smith's request was denied because the District Board had not ratified the tentative agreement on the retirement bonus. By a letter dated January 28, 1991, the District Board itself informed Smith that it had reviewed his request and had denied it. The grievance process did not provide for binding arbitration.

The unfair practice charge was filed on June 18, 1991.

Based on the facts stated above, the charge does not state a prima facie violation of the EERA, for the reasons that follow.

Government Code section 3541.5(a) provides that PERB "shall not . . . 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." In the present case, it appears that the alleged unfair practice (the District's failure to take the tentative agreement on the retirement bonus to the District Board for ratification) occurred more than six months prior to the filing of the charge on June 18, 1991. If (contrary to appearances) the tentative agreement was separate from the negotiation of the complete contract, then the failure to take the tentative agreement to the Board for ratification took place

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in 1988, when the tentative agreement was reached. If (as appears), however, the tentative agreement was part of the negotiation of the complete contract, then the failure occurred on or before October 30, 1990, when the District Board ratified a contract that did not include the tentative agreement on the retirement bonus, and that specifically (in Article XXIII) canceled "all previous agreements" and rejected past "obligations and commitments."

The only event occurring within the six months prior to the filing of the charge is the District Board's letter (dated January 28, 1991) denying Smith's request. Because the grievance procedure Smith had attempted to use did not provide for binding arbitration, his attempt did not toll the six-month limitation. See Regents of the University of California (1990) PERB Decision No. 826-H; San Dieguito Union High School District (1982) PERB Decision No. 194. The District's earlier denial of Smith's request (dated October 4, 1990) appears to have been unambiguous; any possible ambiguity was resolved on October 30, 1990, when the District Board ratified the complete contract without the tentative agreement on the retirement bonus. There is no allegation or evidence that the District ever represented, either to Smith or to the Federation, that the tentative agreement on the retirement bonus might be ratified separate from and subsequent to the ratification of the complete contract.

For these reasons, the charge as presently written does not state a prima facie case. If there are any factual inaccuracies in this letter or any additional facts that would correct the deficiencies explained above, please amend the charge accordingly. The 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 must 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, 1991, I shall dismiss your charge. If you have any questions, please call me at (213) 736-3127.

Sincerely,

Thomas J. Allen
Regional Attorney