STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

FRESNO COUNTY OFFICE OF EDUCATION, Charging Party,	)	Case No. S-CO-283
v.	)	PERB Decision No. 975
FRESNO COUNTY SCHOOLS OFFICE EDUCATORS ASSOCIATION, CTA/NEA, Respondent.	)	February 22, 1993

Appearances: Stroup & de Goede by Daniel G. Stevenson, Attorney, for Fresno County Office of Education; California Teachers Association by Diane Ross, Attorney, for Fresno County Schools Office Educators Association, CTA/NEA.

Before Blair, Chair; Hesse and Caffrey, Members.

DECISION

HESSE, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal of a Board agent's dismissal of an unfair practice charge filed by the Fresno County Office of Education (FCOE). The Board agent found that the charge, alleging that the Fresno County Schools Office Educators Association, CTA/NEA (Association) failed to bargain in good faith in violation of section 3543.6(c) of the Educational Employment Relations Act (EERA or Act), did not state a prima facie case.[1]

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.6 states, in pertinent part:

> It shall be unlawful for an employee organization to:

FACTS

The FCOE filed an unfair practice charge on June 22, 1992, alleging that the Association violated EERA section 3543.6(c) by failing to negotiate in good faith. The Association is the exclusive representative of certificated employees of the FCOE. The unit includes teachers, nurses, therapists, resource teachers, counselors, and instructors at the Regional Occupational Center (ROC).

The charge alleges that in September 1991, the parties agreed to negotiate the ROC collective bargaining agreement separately. Negotiations were completed on November 26, 1991, and the agreement was initialed by the parties' representatives.

On May 14, 1992, Association Chapter President Timothy J. Nolt (Nolt) sent a memo to the ROC administrator James Steuart (Steuart) advising him that he could not implement the ROC agreement until it had been ratified by the Association membership.[2] On June 5, 1992, Nolt sent a memo to FCOE

> (c) Refuse or fail to meet and negotiate in good faith with a public school employer of any of the employees of which it is the exclusive representative.

[2]The memo from Nolt to Steuart was attached to the charge as Exhibit 1. It states:

> It has been reported that you would like to implement the tentative agreement as it relates to ROC. There has not been an agreement to implement any part of the 1991-1992 tentative agreement. Before implementation can take place the entire tentative agreement has to be ratified by the membership. Therefore, we are still

Administrator for Personnel, Lawrence Wilder (Wilder), reiterating the Association's position that there could be no implementation absent ratification by the entire Association membership.[3]

> operating under the current contract. You must abide by the terms of that contract and the terms of that contract will continue to prevail. All 182 day contracts start at the beginning of the established school year, which begins in September and ends in June. All supplemental contracts will be issued at the end of the 182 day contract. Any other starting or ending dates must be negotiated.

[3]The memo from Nolt to Wilder was attached to the charge as Exhibit 2. It states:

> The tentative ROC agreement is only a small part of the whole 1991-1992 tentative agreement. I informed you at the time of the tentative ROC agreement and at subsequent meetings that before any part of the 1991-1992 tentative agreement could be implemented, the entire 1991-1992 tentative agreement has to be ratified by the **entire membership**. No portion of the tentative agreement can be implemented prior to ratification. Therefore, we are still operating under the current contract. You must abide by the terms of that contract and the terms of that contract will continue to prevail. All 182 day contracts start at the beginning of the established school year, which begins in September and ends in June, all supplemental contracts will be issued at the end of the 182 day contract. (Emphasis in original.)
>
> Neither Administration nor the Association can unilaterally pick and choose to implement sections of a tentative agreement when it is convenient for them. Doing this would defeat the purpose of good faith collective bargaining. Once the tentative agreement is ratified by the membership, accepted by the superintendent, and approved by the board of

On June 12, 1992, the parties met at a negotiation session at which time California Teachers Association Professional Services Consultant Enoch Bennett verbalized the Association's position -- that there would be no implementation of the separate provisions affecting ROC instructors absent ratification of the entire agreement. In the charge, the FCOE asserts that the Association's "posture," six months after agreement had been reached on the ROC agreement, amounts to bad faith bargaining.

On August 13, 1992, the Board agent issued a warning letter advising the FCOE that, based on the allegations set forth in the charge and the facts revealed to him during his investigation, the charge failed to state a prima facie violation of section 3543.6(c) of the EERA.

Relying on Stockton Unified School District (1980) PERB Decision No. 143 and Pajaro Valley Unified School District (1978) PERB Decision No. 51, the Board agent stated that, in determining whether a party has failed to bargain in good faith, the Board utilizes either the "per se" or "totality of conduct" test, depending on the conduct involved and the effect such conduct has on the negotiating process.

Certain conduct has such an adverse impact on the negotiation process that it is viewed, without more, as a "per se" indicator of bad faith bargaining. In general, however, the Board looks to the "totality of conduct" during the entire course

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> education, and only then, can be (sic) the agreement be implemented.

of negotiations to determine whether the parties have negotiated with the intent to reach agreement.

The Board agent concluded that informing the ROC administrator that he could not implement the ROC agreement absent ratification by the entire Association membership was not a "per se" indicator that the Association failed to bargain in good faith. Under the "totality of circumstances" test, the Board agent found that the Association's conduct did not, by itself, manifest a lack of good faith and did not establish a prima facie violation of EERA section 3543.6(c).[4]

On August 24, 1992, the FCOE filed a first amended charge. In addition to the allegations contained in the initial charge, the amended charge refers to the tentative agreement between the parties regarding the ROC. That agreement states, in part: "The established work year for ROC instructors shall fall within the period of July 1 through June 30th."[5] According to the allegations, ROC administrator Steuart developed the 1992-93 ROC class schedule based on the good faith assurances of the Association that the ROC agreement would be ratified and

[4]The Board agent's warning letter erroneously states that the charge failed to establish a prima facie violation of EERA section 3543.6(b).

[5]Exhibit 3 attached to the amended charge is a five-page document entitled "Fresno County Office of Education and Fresno County Schools Office Education (sic) Association, ROC Negotiations/1991-92; it is dated November 26, 1991. Article X addresses the subject of hours and work year. Article X.4.d contains the language quoted above.

implemented shortly after the parties reached tentative agreement on November 26, 1991. Individual teachers assigned to teach ROC classes beginning in July refused to return to teach until September 1992, based on the Association's refusal to ratify the ROC agreement. The amended charge asserts that this seriously disrupted the ROC program during the months of July and August 1992.

The Board agent considered FCOE's amended charge and, on August 27, 1992, again determined that it failed to state a prima facie case that the Association was in violation of EERA section 3543.6(c). The Board agent determined that the additional allegations in the amended charge still did not constitute a "per se" violation and that the "totality of circumstances" test was the appropriate test. Concluding that the new allegations contained in the amended charge failed to meet the "totality of circumstances" test, the Board agent dismissed the charge.

FCOE filed an appeal of the Board agent's dismissal on September 14, 1992. In the appeal, FCOE argues that the Board agent erroneously concluded that the Association's conduct was not a per se violation of the Act. It charges that the Board agent misapplied the Board's ruling in Stockton Unified School District, supra, PERB Decision No. 143 (and cases cited therein) that repudiation of an agreement on a single issue is insufficient, by itself, to manifest a lack of good faith. In this case, FCOE argues that the parties reached agreement on the written contract in November 1991, and the Association's "blatant

refusal to implement" the whole agreement frustrated collective bargaining and was a per se indicator of bad faith bargaining.

In its response to the appeal submitted on September 28, 1992, the Association asserts that the charge alleges nothing more than reneging on a ground rule agreement to allow implementation of a single article dealing with one category of bargaining unit employees.[6] It contends that, standing alone, the allegation does not establish bad faith bargaining.

Moreover, the Association argues, the case is not analogous to an employer's refusal to sign a completed and ratified collective bargaining agreement because negotiations are still continuing and the parties remain in mediation.[7] Absent agreement on a successor contract covering the entire bargaining unit, the Association claims there is nothing to ratify, much less execute.

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[6]In support of its position that the charge does not amount to the refusal to sign an entire completed and ratified agreement, the Association points to Exhibit 3, attached to the amended charge. That document shows that only part of the collective bargaining agreement dealing with ROC instructors was negotiated; specifically, recognition (art. I), and hours/work year (art. X). Nothing in this tentative agreement covers such issues as salary, fringe benefits, evaluation, or class size, the Association asserts, and the FCOE has not alleged that there has been tentative agreement on any of those issues with regard to ROC teachers.

[7]PERB records indicate that on October 31, 1991, CTA asked the Board to render a determination that the parties had reached impasse. The Board did so on November 1, 1991, and appointed a mediator. PERB records do not indicate whether the parties subsequently reached agreement on a successor contract or were directed by the mediator to proceed to factfinding.

The Association urges the Board to rely on the general rule that no changes in working conditions may be made, despite individual tentative agreements on individual issues, until the final collective bargaining agreement has been completed and ratified or until exhaustion of the bargaining process. Thus, the Association's position is that no individual tentative agreement regarding hours/work year for ROC teachers can be implemented until the entire collective bargaining agreement is completed and ratified.

DISCUSSION

The duty to negotiate in good faith imposed by EERA requires the parties to demonstrate by their conduct a genuine desire to reach agreement. In general, the Board looks to the totality of the circumstances, or the totality of bargaining conduct, to determine whether there is sufficient indicia of good faith. In Stockton Unified School District, supra, PERB Decision No. 143, for example, where the Board found the District's entire course of conduct was an unfair practice under the totality of circumstances test, it relied on the fact that the District negotiator had reneged on the parties' ground rules agreement, had missed or cancelled several meetings, was recalcitrant in scheduling new meetings, and had unilaterally ended some meetings. Under some circumstances, where a party's conduct is so egregious and has such potential to frustrate negotiations, it is considered a "per se" violation of the duty to bargain in good faith. The "per se" analysis is most often applied to situations

in which one of the parties refuses to negotiate altogether or an employer unilaterally changes conditions of employment. As succinctly put in The Developing Labor Law, "it is the failure to negotiate, rather than the absence of good faith, which lies at the heart of any violation involving [per se] conduct."[8] In this case, the FCOE charges that the Association refused to implement the parties' agreement on the ROC instructors' work year prior to ratification of the full agreement by Association membership. We agree with the Board agent that this conduct is insufficient to establish a prima facie case of bad faith bargaining, either as a "per se" violation or under the totality of circumstances test.

FCOE asserts that this case is analogous to the situation involving repudiation of an entire agreement and, therefore, constitutes a "per se" violation. We disagree. As noted above, the parties' agreement covered only ROC instructors and did not apply to other members of the bargaining unit. Moreover, the agreement involving ROC instructors was limited to certain terms and conditions only. Based on the factual allegations contained in the charge, the Association, at most, repudiated a single issue. By that conduct alone, it did not manifest a lack of good faith or frustrate the parties' bargaining relationship. This conclusion conforms to the Board's ruling in Stockton Unified

[8] See Morris, The Developing Labor Law (2d ed. 1983) p. 562, et seq. for a discussion of the duty to bargain and "per se" violations.

School District, supra, PERB Decision No. 143 and to the court's decision in National Labor Relations Board v. Advanced Business Forms Corp. (2d Cir. 1973) 474 F.2d 457 [82 LRRM 2161], cited by the FCOE in its appeal, that repudiation of an agreement on a single issue, without more, does not manifest a lack of good faith. Having concluded that the Association's conduct did not constitute a per se violation, it follows that the alleged repudiation of a single issue, standing alone, is insufficient to establish bad faith bargaining under the totality of circumstances test. The charge does not describe any other conduct to suggest that the Association lacked a genuine desire to reach agreement on a successor pact with the FCOE.

ORDER

The charge does not contain sufficient allegations to demonstrate that the Association failed to bargain in good faith. The unfair practice charge in Case No. S-CO-283 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Blair and Member Caffrey joined in this Decision.