STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS LONG BEACH COMMUNITY COLLEGE CHAPTER #8,	)	
Charging Party,	)	Case No. LA-CE-3065
v.	)	PERB Decision No. 991
LONG BEACH COMMUNITY COLLEGE DISTRICT,	)	April 26, 1993
Respondent.	)	

Appearances: Richard G. Sharp, Field Representative, for California School Employees Association and its Long Beach Community College Chapter #8; Wagner, Sisneros & Wagner by Patrick D. Sisneros, Attorney, for Long Beach Community College District.

Before Hesse, Caffrey and Carlyle, Members.

DECISION

HESSE, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Long Beach Community College District (District) to an administrative law judge's (ALJ) proposed decision. In the proposed decision, the ALJ found that the District violated section 3543.5(a), (b), and (c), of the Educational Employment Relations Act (EERA or Act)[1] by changing its policy regarding grievance processing when

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. EERA section 3543.5 (a), (b) and (c) state, in pertinent part:

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

it refused to process a grievance filed by the California School Employees Association and its Long Beach Community College Chapter #8 (CSEA or Association) and a bargaining unit member in accordance with the grievance processing policy established by the parties' collective bargaining agreement (CBA). This new policy was allegedly adopted without notice to CSEA or an opportunity to negotiate the decision or its effect. By repudiating the grievance processing procedure, CSEA alleges that the District's conduct amounted to a refusal to bargain in good faith in violation of section 3543.5(c). This same conduct is alleged to interfere with the representational rights of bargaining unit employees in violation of section 3543.5(a) and denies CSEA its right to represent bargaining unit members in violation of section 3543.5(b).

The Board has reviewed the entire record in this case, including the transcript, exhibits, proposed decision, the District's exceptions and CSEA's responses thereto. Based on the

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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.
>
> (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.

following discussion, the Board reverses the ALJ's proposed decision and dismisses the unfair practice charge and complaint.

FACTUAL SUMMARY

The parties stipulated that CSEA is an employee organization and an exclusive representative, and the District is a public school employer within the meaning of the Act.

CSEA is the exclusive representative for a unit of classified employees that includes custodians. There is a CBA between CSEA and the District in effect for the period of July 1, 1989 to June 30, 1992. The current CBA was in effect at all times relevant to this dispute. The District has incorporated the merit system pursuant to the provisions of California Education Code section 88060 et seq.

CSEA stipulated to most of the facts offered in support of its claim.[2]

On or about October 29, 1990, Earl Houston (Houston), employed by the District as a custodian, was advised that he was suspended from work and that a dismissal recommendation would be made to the District board, to be effective November 13, 1990.

On November 8, 1990, Houston, CSEA Field Representative Richard Sharp (Sharp), and CSEA Chapter Vice President Mary Thorpe (Thorpe) met with the District's Interim Dean of Personnel Services John Didion (Didion) for a pre-disciplinary hearing.

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[2]These factual statements were contained in a May 3, 1991, letter to Richard Sharp from Marc Hurwitz, PERB Regional Attorney.

During the meeting, Sharp contended that the proposed dismissal violated several articles of the CBA.

Thereafter Didion sent a letter indicating that the dismissal was justified, and that it would be reviewed by the District board of trustees. Houston's dismissal was upheld by the District board on November 13, 1990.

CSEA and Houston filed a grievance on November 15, 1990, which alleged violations of certain provisions of the CBA, and the rules and regulations of the classified service. These rules are administered by the District's Personnel Commission.[3]

On November 21, 1990, Sharp appealed Houston's dismissal to the District Personnel Commission by requesting a hearing before a hearing officer appointed by the Personnel Commission.

Thorpe sent Didion a memorandum, dated December 12, 1990, which stated that since the District had not responded to the grievance within the required time limit at Level 2, CSEA was requesting that the grievance be submitted to Level 3 (mediation) for resolution. Thorpe requested mediation as soon as possible in January 1991.

On December 20, 1990, Didion advised Sharp by letter that:

> . . . the use of the grievance procedure to challenge a disciplinary action is not appropriate since such is covered by the

[3]The grievance listed violations of the following CBA articles, and rules and regulations of the classified service: Article XXVII, Disciplinary Action; Rules and Regulations of the Classified Service, Chapter XII, section 12.1., Causes for Action; Article V, Evaluation; Article XVIII, Personnel Files; Article IX, Leaves of Absence With Pay, section A.11., Sick Leave, and section C.I., Statutory Leave/Other Sick Leave.

Rules and Regulations of the Classified Service.

On January 15, 1991, Sharp advised Didion that the grievance should be processed.

Didion testified that the District refused to process the Houston grievance because the Personnel Commission has final authority over the disciplinary process. In a discussion with Thorpe about the grievance after their meeting on November 8, 1990, Didion expressed his view that the Personnel Commission was the proper venue for the matter because it involved a disciplinary action. In a subsequent discussion with Thorpe regarding the grievance, he informed her that if CSEA chose to appeal the dismissal, the grievance would not be processed.

At some point, the parties agreed to by-pass Level l of the grievance procedure and submit the grievance to Level 2 (the appropriate vice president) since the matter had already been discussed with Didion (the appropriate dean at Level 1) in the pre-disciplinary hearing. Once Sharp filed the November 21, 1990, appeal to the District's Personnel Commission, according to Didion, the District considered the matter to be within the jurisdiction of the Personnel Commission and no longer a grievance issue.

Didion further testified that the District's decision regarding processing a disciplinary action grievance would depend on the remedy sought. For example, elements of a grievance concerning an evaluation would be subject to resolution through the contractual grievance procedure. However, as Didion

interprets the CBA, a grievance to overturn a dismissal or other disciplinary action is not remedial through the grievance procedure, but through the Personnel Commission.

While Didion personally has never agreed to a grievance remedy other than the one proposed by the grievant, he is aware that other District managers have done so. Didion was not aware of any prior CSEA grievance involving discipline that has proceeded through the contractual grievance procedure.

Since the Houston grievance, two grievances have been processed involving employees represented by CSEA. One was resolved at Level 1. The other was resolved at Level 2. It appears that neither grievance related to discipline.

The CBA contains several relevant provisions which are set forth below. Article I includes a scope and waiver clause that reads:

> This Agreement shall supercede any rules, regulations, or practices of the Board and Personnel Commission which shall be contrary to or inconsistent with, its terms. The provisions of the Agreement shall be incorporated into and be considered part of the established policies of the Board and Personnel Commission.

Article IV contains the terms of the grievance procedure. Section A.1. defines a "grievance" as:

> . . . a formal written allegation by a grievant that there has been a violation, misinterpretation or misapplication of a specific provision of this Agreement.

Section A.2. permits CSEA to be a grievant.

Sections B. and C. establish a multi-level review mechanism.

The initial review is an informal level which calls for a meeting between the grievant and the immediate supervisor. The formal level begins at Level 1 which provides for a review of the written grievance by the dean/director of the area being grieved. Level 2 permits an appeal of the decision to the appropriate vice president. Level 3 provides for submission of the dispute to the mediation process utilizing the services of a State mediator. Level 4 allows for advisory arbitration by an arbitrator mutually selected by the parties. Level 5 permits an appeal of the arbitrator's decision to the District board. The decision of the District board is final and binding upon the parties. Article IV contains no provisions for final and binding arbitration by a neutral party.

Article XXVII, Disciplinary Action, states, in pertinent part, as follows:

> A. Permanent unit employees shall be subject to disciplinary action for just cause.
>
> G. The procedures for disciplinary action and appeals are governed by the rules of the Personnel Commission. Either the unit employee or his/her designated representative may ask the Personnel Commission to consider employing a hearing officer to hear his/her disciplinary appeal.

Article XXXI, Contract Administration, contains the following provisions:

> A. This Article establishes a Contract Administration Committee for the purpose of administering this Agreement composed of a District Vice President, the District Chief Negotiator, the CSEA President, or designee, and the CSEA Chief Negotiator. The titles

> used relate to those individuals who by-designation of the District or CSEA are fulfilling all the normal duties of their respective positions. Advisors may be called as required but are excluded from voting and deliberation. The committee will meet on an as-needed basis by request of either the District or CSEA. Action minutes will be kept as a record of each meeting. Applicable decisions reached by this group will be recorded and distributed by the parties to the District and CSEA. The committee's decisions shall be binding as though part of this Agreement....
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> B. In the case of a grievance, the grievant and respondent may mutually request that the point or points at issue be considered by this committee. Such requests shall be activated between the Informal Level and Level 1 of the grievance procedure (Article IV). Decisions reached by the Contract Administration Committee shall be binding on both parties.
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> C. Neither the District nor CSEA waive any rights included in other Articles by participation in this procedure. It is also expressly understood that written decisions, and/or resolution of disputes established pursuant to Sections A and B above, shall be binding upon the parties exclusively for the duration of the Agreement.

DISCUSSION

It is well-settled that an employer that makes a pre-impasse unilateral change in an established, negotiable practice violates its duty to meet and negotiate in good faith. (NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177].) Such unilateral changes are inherently destructive of employee rights and are a failure per se of the duty to negotiate in good faith. (Davis Unified School District, et al. (1980) PERB Decision No. 116; State of

California (Department of Transportation) (1983) PERB Decision No. 361-S.)

An established negotiable practice may be reflected in a CBA (Grant Joint Union High School District (1982) PERB Decision No. 196) or where the agreement is vague or ambiguous, it may be determined by an examination of bargaining history (Colusa Unified School District (1983) PERB Decision Nos. 296 and 296a) or the past practice (Rio Hondo Community College District (1982) PERB Decision No. 279; Pajaro Valley Unified School District (1978) PERB Decision No. 51).

An employer makes no unilateral change, however, where an action the employer takes does not alter the status quo. "[T]he 'status quo' against which an employer's conduct is evaluated must take into account the regular and consistent past patterns of changes in the conditions of employment." (Pajaro Valley Unified School District, supra, PERB Decision No. 51.) Thus, where an employer's action was consistent with the past practice, no violation was found in a change that did not affect the status quo. (Oak Grove School District (1985) PERB Decision No. 503.)

In the present case, there is insufficient evidence to show an established practice or policy concerning the District's processing of grievances involving disciplinary action. Therefore, the Board must look to the language of the CBA.

The grievance involved an alleged violation of Article XXVII, Disciplinary Action, which provides:

A. Permanent unit employees shall be subject to disciplinary action for just cause.

B. Disciplinary action shall include termination, suspension with or without pay, or demotion.

C. Discipline is to be administered progressively except for those acts or omissions which in and of themselves are not compatible with the progressive discipline concept.

D. Unit employees shall have the right to request union representation at a disciplinary meeting.

E. Unit employees must receive notice of any proposed action to suspend, dismiss, or demote prior to presentation of the matter to the Board of Trustees.

F. Additionally, unit employees shall have the right to respond verbally and/or in writing, prior to the imposition of discipline.

G. The procedures for disciplinary action and appeals are governed by the rules of the Personnel Commission. Either the unit employee or his/her designated representative may ask the Personnel Commission to consider employing a hearing officer to hear his/her disciplinary appeal.

In addition to Article XXVII, the grievance alleged violations of Article V, Evaluation; Article XVIII, Personnel Files; and Article IX, Leaves of Absence with Pay.

According to the undisputed testimony, the District decided that the subject matter of the grievance involved reinstatement or reversal of disciplinary action, and that this issue was within the exclusive jurisdiction of the Personnel Commission.

In making this determination, the District did not analyze all the alleged violations in the grievance. Based solely on the requested remedy (i.e., reinstatement and back pay), the District concluded the grievance matter was properly before the Personnel Commission.

Pursuant to the relevant provisions of the CBA, once an employee files an appeal of a disciplinary action with the Personnel Commission, jurisdiction over that appeal is conferred on the Personnel Commission for a final decision. However, I find the Personnel Commission does not have jurisdiction over all of the alleged violations of the CBA in the grievance. With regard to the alleged violations of Article V, Evaluation; Article XVIII, Personnel Files; and Article IX, Leaves of Absence With Pay, I find that the District violated Article V by failing to proceed on the alleged contract violations.

Once the Board finds that the employer has repudiated a provision of the CBA, the Board must next determine whether this conduct represents an isolated breach of the CBA or has a generalized effect and continuing adverse impact on bargaining unit members. (See Grant Joint Union High School District, supra, PERB Decision No. 196.)

In Grant Joint Union High School District, supra, the Board stated:

> This is not to say that every breach of contract also violates the Act. Such a breach must amount to a change of policy, not merely a default in a contractual obligation, before it constitutes a violation of the duty to bargain. This distinction is crucial. A.

> change of policy has, by definition, a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members. On the other hand, when an employer unilaterally breaches an agreement without instituting a new policy of general application or continuing effect, its conduct, though remediable through the courts or arbitration, does not violate the Act. The evil of the employer's conduct, therefore, is not the breaching of the contract per se, but the altering of an established policy mutually agreed upon by the parties during the negotiation process. Walnut Valley Unified School District (3/30/81) PERB Decision No. 160; C & S Industries (1966) 158 NLRB 454 [62 LRRM 1043]. By unilaterally altering or reversing a negotiated policy, the employer effectively repudiates the agreement. Sea Bay Manor Home, supra. (Id. at p. 9.)

The Board went on to hold that in order to establish a prima facie case of unlawful unilateral change in, or repudiation of, a contract or past practice, the charging party must show: (1) that the respondent has breached or otherwise altered the party's written agreement or its own established past practice; and (2) that the breach constituted a change of policy having a generalized effect or continuing impact on the terms and conditions of employment of bargaining unit employees.

In this case, CSEA has not met this burden. There is no evidence that the District's conduct constituted anything but an isolated breach of the CBA. Specifically, there is no evidence that the breach had a generalized effect or a continuing impact upon terms and conditions of employment of bargaining unit employees. (See Riverside Unified School District (1987) PERB Decision No. 639.)

It appears that the District's decision to refer the entire grievance matter to the Personnel Commission was based on its interpretation of Article XXVII, albeit a different interpretation than CSEA's. Arguably, the District's conduct may not even constitute a contract repudiation or a policy change. (See Eureka City School District (1985) PERB Decision No. 528.) However, assuming the District's conduct constituted a breach of Article XXVII, there is no evidence to support the finding of an unlawful unilateral change in violation of section 3543.5(c) of EERA. Further, there is no evidence that the District's conduct violated section 3543.5(a) and (b) of EERA. Therefore the charge must be dismissed.

ORDER

The unfair practice charge and complaint in Case No. LA-CE-3065 are hereby DISMISSED.

Member Caffrey's concurrence begins on page 14.

Member Carlyle's dissent begins on Page 16.

Caffrey, Member, concurring: I agree with Member Hesse's conclusion in dismissing the unfair practice charge against the Long Beach Community College District (District).

A unilateral change in terms and conditions of employment within the scope of representation is a per se refusal to negotiate. (NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177].) In order to establish an unlawful unilateral change or a repudiation of a collective bargaining agreement, a charging party must show that: (1) the respondent has breached or otherwise altered the parties' written agreement; and (2) the breach constituted a change of policy having a generalized effect or continuing impact on the terms and conditions of employment. (Grant Joint Union High School District (1982) PERB Decision No. 196.) I find that the District did not breach the terms of the parties' collective bargaining agreement (CBA) when it refused to process the grievance filed by the California School Employees Association and its Long Beach Community College Chapter #8 (CSEA) on behalf of Earl Houston (Houston).

Article I of the CBA includes a "Scope and Waiver Clause," indicating that "[T]he provisions of this Agreement shall be incorporated into and be considered part of the established policies of the Board and Personnel Commission."

Article XII describes a multi-level grievance procedure allowing for advisory arbitration. The arbitrator's decision is appealable to the District board, which retains the final authority to decide grievance issues. The CBA contains no binding arbitration provisions for grievances.

Article XXVII, Disciplinary Action, defines disciplinary action to include only termination, suspension or demotion. The District board is presented all proposed disciplinary actions and approves them prior to action being taken. The CBA provides that appeals of disciplinary actions are to the Personnel Commission.

The clear intent of the parties' agreement is to require use of the Personnel Commission process for resolution of disciplinary action appeals, not the grievance procedure. By incorporating the provisions of the CBA into the rules of the Personnel Commission, the Personnel Commission is afforded maximum authority and flexibility in resolving disciplinary matters, including the authority to determine whether provisions of the CBA have been followed in the process leading to disciplinary action.

In this case, Houston filed a grievance after receiving the notice of dismissal. A review of the grievance clearly indicates that it seeks to overturn the dismissal action. Houston alleges numerous violations of the CBA as the basis for challenging his dismissal. . The grievance is essentially an appeal of the disciplinary action which the CBA intended should be referred to the Personnel Commission. The Personnel Commission has full authority to review all alleged violations of the CBA when considering Houston's appeal of the disciplinary action.

I conclude, therefore, that the District did not breach the terms of the parties' CBA when it refused to process the CSEA/Houston grievance. Accordingly, the unfair practice charge against the District must be dismissed.

Carlyle, Member, dissenting: I respectfully dissent from my colleagues' reversal of the administrative law judge's proposed decision finding that the Long Beach Community College District (District) violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA) .

Although I agree with the analysis of Member Hesse's opinion, finding that the District repudiated a provision of the collective bargaining agreement (CBA), I disagree as to her finding of this breach as an isolated breach not having a generalized effect and continuing adverse impact on bargaining unit members. (Grant Joint Union High School District (1982) PERB Decision No. 196.)

I do not subscribe to the theory that the first time an employer changes its policy without prior notice or opportunity to meet and negotiate before the decision is made it is a de facto isolated situation or breach. Since I do not apply the tort theory of "every dog is entitled to free bite" to labor law, it is my position that a closer analysis of the District's position is necessary with respect to its change in processing the California School Employees Association and its Long Beach Community College Chapter #8 (CSEA)/Earl Houston grievance.

Upon such analysis, it is my view that the District's policy more likely amounts to the adoption of a policy that has the potential for a generalized effect and continuing adverse impact on all members of the bargaining unit and upon CSEA's ability to represent unit members in grievance matters. Under this policy, if CSEA or a unit member files a grievance challenging a

disciplinary action in conjunction with other violations of the CBA, the grievant(s) would be precluded from attaining complete resolution of the grievance on its merits.

The District adopted this policy without prior notice to CSEA or an opportunity for CSEA to meet and negotiate before the decision was made. This conduct constitutes a refusal and failure to bargain in good faith in violation of EERA section 3543.5(c). I conclude that this action also interfered with the rights of bargaining unit members to be represented by CSEA in violation of section 3543.5(a) and denied CSEA its statutory right to represent bargaining unit members in grievance matters in violation of section 3543.5(b).