STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

UNITED PUBLIC EMPLOYEES, SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 790,	)	
Charging Party,	)	Case No. SF-CE-1631
v.	)	PERB Decision No. 1036
FREMONT UNIFIED SCHOOL DISTRICT,	)	February 4, 1994
Respondent.	)	

Appearances: Van Bourg, Weinberg, Roger & Rosenfeld by Stewart Weinberg, Attorney, for United Public Employees, Service Employees International Union, Local 790; Breon, O'Donnell, Miller, Brown & Dannis by David A. Wolf, Attorney, for Fremont Unified School District.

Before Caffrey, Carlyle and Garcia, Members.

DECISION

CAFFREY, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by United Public Employees, Service Employees International Union, Local 790 (SEIU) of a Board agent's dismissal (attached hereto) of its charge. SEIU alleged that the Fremont Unified School District (District) violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA)[1] by unilaterally

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references 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:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to

changing the date on which employees observed Veterans' Day. In dismissing the charge, the Board agent applied a post-arbitration repugnancy analysis to the arbitrator's determination of the issues, finding that the arbitrator's award was not repugnant to the purposes of EERA.

The Board has reviewed the warning and dismissal letters, SEIU's appeal, the District's response and the entire record in this case. The Board finds the Board agent's dismissal to be free of prejudicial error and adopts it as the decision of the Board itself in accordance with the following discussion.

DISCUSSION

On appeal, SEIU contends that the Board agent erred in dismissing the charge, asserting that it has a statutory right under EERA to negotiate the school calendar independent of the contract which provides for a Veterans' Day holiday. SEIU contends that the grievance involved an alleged breach of a contractual right, while the unfair practice charge filed with PERB alleges a breach of a statutory right. Accordingly, SEIU argues that a complaint should issue, allowing PERB to adjudicate SEIU's statutory right to negotiate the matter.

> interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (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.

EERA section 3541.5(a)[2] grants the Board the discretion to review an arbitration award to determine "whether it is repugnant to the purposes of EERA." In applying this discretion, the Board has addressed the issue of the breach of a statutory right versus a contractual right that SEIU raises here on appeal.

In Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81a, the Board adopted the National Labor Relations Board's (NLRB) standard to determine whether an arbitrator's award is repugnant to the purposes of EERA.[3] The NLRB standard requires that:

> 1. The matters raised in the unfair practice charge must have been presented to and considered by the arbitrator;
>
> 2. The arbitral proceedings must have been fair and regular;

---

[2]Section 3541.5 states, in pertinent part, that PERB shall not:

> Issue a complaint against conduct also prohibited by the provisions of the agreement 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. . . . The board shall have discretionary jurisdiction to review the settlement or arbitration award reached pursuant to the grievance machinery solely for the purpose of determining whether it is repugnant to the purposes of this chapter. If the board finds that the settlement or arbitration award is repugnant to the purposes of this chapter, it shall issue a complaint on the basis of a timely filed charge, and hear and decide the case on the merits. Otherwise, it shall dismiss the charge.

[3]Spielberg Manufacturing Company (1955) 112 NLRB 1080 [36 LRRM 1152] (Spielberg) and Collyer Insulated Wire (1971) 192 NLRB 837 [77 LRRM 1931].

> 3. All parties to the arbitration proceedings must have agreed to be bound by the arbitral award; and
>
> 4. The award must not be repugnant to the National Labor Relations Act, as interpreted by the NLRB.

In San Diego County Office of Education (1991) PERB Decision No. 880, the Board cited the NLRB's further encouragement of voluntary arbitration of disputes and the Board's proper deferral to the arbitrator's award. The NLRB stated:

> . . . we adopt the following standard for deferral to arbitration awards. We would find that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. [Fn. omitted.] In this respect, differences, if any, between the contractual and statutory standards of review should be weighed by the Board as part of its determination under the Spielberg standards of whether an award is "clearly repugnant" to the Act. . . . Unless the award is "palpably wrong," [Fn. omitted.] i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, we will defer. [Olin Corporation (1984) 268 NLRB 573 [115 LRRM 1056].]

Further, the Board has stated, "The possibility that this Board may have reached a different conclusion in interpreting the parties' agreement and the evidence does not render the award unreasonable or repugnant." (Los Angeles Unified School District (1982) PERB Decision No. 218.)

In this case, the contractual issue is clearly parallel to the issue SEIU raises in its unfair practice charge. The arbitrator reached his conclusion after considering evidence and facts which are relevant to the resolution of the unfair practice

charge. SEIU has failed to demonstrate that the arbitrator's award is "clearly repugnant" or "palpably wrong." Accordingly, the Board affirms the Board agent's finding that the arbitrator's award is not repugnant to the purposes of EERA and that the charge should be dismissed.

ORDER

The unfair practice charge in Case No. SF-CE-1631 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Member Garcia joined in this Decision.

Member Carlyle's concurrence begins on page 6.

Carlyle, Member, concurring: This case is before the Public Employment Relations Board (PERB or Board) on appeal by United Public Employees, Service Employees International Union, Local 790 (SEIU) of a Board agent's dismissal of its charge. SEIU alleged that the Fremont Unified School District (District) violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA)[1] by unilaterally changing the date on which employees observed Veterans' Day.

I have reviewed the attached warning and dismissal letters, the original unfair practice charge, SEIU's appeal, the District's opposition to appeal, and the entire record in this case. I find the Board agent's dismissal and incorporation of the warning letter to be free of prejudicial error and adopt it as my decision. Period.

What has just been written is the language utilized in an approach known as summary affirmance. It is a practice which has been around PERB for years. It is most common in occurrence of

---

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references 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:
>
> (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.
>
> (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.

an appeal to the dismissal of a charge, amended or not. The Board reviews the charge, the Board agent's warning letter which sets out the law, the dismissal letter which invariably merely incorporates the warning letter by attachment, and the papers filed by any and all parties on appeal. If the circumstances warrant it, and they usually do, particularly in an unamended charge as is this case, then summary affirmance by the Board as indicated previously herein follows.

There are two policy reasons for this approach which has served this Board well through the years. First, the charging party has had ample opportunity to make his/her case and has been given a detailed letter listing the shortcomings of the charge. Assuming the warning letter is accurate, no more is needed.

Second, and this is the danger of adopting the Board agent's work and then adding surplusage as the new majority has done in this case, section 3542(b) precludes the unsuccessful party from making an appeal to the courts of the decision of the Board not to issue a complaint. I see no redeeming value under the facts of this case to add language which, cannot by law, be subject to further review. In my opinion, and in the apparent opinion of members of this Board spanning two prior Governors, the benefits conferred by such illumination do not outweigh the inherent danger of future troublesome language, no matter how well intentioned at the time.

This is not the first time that the new majority has seen fit to depart with past practices of PERB on procedural issues,[2] or on matters more substantive in nature.[3] Nor will it be the last.

---

[2]See Los Angeles Unified School District (1993) PERB Order No. Ad-249.

[3]See California Union of Safety Employees (Coelho) (1994) PERB Decision No. 1032-S, pp. 14-17.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415) 557-1350

October 19, 1993

Stewart Weinberg
Van Bourg, Weinberg, Roger & Rosenfeld
875 Battery Street
San Francisco, California 94111

Re: **DISMISSAL OF UNFAIR PRACTICE CHARGE/REFUSAL TO ISSUE COMPLAINT**
United Public Employees, Service Employees International Union, Local 790 v. Fremont Unified School District
Unfair Practice Charge No. SF-CE-1631

Dear Mr. Weinberg:

The above-referenced unfair practice charge filed on May 10, 1993, alleges that the Fremont Unified School District (District) unilaterally changed the date on which employees observed Veterans' Day. This conduct is alleged to violate Government code section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA).

I indicated to you, in my attached letter dated October 8, 1993, 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 which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to October 18, 1993, the charge would be dismissed.

I have not received either an amended charge or a request for withdrawal. Therefore, I am dismissing the charge based on the facts and reasons contained in my October 8, 1993, 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. (Cal. 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 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing. (Cal. 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 (20) calendar days following the date of service of the appeal. (Cal. 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 Cal. 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 (3) 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. (Cal. Code of Regs., tit. 8, sec. 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,

ROBERT THOMPSON
Deputy General Counsel

By _____
DONN GINOZA
Regional Attorney

Attachment

cc: David A. Wolf

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415) 557-1350

October 8, 1993

Stewart Weinberg
Van Bourg, Weinberg, Roger & Rosenfeld
875 Battery Street
San Francisco, California 94111

Re: **WARNING LETTER**
United Public Employees, Service Employees International Union, Local 790 v. Fremont Unified School District
Unfair Practice Charge No. SF-CE-1631

Dear Mr. Weinberg:

The above-referenced unfair practice charge filed on May 10, 1993, alleges that the Fremont Unified School District (District) unilaterally changed the date on which employees observed Veterans' Day. This conduct is alleged to violate Government code section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA).

Investigation of the charge revealed the following. United Public Employees, Service Employees International Union, Local 790 (SEIU) exclusively represents a bargaining unit of District classified employees. SEIU and the District are parties to a collective bargaining agreement effective from July 1, 1992 through June 30, 1995. The parties' 1989-92 agreement expired by its terms on June 30, 1992. The first negotiating session for a new contact took place on June 16, 1992. At that meeting, SEIU requested a written extension of the old contract. The District negotiator responded that the District would not agree to a signed extension, but that the status quo would be protected during negotiations. The District proposed granting the Veterans' Day holiday but having it observed on Friday, November 13, rather than Wednesday, November 11, 1992, the official date of the holiday. SEIU countered by proposing that the District grant an additional holiday in exchange for moving Veteran's Day to the 13th.

Article 10, section 10.4 of the expired agreement states:

> The District shall determine the confirmation of the calendar and determine whether one (1) holiday in addition to 1980-81 shall be floating or otherwise scheduled. Admission Day Holiday will be subsumed in Martin Luther King, Jr. holiday.

Article 10, section 10.6 states in pertinent part:

> The Board agrees to provide all eligible employees with the following paid holidays:
>
> . . . . . .
>
> 10.6.3 Veterans' Day

SEIU filed a grievance on November 10, 1992 at a time when they were still negotiating over the observance date of Veterans' Day. The District had directed employees to take November 13 as the Veterans' Day holiday when no agreement was reached.

An arbitration hearing was conducted on May 13, 1993 and the arbitrator, Frank Silver, issued his decision in favor of the District on August 3, 1993. Silver found that the contract's mere designation of Veterans' Day as a holiday in Article 10, section 10.6 does not require its observance on November 11. Silver relied on Article 10, section 10.4 and read that provision to impose a duty on both the District and SEIU to "consult and confirm" the holidays in light of the school calendar. Silver further concluded that there was an obligation on both parties that confirmation of the holidays would not be unreasonably withheld. Silver found that SEIU unreasonably withheld its confirmation of the holiday in light of the fact that (1) SEIU had agreed in 1986 and 1987 to move the holiday to a Monday or a Friday (in return for a commitment that veterans could take November 11 off as a sick day) and (2) the District had agreed with the exclusive representative of the certificated bargaining unit for the November 13 observance day which meant that school would be in session on November 11, and the absence of classified employees on that date would be disruptive to District operations.

Based on the facts stated above, the charge as presently written fails to demonstrate that the arbitrator's award is repugnant to the EERA, and therefore it must be dismissed.

Section 3541.5(a) of the EERA states, in pertinent part, that the Public Employment Relations Board (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. . . The board shall have discretionary jurisdiction to review the

> settlement or arbitration award reached pursuant to the grievance machinery solely for the purpose of determining whether it is repugnant to the purposes of this chapter. If the board finds that the settlement or arbitration award is repugnant to the purposes of this chapter, it shall issue a complaint on the basis of a timely filed charge, and hear and decide the case on the merits. Otherwise, it shall dismiss the charge. . .

(See also PERB Reg. 32661 [Cal. Code of Regs., tit. 8, sec. 32661]; Los Angeles Unified School District (1982) PERB Dec. No. 218; Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81a.)

In Los Angeles Unified School District, supra, PERB Dec. No. 218, PERB held that an arbitrator's decision is not repugnant if the unfair practice issue is "parallel" to the contractual issue and the arbitrator has considered all of the evidence relevant to the unfair practice charge. In the instant case, SEIU's claim of a unilateral change is grounded in the contract and there is no suggestion that the arbitrator failed to consider all of the evidence relevant to the alleged repudiation of the contractual provisions. Accordingly, the arbitrator's award is not repugnant to the EERA and PERB is without authority to issue a complaint.

If 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. 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 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 filed with PERB. If I do not receive an amended charge or withdrawal from you before **October 18, 1993**, I shall dismiss your charge without leave to amend. If you have any questions, please call me at (415) 557-1350.

Sincerely,

DONN GINOZA
Regional Attorney