STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION & ITS MILPITAS CHAPTER 281,	)	
Charging Party,	)	Case No. SF-CE-1947
v.	)	PERB Decision No. 1234
MILPITAS UNIFIED SCHOOL DISTRICT,	)	November 20, 1997
Respondent.	)	

Appearance: California School Employees Association by Denise K. Jensen, Labor Relations Representative, for California School Employees Association & its Milpitas Chapter 281.

Before Johnson, Dyer and Jackson, Members.

DECISION AND ORDER

JACKSON, Member: This case is before the Public Employment Relations Board (Board) on appeal by the California School Employees Association & its Milpitas Chapter 281 (Association) to a Board agent's dismissal (attached) of its unfair practice charge. The Association alleges that the Milpitas Unified School District (District) violated section 3543.5(a), (b) arid (c) of the Educational Employment Relations Act (EERA)[1] when the

[1]EERA is codified at Government Code section 3540 et seq. Section 3543.5 provides, 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. For purposes of

District changed its work year calendar to close school facilities during its winter break.

The Board finds that the District clearly communicated in its memorandum dated October 4, 1996, its firm decision to close school facilities during the 1996 winter break and restated that intent to the Association on several occasions.[2] In its charge, the Association failed to meet its burden of showing timeliness. (Tehachapi Unified School District (1993) PERB Decision No. 1024.)

The Board has reviewed the entire record in this case, including the Board agent's warning and dismissal letters, the original and amended unfair practice charge, and the Association's appeal. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself.

The unfair practice charge in Case No. SF-CE-1947 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Johnson and Dyer joined in this Decision.

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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.

[2]A1though the Board agent used the term "counterproposal," the Association has failed to show that the District ever communicated any change in its firm decision to close school facilities during the winter break.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415) 439-6940

August 1, 1997

Denise Jensen
California School Employees Association
P.O. Box 640
San Jose, CA 95106

Re: **DISMISSAL LETTER/REFUSAL TO ISSUE COMPLAINT**
California School Employees Association & its Milpitas Chapter 281 v. Milpitas Unified School District
Unfair Practice Charge No. SF-CE-1947

Dear Ms. Jensen:

The above-referenced unfair practice charge, filed May 30, 1997, alleges the Milpitas Unified School District (District) unilaterally changed the work-year calendar. The California School Employees Association and its Milpitas Chapter 281 (CSEA) allege this conduct violates Government Code sections 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA or Act).

I indicated to you, in my attached letter dated July 17, 1997, 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 July 25, 1997, the charge would be dismissed.

On July 28, 1997, you filed an amended charge. The amended charge reiterates the original charge and adds the following. CSEA alleges that on October 7, 1996, District and CSEA representatives met for their regular monthly meeting. During this meeting, District representative Pat Dell informed CSEA of the District's "interest" in a District-wide shutdown of offices and schools. CSEA further alleges that on October 8, 1997, CSEA Received a memorandum dated October 4, 1996, from Human Resources Director, Sandra Edwards. The memorandum states in pertinent part:

> The District plans to annually close all offices and sites during the two week Winter Break periods beginning this December, 1996.

> This decision was made so the District can conserve on heating and electricity costs when all students and the vast majority of certificated and classified employees are not in attendance.

CSEA asserts this memorandum does not demonstrate a decision by the District to close all sites, but instead is merely a proposal by the District to take such action.

On November 4, 1996, the parties met again for their regular monthly meeting. During this meeting, CSEA presented the District with a memorandum which stated:

> On the subject of district wide shut down at winter break/4 day work week at building 100 and 200 during summer, we will not be able to agree with the position the district has decided to take.

CSEA further alleges that at no time during this meeting did the District indicate its desire to implement the Winter Break closure without negotiating with CSEA.

On November 18, 1996, the parties met for a regular contract negotiating session. During this session, District representative Dick Loftus informed CSEA that it was the District's position that the District had the right to shut down the offices during Winter Break without CSEA's agreement. CSEA further alleges that Mr. Loftus agreed, however, to negotiate the issue with CSEA.

During another contract negotiating session on November 27, 1996, the District presented a counterproposal to CSEA. The counterproposal reiterated the District's original position, stating in relevant part:

> December 26, 27, 30, 1996 and January 2, 3, 1997 will be "shutdown" days for those areas where services are not required.

On December 3, 1996, the District informed all classified and certificated personnel of its decision to close all sites during the Winter Break. The District's memorandum to all employees mirrored the language of the District's October 4, 1996, memorandum to CSEA. CSEA asserts the District never gave any indication of its intent to implement this decision without negotiating with CSEA.

Based on the facts presented, the charge fails to state a prima facie case within PERB's jurisdiction and therefore must be dismissed.

Government Code section 3541.5(a)(1) prohibits the Board from issuing 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. It is the Charging Party's burden to demonstrate the charge is timely filed. (Tehachapi Unified School District (1993) PERB Decision No. 1024)

The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilian Joint Community College District (1996) PERB Decision No. 1177.) In the case of a unilateral change, the statute of limitations begins to run on the date that the charging party has actual or constructive notice of the respondent's clear intent to implement a unilateral change in policy, provided that nothing subsequent to that date evinces a wavering of that intent. (Cloverdale Unified School District (1991) PERB Decision No. 911.) The charging party may not rest on its rights until actual implementation occurs. (Mt. Diablo Unified School District (1994) PERB Decision No. 1034.)

CSEA asserts the District's actions did not demonstrate the District intended to implement the closure without negotiating with CSEA on the matter. CSEA's contention is, however, unpersuasive. The District's October 4, 1996, letter indicates the District's intent to close all sites during the Winter Break. Although CSEA made counterproposals requesting employees receive holiday pay or other benefits, CSEA does not present any facts demonstrating the District wavered from its decision to close the sites or from its decision to require employees to take vacation time or other personal time during those days. Moreover, CSEA admits that District representative Dick Loftus informed CSEA of the District's position with regard to the closure. Mr. Loftus informed CSEA on November 18, 1996, that the District believed it had the right to close the sites without negotiating with CSEA. Thus, CSEA had actual and constructive notice on this day, of the District's intent to implement the change. CSEA fails to present any facts demonstrating the District changed its position on this issue at any time after Mr. Loftus' statement. As such, this charge must be dismissed as untimely.

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 _
Kristin L. Rosi
Regional Attorney

Attachment

cc: Richard M. Noack

STATE OF CALIFORNIA PETE WILSON, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415)439-6940

July 17, 1997

Denise Jensen
California School Employees Association
P.O. Box 640
San Jose, CA 95106

Re: **WARNING LETTER**
California School Employees Association & its Milpitas Chapter 281 v. Milpitas Unified School District
Unfair Practice Charge No. SF-CE-1947

Dear Ms. Jensen:

The above-referenced unfair practice charge, filed May 30, 1997, alleges the Milpitas Unified School District (District) unilaterally changed the work-year calendar. The California School Employees Association and its Milpitas Chapter 281 (CSEA) allege this conduct violates Government Code sections 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA or Act).

Investigation of the charge revealed the following. CSEA is the exclusive representative of the District's certificated bargaining unit. The District and CSEA are parties to a collective bargaining agreement (Agreement) which expired by its own terms on June 30, 1996. The parties are currently negotiating for a successor agreement.

On October 4, 1996, Sandra Edwards, District Executive Director of Human Resources informed CSEA President Bill MacLean of the District's intention to shut-down offices and schools during the Winter holiday. Specifically, Ms. Edwards letter stated in pertinent part:

> The District plans to annually close all offices and sites during the two week Winter Break periods beginning this December, 1996.
> . . .
>
> Should you have any concerns or questions about . . . the above, please give me a call.

On November 4, 1996, Mr. MacLean responded to Ms. Edwards letter as follows:

> On the subject of district wide shut down at winter break/4 day work week at building 100 and 200 during summer, we will not be able to agree with the position the district has decided to take.

On November 18, 1996, during a negotiation session for the successor agreement, District representative Dick Loftus reiterated the District's intention to shut-down operations during the Winter Break. Mr. Loftis further stated that the District was willing to negotiate the impact of this decision with CSEA. On November 27, 1996, the parties met for another negotiating session. During this session, CSEA alleges the parties exchanged proposals regarding the Winter Break closure. CSEA does not, however, provide copies of these proposals.

On December 3, 1996, Superintendent Mary Frances Callan, distributed a memorandum to all bargaining unit members. The memorandum stated in pertinent part:

> The District plans to close all offices and sites during the two week Winter Break from Monday, December 23, 1996 through January 3, 1997.

Based on the above stated facts, the charge as presently written, fails to state a prima facie case of unilateral change, for the reasons stated below.

Government Code section 3541.5(a)(1) prohibits the Board from issuing 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. It is the Charging Party's burden to demonstrate the charge is timely filed. (Tehachapi Unified School District (1993) PERB Decision No. 1024)

The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilian Joint Community College District (1996) PERB Decision No. 1177.) In the case of a unilateral change, the statute of limitations begins to run on the date that the charging party has actual or constructive notice of the respondent's clear intent to implement a unilateral change in policy, provided that nothing subsequent to that date evinces a wavering of that intent. (Cloverdale Unified School District (1991) PERB Decision No. 911.) The charging party may not rest on its rights until actual implementation occurs. (Mt. Diablo Unified School District (1994) PERB Decision No. 1034.)

In the instant charge, CSEA was aware on or about October 3, 1996, of the District's intent to unilaterally change the work year calendar. This charge was filed on May 30, 1997, more than six months after the date the alleged unfair practice occurred. As CSEA fails to provide any facts demonstrating the District subsequently wavered in its decision to implement this policy, the charge must be dismissed as untimely.

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 additional facts which would correct the deficiencies 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 must be filed with PERB. If I do not receive an amended charge or withdrawal from you before July 25. 1997. I shall dismiss your charge. If you have any questions, please call me at (415) 439-6940.

Sincerely,

Kristin L. Rosi
Regional Attorney