

bad faith bargaining and refusing to provide information.

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, the Federation's appeal, and the District's response. 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. LA-CE-3828 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Dyer and Jackson joined in this Decision.

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.

PUBLIC EMPLOYMENT RELATIONS BOARD



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



March 6, 1998

Lawrence Rosenzweig
Ventura County Federation of College
Teachers, AFT Local 1828
1757 Mesa Verde Avenue, Suite 250
Ventura, CA 93003

Re: Ventura County Federation of College Teachers, AFT Local
1828 v. Ventura County Community College District
Unfair Practice Charge No. LA-CE-3828, Second Amended Charge
DISMISSAL AND REFUSAL TO ISSUE A COMPLAINT

Dear Mr. Rosenzweig:

In the above-referenced charge the Ventura County Federation of College Teachers, AFT Local 1828 (AFT) alleges the Ventura County Community College District (District) violated the Educational Employment Relations Act (EERA or Act) § 3543.5(a), (b), and (c) by engaging in bad faith bargaining, and refusing to provide information.

I indicated to you, in my attached letter dated February 4, 1998, 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 February 11, 1998, the charge would be dismissed. On February 11, 1998, I received the second amended charge.

The warning letter indicated the totality of conduct test is generally applied to determine whether an employer is engaged in bad faith bargaining. The warning letter then indicated that the original and first amended charges provided little information regarding the District's conduct prior to the implementation of impasse, and that as such the charges did not present a prima facie violation of EERA § 3543.5(c). The second amended charge alleges the District's Chief Negotiator, Richard Currier, was unprepared for negotiations in March and April 1997. The charge alleges Currier told union negotiators that he was not involved in drafting the District's initial proposals and that he did not understand all of the Federation's proposals. The second amended charge also alleges Currier would often say that he would have to

"get back" to the Federation on issues, and was unable to answer questions throughout the negotiations.

The facts also indicate, however, that the parties met only four times prior to declaring impasse, and that during these few sessions, the parties reached tentative agreements on several issues. In this case, the parties' ability to reach agreement on five articles prior to the declaration of impasse undermines the charge's allegations that the employer was trying to frustrate the bargaining process. Although Currier did not respond immediately to the Federation's questions, it does not appear that Currier was unprepared, or without authority to negotiate. Thus, the employer's totality of conduct prior to the declaration of impasse does not demonstrate a violation of EERA § 3543.5(c).

In analyzing the District's conduct following the declaration of impasse, the warning letter also utilized the totality of conduct test. The warning letter addressed the following allegations: (1) the District improperly communicated with bargaining unit employees regarding the issue of membership and agency fees; and (2) the District's proposals demonstrate bad faith because they were regressive and illegal. The warning letter concluded the facts failed to demonstrate a prima facie violation of EERA § 3543.5(e). The second amended charge does not include additional information regarding these allegations. Thus, these allegations do not demonstrate a prima facie violation of EERA § 3543.5(e), and are dismissed for the reasons stated in the warning letter.

On February 9, 1998, I received a letter from the Charging Party which indicated that on September 23, 1997, the District made a regressive proposal regarding the issue of agency fees. The letter indicated, that on April 8, 1997, the parties' agreed to an agency fee policy (Article 18), but that on September 23, 1997, the District made a proposal requiring an agency fee election to be held (Article 19). The letter alleges the new Article 19 is a clear indication of regressive bargaining that the warning letter did not specifically address.

PERB Regulation § 32615(b) requires the Charging Party to serve the Respondent with the charge, and provide proof of service to PERB. The February 9, 1998, letter from the Charging Party was filed separately from the second amended charge, and did not include the requisite proof of service. As such, the letter is not considered a part of the second amended charge and need not be addressed. However, even if properly alleged in the second amended charge, the allegation does not present a prima facie violation of the EERA.

EERA § 3546(a) states, in pertinent part:

At the time the issue is being negotiated, the public school employer may require that the organizational security provision be severed from the remainder of the proposed agreement and cause the organizational security provision to be voted upon separately by all members in the appropriate negotiating unit, in accordance with rules and regulations promulgated by the board. Upon such a vote, the organizational security provision will become effective only if a majority of those members of the negotiating unit voting approve the agreement. Such vote shall not be deemed to either ratify or defeat the remaining provisions of the proposed agreement.

Thus, it appears the District has a statutory right to require the organizational security provision to be voted upon by the unit.

Since the District failed to make its proposal to require a vote until after the parties already had a tentative agreement on the Organizational Security article, Article 18, the District's proposal when viewed separately is regressive. However, as stated in the warning letter, individually regressive proposals must be viewed in the context of the entire package of proposals. The warning letter noted, and the second amended charge did not dispute, that the District's September 23, 1997, proposals also included concessions. Thus, even accepting the Article 19 proposal as regressive, a review of the entire package of proposals presented on September 23, 1997, did not indicate the package as a whole was regressive.

Even if the charge demonstrated that the District engaged in regressive bargaining, the test for surface bargaining requires an examination of the totality of the employer's conduct. One indicia of bad faith bargaining is not enough to demonstrate a prima facie violation. (Pajaro Valley Unified School District (1978) PERB Decision No. 51.) The totality of the District's conduct following the declaration of impasse in April does not demonstrate a prima facie violation. The charge did not demonstrate the District made any individually regressive proposals other than the proposal regarding the organizational security vote. Nor was the District's communication with the employees regarding membership and agency fees in violation of EERA. Thus, an examination of the totality of the District's

conduct after the declaration of impasse does not demonstrate the District engaged in surface bargaining in violation of EERA § 3543.5(e). Thus, the charge must be dismissed.

The warning letter also indicated the original and first amended charge's allegations that the District refused to provide information did not state a prima facie violation of EERA § 3543.5(c). The second amended charge does not include additional information regarding these allegations. Thus, these allegations do not demonstrate a prima facie violation of the EERA § 3543.5(c), and are dismissed for the reasons stated in the warning 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.

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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.)

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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,

ROBERT THOMPSON
Deputy General Counsel

Tammy L. Samsel
Regional Director

Attachment

cc: Richard J. Currier

PUBLIC EMPLOYMENT RELATIONS BOARD



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February 4, 1998

Lawrence Rosenzweig, Attorney
2450 Broadway, Suite 550
Santa Monica, CA 904043003

Re: Ventura County Federation of College Teachers, AFT Local
1828 v. Ventura County Community College District
Unfair Practice Charge No. LA-CE-3828
WARNING LETTER

Dear Mr. Rosenzweig:

In the above-referenced charge the Ventura County Federation of College Teachers, AFT Local 1828 (AFT) alleges the Ventura County Community College District (District) violated the Educational Employment Relations Act (EERA or Act) § 3543.5(a), (b), and (c) by engaging in bad faith bargaining, and refusing to provide information. My investigation revealed the following information.

In February 1997, the District and AFT began negotiating a successor agreement. AFT alleges the District failed to negotiate in good faith during bargaining sessions held in March and April 1997. AFT alleges questions from AFT were met with stalling tactics, such as "I'll have to get back to you on that." The parties met four times to negotiate prior to declaring impasse. During the second session the parties reached tentative agreement on four articles. During the third session, the parties reached tentative agreement on another article. During the fourth session AFT refused to discuss any proposals, and decided to only answer questions proffered by the District.

The District filed for impasse with PERB on April 23, 1997.¹ On April 28, 1997, PERB found the parties to be at impasse.

On May 20, 1997, AFT requested information regarding a new management position, Interim Dean. On June 24, 1997, AFT sent a second letter requesting the information to the President of Oxnard College, Tomas Sanchez. On June 30, 1997, Sanchez instructed that requests for information regarding the Interim Dean position be directed to Deputy Chancellor Mike Gregory.

¹See Petition for Declaration of Impasse No. LA-IM-2675-E.

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On May 22, 1997, AFT requested copies of documents regarding the investigation of the District's Men's Basketball program. On or about June 9, 1997, AFT filed Unfair Practice Charge No. LA-CE-3802 regarding this issue. A complaint issued on that charge on October 8, 1997.

On June 10, 1997, AFT requested copies of the contracts between the District and two law firms. On June 11, 1997, Chancellor Phillip Westin responded to by requesting that all requests by AFT for information be directed to the District's Chief Negotiator, Richard J. Currier. On June 30, 1997, Currier provided a copy of one of the requested contracts.

In or about June 16, 1997, the District attempted to delay a grievance mediation by citing the need for their insurance company representative's presence at the mediation. On June 16, 1997, AFT requested information about the District's liability insurance coverage. On August 11, 1997, the District provided a 51-page document, entitled, "1996-1997 Property and Liability Program." AFT alleges it has yet to determine whether the document contains the information that it sought.

On June 18, 1997, AFT requested copies of employment contracts between the District and two college presidents who are not members of the bargaining unit. On June 30, 1997, Currier told AFT the contracts were not yet finalized. On August 18, 1997, the District provided the contracts to AFT.

On June 30, 1997, Deputy Chancellor, Mike Gregoryk, sent a memorandum to the faculty which stated:

As you are aware, negotiators for the District and AFT have been negotiating for a new Agreement. The 1994-1997 Agreement will no longer be in effect after June 30, 1997, therefore, faculty members who wish to withdraw their membership from the AFT may do so at any time after June 30, 1997.

On July 1, 1997, the District sent a memorandum to employees paying agency fees which stated:

The purpose of this memo is notify you that effective on July 1, 1997, the District will no longer involuntarily deduct from your paychecks the mandatory agency service fee imposed by the AFT. Upon advice from legal counsel, the District will not require you to

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pay an agency service fee to the AFT absent a collective bargaining agreement with such a requirement.

Since the 1994-1997 Agreement between the District and the AFT will no longer be in effect on July 1, 1997, the mandatory agency service fee in Article 18.2 will not be implemented commencing July 1, 1997.

On August 13, 1997, AFT asked the District to continue to collect the service fees and place the money in escrow until the parties sign a successor agreement. The District denied AFT's request, explaining that although the parties signed a tentative agreement on the parties' agency fee provision, Article 18, there was not a current ratified agreement.

AFT alleges the District continued to bargain in bad faith when mediation began between the parties on June 20, 1997. AFT alleges the District's September 23, 1997, proposal included proposals which were: new, regressive, and/or illegal. AFT alleges the District made for the first time proposals on these provisions: Article 3 Salary; Article 4 Health and Welfare; Article 17; Article 19 Effect of the Agreement; and Appendix E and H.

The District alleges its September 23, 1997, proposal was comprehensive and also included items more advantageous to AFT. For example, the proposal included a 1.5% increase in the salary schedule. The District also offered to drop: (a) its request to extend the workday to 10 p.m.; (b) its request to make part-time faculty at-will employees; and (c) all but four of its proposed changes to Article 3 Salary.

The above-stated information fails to demonstrate a prima facie violation of the EERA for the reasons that follow.

Bad Faith Bargaining

The charge alleges the District violated EERA § 3543.5(a), (b), and (c) by engaging in surface bargaining. The totality of conduct test is generally applied to determine whether an employer is engaged in bad faith bargaining. Although the totality of conduct test is generally applied, some conduct is considered to be a "per se" violation without a determination of the employer's subjective intent. In establishing bad faith, PERB examines the "totality of the bargaining conduct" to determine whether there are sufficient objective indicia of a subjective intent to participate in good faith, or conversely, of

an intent to frustrate the bargaining process. (Pajaro Valley Unified School District (1978) PERB Decision No. 51; see also Regents of the University of California (1996) PERB Decision No. 1157-H.) Conduct that moves the parties away from agreement, rather than toward agreement, is considered evidence of bad faith. (Pajaro, supra.) However, one indicia of bad faith bargaining does not meet the totality of circumstances test. (Pajaro, supra.) The charge as presently written does not meet the above-stated test.

Factors which may be indicative of bad faith bargaining include frequent turnover in negotiators (Muroc Unified School District (1978) PERB Decision No. 80.); negotiators' lack of authority which delays the bargaining process (Oakland Unified School District (1983) PERB Decision No. 326); missing, delaying, or cancelling bargaining sessions (Oakland Unified School District (1983) PERB Decision No. 326.); taking an inflexible position or making regressive bargaining proposals. (San Ysidro School District (1980) PERB Decision No. 134; Oakland Unified School District (1982) PERB Decision No. 275.)

The charge provides little information regarding the District's actions prior to the declaration of impasse. AFT alleges the District did not explain the meaning and intent of its proposals, and engaged in stalling tactics during bargaining sessions in March and April 1997. However, the charge does not provide specific facts to establish the District's behavior in March and April 1997 was indicative of an intent to frustrate the bargaining process. In fact, the parties reached tentative agreements on several issues in the few bargaining sessions held before the declaration of impasse. Thus, the charge does not establish a prima facie violation of EERA § 3543.5(c).

The charge also includes facts regarding events which occurred after the District filed for impasse on April 23, 1997. For conduct occurring during and prior to the exhaustion of the statutory impasse procedure, EERA § 3543.5 (e) is at issue.² Conduct within that time-frame cannot also be the basis for a violation of EERA § 3543.5 (c). (Moreno Valley Unified School District v. Public Employment Relations Board (1983) 142 Cal.App.3d 191; Regents of the University of California (1996)

²EERA § 3543.5(e) states it shall be unlawful for a public school employer to do any of the following:

- (e) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).

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PERB Decision No 1157-H.) However, even assuming the charge properly alleged the District violated EERA § 3543.5(e), the allegations addressed in this letter fail to state a prima facie violation of that section.

The totality of conduct test will apply to AFT's allegation that the District's conduct following the declaration of impasse violated the EERA. That allegation rests on the following claims: (1) the District improperly communicated with bargaining unit employees regarding the issue of membership and agency fees; and (2) the District's proposals demonstrate bad faith because they were regressive and illegal. Allegations that the District refused to provide information will be addressed as a per se violation.

Once an exclusive representative is selected, the employer must refrain from bargaining directly with bargaining unit employees. However the employer does have a free speech right. An employer's speech does not generally violate the EERA, unless the speech contains a threat of reprisal or promise of benefit. (See Rio Hondo Community College District (1980) PERB Decision No. 128.)

EERA §3540.1(i) states that the term "Organizational Security" means either of the following:

(1) An arrangement pursuant to which a public school employee may decide whether or not to join an employee organization, but which requires him or her, as a condition of continued employment, if he or she does join, to maintain his or her membership in good standing for the duration of the written agreement. However, no such arrangement shall deprive the employee of the right to terminate his or her obligation to the employee organization within a period of 30 days following the expiration of a written agreement.

(2) An arrangement that requires an employee, as a condition of continued employment, either to join the recognized or certified employee organization, or to pay the organization a service fee in an amount not to exceed the standard initiation fee, periodic dues, and general assessments of the

organization for the duration of the agreement, or a period of three years from the effective date of the agreement, whichever comes first.

The parties' 1994-1997 CBA does not include a maintenance of membership provision as described in EERA § 3540.1(i)(1). Therefore this charge will be analyzed under EERA § 3540.1(i)(2). EERA § 3540.1(i)(2), cited above, states, organizational security endures for the duration of the agreement. As the parties do not have an effective agreement, the employees may resign their membership in AFT. The employer's act of notifying employees of this fact does not violate the EERA, nor does it support a surface bargaining violation.

The District's correspondence with the employees regarding the collection of service fees similarly does not contain a threat or promise of benefit, but merely informs the employees of their rights pursuant to EERA. Again, as the parties do not have an effective agreement, the employees may resign their membership in AFT, and the District need not collect service fees. (See State of California (1996) PERB Decision No. 1179-S.) Thus, the charge's allegation that the District illegally communicated with bargaining unit employees is not a violation of the EERA, nor does it support a surface bargaining violation.

Although regressive bargaining is considered a factor indicative of bad faith bargaining it is not clear that the District engaged in regressive bargaining. Individually regressive proposals must be reviewed in the context of the entire package of proposals. (See Regents of the University of California (1996) PERB Decision No. 1157-H.) In the instant charge the employer's September 23, 1997, proposal included concessions on salary, workday, and the status of the part-time faculty. Moreover, even if the District engaged in regressive bargaining, one indicia alone does not demonstrate bad faith. (Pajaro, supra.) Even if the District engaged in regressive bargaining, there are not additional factors indicative of bad faith.

Thus, the charge does not provide facts demonstrating the District's totality of the bargaining conduct was indicative of intent to frustrate the impasse procedure.

The charge's allegation that the District's proposal on the instructional calendar was illegal also fails to state a prima facie case. The parties 1994-1997 contract indicated, "the parties shall meet on or before December 1 of each year to establish the instructional calendar for the following academic

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year." The District proposed that the language be changed to indicate the calendar "shall be established by the District after considering input from the Federation." AFT alleges this proposal requires AFT to waive its right to bargaining on a matter within the scope of bargaining, and is therefore an illegal proposal.

The EERA does not prohibit proposals during impasse on subjects within the scope of bargaining. The District's calendar proposal is on a subject within the scope of bargaining. (See Los Rios Community College District (1988) PERB Decision No. 684.) The proposal does not waive any statutory right. Therefore, this allegation does not present a prima facie violation of the EERA.

Requests For Information

The charge alleges the District refused to provide the following information: (a) employment contracts of the District's College Presidents; (b) information regarding the Men's Basketball program; (c) contracts between the District and two of its law firms; (d) information regarding the District's liability insurance; and (e) information regarding the Interim Dean position. For the reasons stated below, the charge does not factually demonstrate a prima facie refusal to provide information violation.

The exclusive representative is entitled to all information that is "necessary and relevant" to the discharge of its duty of representation. (Stockton Unified School District (1980) PERB Dec. No. 143). Failure to provide such information is a per se violation of the duty to bargain in good faith. The charge, however, fails to demonstrate that the District refused to provide the above-listed information.

On June 30, 1997, the District indicated the employment contracts of the college presidents were not finalized, and on August 18, 1997, the District provided the contracts. As AFT does not demonstrate the contracts existed on June 18, 1997, when AFT requested the contracts, the charge does not demonstrate a prima facie violation.

On August 28, 1997, the District provided a report on the Men's Basketball program to AFT. Thus it appears the District responded to the AFT's requests for information regarding the program and the allegation does not state a prima facie violation. Even if the allegation states a prima facie violation, requests for information regarding the Men's

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Basketball program were addressed in Unfair Practice Charge LA-CE-3802. Since a complaint already issued in LA-CE-3802, a second complaint would create duplicative proceedings.

With regard to the law firm contracts, the charge does not include facts indicating how the contracts between the District and the law firms are necessary and relevant to AFT's duty to represent bargaining unit employees. Moreover, on June 30, 199 7, the District provided one of the two requested contracts. Thus, this allegation must also be dismissed.

On, August 11, 1997, the District provided the 1996-1997 Property and Liability Program to AFT. By AFT's own account it is unsure whether the document contains the information it sought. Since the requested information may be included in the document provided, this allegation must be dismissed.

AFT asked Tomas Sanchez on two occasions for information regarding a new non-bargaining unit position, Interim Dean. On June 30, 199 7, Sanchez responded and instructed AFT to contact Deputy Chancellor Mike Gregoryk. The charge does not allege facts indicating the District refused to provide the information, but only that AFT direct its inquiry to another District official. As the charge does not indicate that AFT contacted Gregoryk, and that Gregoryk refused to provide the information, this must be dismissed.

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 February 11, 1998. I shall dismiss your charge. If you have any questions, please call me at (213) 736-3008.

Sincerely,

Tammy L. Samsel
Regional Director