

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



OAK PARK CLASSIFIED ASSOCIATION,)
)
Charging Party,) Case No. LA-CE-3936
)
v.) PERB Decision No. 1286
)
OAK PARK UNIFIED SCHOOL DISTRICT,) September 24, 1998
)
Respondent.)
_____)

Appearances: California Teachers Association by Charles R. Gustafson, Attorney, for Oak Park Classified Association; Miller, Brown & Dannis by David G. Miller, Attorney, for Oak Park Unified School District.

Before Caffrey, Chairman; Johnson and Amador, Members.

DECISION AND ORDER

AMADOR, Member: This case is before the Public Employment Relations Board (Board) on appeal by the Oak Park Classified Association (Association) to a Board agent's dismissal (attached) of the unfair practice charge. The Association alleges that the Oak Park Unified School District (District) violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA)¹ by engaging in bad faith bargaining.

¹EERA is codified at Government Code section 3540 et seq. EERA 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.

The Board has reviewed the entire record, including the unfair practice charge, the warning and dismissal letters, the Association's appeal and the District's response. The Board finds the Board agent's 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-3936 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Caffrey and Member Johnson joined in this Decision.

(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
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Los Angeles, CA 90010-2334
(213) 736-3127



July 8, 1998

Charles R. Gustafson, Esq.
California Teachers Association
P.O. Box 2153
Santa Fe Springs, California 90670

Re: Oak Park Classified Association v. Oak Park Unified School District
Unfair Practice Charge No. LA-CE-3936
DISMISSAL LETTER

Dear Mr. Gustafson:

In the above-referenced charge the Oak Park Classified Association (Association) alleges the Oak Park Unified School District (District) violated the Educational Employment Relations Act (EERA or Act) § 3543.5(a), (b), and (c) by engaging in bad faith bargaining.

I indicated to you, in my attached letter dated June 22, 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 June 29, 1998, the charge would be dismissed. On June 29, 1998, you filed a first amended charge.

The first amended charge includes the following allegations: (a) the District unilaterally changed the parties' policy by contracting out for mowing services; and (b) the District engaged in bad faith bargaining by sending two letters to bargaining unit members.

Unilateral Change

With regard to the unilateral change violation, the warning letter indicated the Association waived its right to bargain the decision to contract out bargaining unit work. The first amended charge indicates that the parties' well-established past practice is to contract out work only when employees cannot perform certain services, when specialized services are needed, and for special short-term projects. The Association alleges the District has never contracted-out work normally and regularly performed by unit members. The Association also contends that the District's unsuccessful attempts to modify the parties'

contracting out language during negotiations supports the Association's position.

Although the District may not have contracted out work normally and regularly performed by bargaining unit members in the past, the parties' CBA clearly indicates the District has the right to contract out bargaining unit work. As stated in the warning letter, Article 7.1 of the parties' CBA grants the District the right to contract out work. The District does not lose that right, merely because it failed to previously exercise it. (See Marysville Joint Unified School District (1983) PERB Decision No. 314.) Nor does the fact that the District made proposals to modify the parties' contract language on this issue undermine the District's right to contract out as it is currently written in the parties' collective bargaining agreement. Thus, this allegation is dismissed for the reasons stated above and in the warning letter.

Bypassing

The first amended charge alleges the District violated the EERA with written communications to bargaining unit employees on April 27, 1998, and May 7, 1998.

The Association alleges the District attempted "to take credit for the style of bargaining knowing full well that bargaining is a two-party mutual process." The Association also alleges the District "created the illusion that it was cooperating with the Association" when it had in fact sabotaged the negotiations process by bringing in persons hostile to the Association's interests during the parties' meeting on benefits.

These two allegations refer to the following sections of the Superintendent Marilyn Lippiatt's April 27, 1998, memorandum to the employees:

I started this process based upon the principles of Interest Based Bargaining - a collaborative and cooperative approach to negotiations where all information is shared and, then, options are explored in an effort to find mutually "acceptable" solutions. For example, we recently held an informational meeting for OPCA on Health and Welfare, bringing in three representatives of the insurance and health care industries. We discussed only such options as IRC 125 Plans, childcare, . . .

I truly believe that style of information gathering and sharing better fit the Oak Park Unified culture and atmosphere than the old style adversarial bargaining. OPCA seems intent on proving me wrong. Thank you for your response to my first letter. . .

The first amended charge also alleges the District's May 7, 1998, letter violates the EERA. The Association alleges the District "knowingly and or with reckless abandon totally misstated the Association position in order to gain an advantage in bargaining and make it appear the Association was the party unwilling to negotiate." The document states, in pertinent part:

What happened? The mediator first met with OPCA; he then came to the district team room after about 1/2 hour and informed us that OPCA was unwilling to proceed unless the District immediately agreed to the Union's demand to cease contracting for services and that there was no point in negotiating any other issues. [emphasis in original]

The first amended charge makes the following assertion regarding the above-quoted statement:

This gives the false impression that the Association actually said that according to the personal knowledge of the District when in fact the Association did not say that and the District has no way of knowing exactly what the Association did say.

The District's May 7, 1998, communication does not make a false impression regarding the District's personal knowledge but identifies the source of the information as the mediator.

The first amended charge also makes the following assertion regarding the warning letter's analysis.

Your warning letter relies on *Rio Hondo Community College District* (1980) PERB Decision No. 128 for the proposition that employer misstatements of facts about the bargaining process do not constitute an unfair practice absent a threat of reprisal or promise of benefit. I do not believe that issue is that cut and dried. I believe the holding in *Muroc Unified School District* (1978) PERB Decision No. 80 is still good

law. The *Rio Hondo* case did not overrule the decision in *Muroc*, and in fact, it quoted it approvingly.

The warning letter stated:

The EERA prohibits an employer from using direct communications with employees to bypass the exclusive representative and undermine the representative's exclusive authority to represent unit members, and negotiate with the employer. (See Muroc Unified School District (1978) PERB Decision No. 80.) However, not all communication with employees violates the Act. (See, Marin Community College District (1995) PERB Decision No. 1092.) PERB has adopted the NLRB standard for employer free speech, and generally does not find speech an unfair practice if the communication contains neither threat of reprisal or force, nor promise of benefit. (Rio Hondo Community College District (1980) PERB Decision No. 128.) During negotiations, an employer is obligated to present factually accurate information and may not engage in conduct to derogate the exclusive representative's authority. (Temple City Unified School District (1990) PERB Decision No. 841.)

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

Despite the first amended charge's suggestion to the contrary, the warning letter did not indicate Muroc Unified School District (1978) PERB Decision No. 80 had been overruled by Rio Hondo Community College District (1980) PERB Decision No. 128. The warning letter cited both cases, and additionally relied on an even more recent Board decision, Temple City Unified School District (1990) PERB Decision No. 841. Thus, as the first amended charge fails to present facts indicating the District's communications with the employees contained threats of reprisal, promises of benefits, or language undermining the authority of the exclusive representative this allegation must be dismissed.

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.)

LA-CE-3936
Dismissal Letter
Page 6

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: David G. Miller

PUBLIC EMPLOYMENT RELATIONS BOARD



Los Angeles Regional Office
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June 22, 1998

Charles R. Gustafson, Esq.
California Teachers Association
P.O. Box 2153
Santa Fe Springs, California 90670

Re: Oak Park Classified Association v. Oak Park Unified School District
Unfair Practice Charge No. LA-CE-3936
WARNING LETTER

Dear Mr. Gustafson:

In the above-referenced charge the Oak Park Classified Association (Association) alleges the Oak Park Unified School District (District) violated the Educational Employment Relations Act (EERA or Act) § 3543.5(a), (b), and (c) by engaging in bad faith bargaining.

The parties' last collective bargaining agreement expired on June 30, 1997, and they are currently at impasse over a successor agreement.¹

On May 5, 1998, the District notified the Association of its intent to contract-out mowing services on or about June 1, 1998, due to a lack of available personnel and the immediacy of the job. Mowing services have been provided by bargaining unit members. On May 7, 1998, the Association demanded to bargain the District's decision to contract out mowing services. The District refused to negotiate the decision, but agreed to negotiate the effects.

Article 7.1 of the parties' last CBA states:

In order to insure that the District is able flexibly and efficiently to carry out its functions and responsibilities as imposed by law, it is understood and agreed that the District retains all of its power and authority to direct, manage and control the

¹Although not alleged as a violation of EERA § 3543.5(e), since the charge alleges the unlawful conduct took place during impasse, it is properly considered as a violation of EERA § 3543.5(e). (See Moreno Valley Unified School Dist. v. Public Employment Relations Bd. (1983) 142 Cal.App.3d 191.)

performance of District services and the work force performing such services. The District retains therefore, the exclusive rights, duties and powers which include, but are not limited to, the following: . . . lawfully to contract out work . . . (emphasis added.)

Article 23.2 of the parties' last CBA states:

23.2 Except as specifically provided herein, during the term of this Agreement neither party shall be required to negotiate with respect to any matter whether or not covered by this Agreement, and whether or not within the knowledge or contemplation of either or both of the parties at the time they negotiated, ratified and/or signed this Agreement. This constitutes a knowing and specific waiver of rights in connection with each and every subject matter specifically, expressly or implicitly classified as a matter within the scope of representation as defined by the Educational Employment Relations Act and/or any precedential decision of the Public Employment Relations Board.

The Association also alleges the District misrepresented the positions of the parties in two flyers it distributed to bargaining unit employees. The charge alleges:

6.a On April 27, 1998, the District distributed a flyer, a true and correct copy of which is attached hereto marked B. In the flyer the District includes a "personal note" which states the District "started this process based upon the principles of Interest Based Bargaining" attempting to take credit for the style of bargaining knowing full well that bargaining is a two-party mutual process. It then says it "held an informational -meeting- for OPCA" which misrepresents the actual meeting and its purpose, knowingly full well that the Association agreed to the meeting on the premise the District would bring in outside consultants to provide information on benefit caps and rate increase forecasts. The

District brought in persons hostile to the Association, none of whom could provide the requested information.

6.b On May 7, 1998, the District distributed a flyer, a true and correct copy of which is attached hereto marked C. The flyer purports to be "the most accurate characterization of OPCA's actions" but fails to state that because of the nature of the process it relied upon the mediator's characterization of the Association's actions. The flyer follows this under "What Happened?" with a purported report from the mediator that the Association said "there was no point in negotiating any other issues." This gives the false impression that the Association actually said that according to the personal knowledge of the District when in fact the Association did not say that and the District has no way of knowing exactly what the Association did say.

Additionally, the flyer states under "District Response" that "We responded that we would be derelict in our duty to give up the flexibility to contract for needed work." This gives the false impression that the Association attempted to get the District to give up such flexibility in the areas outlined in the preceding paragraph when the District knows full well that the Association was not concerned with those areas but only with the mowing services.

Based on the above-stated information, the charge fails to state a prima facie violation for the reasons that follow.

Unilateral Change

In determining whether a party has violated EERA section 3543.5 (e), PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process.

(Stockton Unified School District, (1980) PERB Decision No. 143.) Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the

scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Walnut Valley Unified School District (1981) PERB Decision No. 160; Grant Joint Unified High School District (1982) PERB Decision No. 196.)

While in San Jacinto Unified School District (1994) PERB Decision No. 1078, PERB held that a broadly based management-rights clause would not be construed as a waiver of statutory bargaining language, such is not the case herein. The Association's arguments that the District violated past practice and the agreement are unpersuasive. Article 7.1 of the Agreement states the District's right to lawfully contract out work. Indeed, the parties seem to have a past practice of allowing contracting out that is consistent with this provision of the contract. Thus, the charge does not provide facts supporting the Association's contention that the District's contracting out of mowing services violates the EERA.

Bypassing

The EERA prohibits an employer from using direct communications with employees to bypass the exclusive representative and undermine the representative's exclusive authority to represent unit members, and negotiate with the employer. (See Muroc Unified School District (1978) PERB Decision No. 80.) However, not all communication with employees violates the Act. (See, Marin Community College District (1995) PERB Decision No. 1092.) PERB has adopted the NLRB standard for employer free speech, and generally does not find speech an unfair practice if the communication contains neither threat of reprisal or force, nor promise of benefit. (Rio Hondo Community College District (1980) PERB Decision No. 128.) During negotiations, an employer is obligated to present factually accurate information and may not engage in conduct to derogate the exclusive representative's authority. (Temple City Unified School District (1990) PERB Decision No. 841.)

The charge fails to demonstrate the District's communications included threats of reprisals or promises of benefits. Moreover, the charge fails to provide any facts indicating the District bargained directly with the employees. (See Walnut Valley Unified School District (1981) PERB Decision No. 160.) The communications complained of here do not demonstrate the District acted to undermine the Association. Thus, this allegation does not present a prima facie violation.

LA-CE-3936
Warning Letter
Page 5

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 June 29, 1998, I shall dismiss your charge without leave to amend. If you have any questions, please call me at (213) 736-3008.

Sincerely,

Tammy L. Samsel
Regional Director