STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JOHN ROSSMANN, Charging Party, v. ORANGE UNIFIED EDUCATION ASSOCIATION & CALIFORNIA TEACHERS ASSOCIATION, Respondent.	Case No. LA-CO-1123-E PERB Decision No. 1533 June 23, 2003

Appearance: John Rossmann, on his own behalf.

Before Baker, Whitehead and Neima, Members.

DECISION

BAKER, Member: This case is before the Public Employment Relations Board (Board) on appeal by John Rossmann (Rossmann) of a Board agent's dismissal (attached) of his unfair practice charge. Rossmann alleged that the Orange Unified Education Association (OUEA) and the California Teachers Association (CTA) violated the Educational Employment Relations Act (EERA)[1] by breaching their duty of fair representation. Specifically, Rossmann alleged that OUEA and CTA violated their duty of fair representation by negotiating changes to retirees' health benefits.

The Board has reviewed the entire record in this matter, including the original unfair practice charge, the Board agent's warning and dismissal letters and Rossmann's appeal. The

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

Board finds the warning and dismissal letters to be free from prejudicial error and adopts them as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. LA-CO-1123-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Whitehead and Neima joined in this Decision.

STATE OF CALIFORNIA GRAY DAVIS, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1023
Fax: (510) 622-1027

January 31, 2003

John Rossmann

Re: John Rossmann v. Orange Unified Education Association & California Teachers Association
Unfair Practice Charge No. LA-CO-1123-E
DISMISSAL LETTER

Dear Mr. Rossmann:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on December 28, 2002. You allege that the Orange Unified Education Association & California Teachers Association violated the Educational Employment Relations Act (EERA)[1] by negotiating changes to retirees' health benefits.

I indicated to you in my attached letter dated January 13, 2003, 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 January 22, 2003, the charge would be dismissed. On January 21, 2003, I received your first amended charge.

The Warning Letter indicated that the original charge failed to state a prima facie violation and explained that employers and exclusive representatives were permitted to negotiate regarding permissive subjects of bargaining. The Warning Letter further explained that only the exclusive representative owes the employees a duty of fair representation.

The first amended charge's allegations are summarized as follows: (a) CTA is the acting exclusive representative of the certificated bargaining unit as OUEA "converted" its affiliation with CTA to "Option 1" and is under the direction of a CTA Executive Director; (b) the Respondent submitted false statements to PERB in response to the Charging Party's request for injunctive relief; (c) the Legislature intended to limit the scope of representation and PERB cannot legally change the Legislature's intent; (d) the Warning Letter's statement that "Even if the retirees' benefits is an illegal subject of bargaining, the charge fails to demonstrate the parties made substantial changes to the retirees benefits in the 2002 Agreement" is equivalent to saying, "its ok to break the law, so long as you don't break it too severely;" (e) PERB usurped its authority because the Warning Letter states that "The Board has determined that a

[1] EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

union may violate its duty of fair representation by agreeing in negotiations to contractual language that violates certain statutory guarantees;" and (f) OUEA acted in an arbitrary, discriminatory or bad faith manner because the 2002 Agreement fails to fairly and equally represent the interests of both active employees and retirees.

The charge fails to state a prima facie violation for the reasons stated below.

Although OUEA may accept direction from an Executive Director hired by CTA, the charge does not demonstrate CTA is the exclusive representative of the certificated bargaining unit. OUEA may affiliate with other organizations like CTA, but CTA is not the exclusive representative. (California Teachers Association (Torres) (2000) PERB Decision No. 1386.) Thus, CTA does not owe the employees a duty of a fair representation and the charge fails to demonstrate CTA violated the Act.

The Charging Party alleges OUEA violated its duty of fair representation by negotiating retiree benefits. However, as stated in the Warning letter, parties do not violate EERA section 3543.2 by negotiating permissive subjects of bargaining. (Chula Vista City School District (1990) PERB Decision No. 834; Poway Unified School District (1988) PERB Decision No. 680.) The Charging Party alleges PERB is undermining the Legislature's intent by failing to issue a complaint. These decisions do not undermine the limitations on the scope of representation stated in EERA section 3543.2 as either party may refuse to bargain such permissive subjects and the employer cannot insist to impasse over such subjects.

It appears that the Charging Party misinterpreted the Warning Letter's statement that "Even if retirees' benefits is an illegal subject of bargaining the charge fails to demonstrate the parties made substantial changes to the retiree benefits in the 2002 Agreement," as it was not intended to indicate that it is "ok to break the law." Following that statement, the Warning Letter explained that the charge failed to demonstrate whether the alleged change in HMO plans reduced the plan participants' benefits and whether the changes alleged occurred as a result of the 2002 Agreement. It is incumbent upon the Charging Party to allege the "who, what, when, where, and how" of an unfair practice. (United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision 944.) Mere legal conclusions are insufficient. (See State of California (Department of Food and Agriculture (1994) PERB Decision No. 1071-S.)

The Warning Letter states, "the Board has determined that a union may violate its duty of fair representation by agreeing in negotiations to contractual language that violates certain statutory guarantees." With regard to this statement, the Charging Party argues that such a determination places PERB above the Legislature in determining what is law and what is not and that PERB has usurped the prerogatives of the Legislature. Again, it appears the Charging Party has misinterpreted the Warning Letter. The statement in question does not, by the use of the word "may," indicate an exclusive representative has permission to violate its duty of fair representation by agreeing to contractual language that violates statutory guarantees. The statement is instead meant to indicate that if a union agrees to contractual language that violates certain statutory guarantees such conduct could be deemed a violation of its duty of fair representation. The Warning Letter cites Oxnard Educators Association (Gorcey et al.) (1988) PERB Decision No. 664, in support of this rule. In that decision the Board reversed a board agent's dismissal of a duty of fair representation allegation and thereby indicated that the

charging party would be afforded an opportunity to demonstrate at a hearing that the union's conduct violated the act. (Oxnard Educators Association (Gorcey et al.), supra.)

At this level of the investigation the Charging Party's facts are taken as true. (Mark West Union School District (1993) PERB Decision No. 1011.) Thus, whether the statements made to PERB by the Respondent in response to the Charging Party's request for injunctive relief were untrue is not determinative of the charge. Despite the Charging Party's allegations that the Association fails to fairly and equally represent the members' interests; the charge fails to demonstrate that OUEA acted in an arbitrary, discriminatory or bad faith manner. As discussed previously the charge does not present facts demonstrating that the negotiation of retiree benefits violates the EERA. Moreover, the Association is not required or expected to satisfy all members of the bargaining unit it represents, and the duty of fair representation does not mean that the Association is barred from making contracts which may have unfavorable effects on some of the members. (Corona Norco Teachers Association (2000) PERB Decision No. 1385.) Thus, for the above-stated reasons and those stated in the Warning Letter, the charge is dismissed.

Right to Appeal

Pursuant to PERB Regulations,[2] 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. (Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Regulations 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

[2] PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

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. (Regulation 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 Regulation 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. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

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. (Regulation 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
General Counsel

By
Tammy Samsel
Regional Attorney

Attachment

cc: Robert Lindquist

STATE OF CALIFORNIA GRAY DAVIS, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1023
Fax: (510) 622-1027

January 13, 2002

John Rossmann

Re: John Rossmann v. Orange Unified Education Association & California Teachers Association
Unfair Practice Charge No. LA-CO-1123-E
WARNING LETTER

Dear Mr. Rossmann:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on January 2, 2003. You allege that the Orange Unified Education Association & California Teachers Association violated the Educational Employment Relations Act (EERA)[1] by negotiating changes to retirees' health benefits. My investigation revealed the following information.

The Orange Unified School District employs Rossmann as a certificated employee exclusively represented by OUEA. In 1997 OUEA negotiated a collective bargaining agreement that included provisions regarding retirees' health benefits. Rossmann objected to the inclusion of these proposals and voted against ratification of the agreement. The bargaining unit later elected Rossmann President of OUEA and during his tenure he organized the retired employees and financed a lawsuit by the retirees against the District for the changes in the 1997 agreement.[2] The retirees' lawsuit is still pending. In 2000, Rossmann stepped down as OUEA President and OUEA again began bargaining with the District regarding health benefits.

On December 11, 2002, OUEA and the District signed a Tentative Agreement for a new collective bargaining agreement. On December 19, 2002, the parties ratified the Tentative Agreement and thereby created a collective bargaining agreement effective by its terms July 1, 2002, to June 30, 2005. The CBA included changes to the parties' health and welfare benefits article. Article 2.3 included, inter alia, the following provisions:

> 2.311 Within the cost maximums set forth below, the District shall pay the actual cost of providing health and welfare benefits (medical, dental, prescription, vision, and for actives only, life insurance) through an HMO plan for all active employees and

[1] EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

[2] See David Reger et al. v. Orange Unified School District, Case No. 817837, in Orange County Superior Court.

their eligible dependents, and through an HMO plan or Medicare Risk HMO for all eligible retirees and their dependents. Eligibility shall be set for the in the current agreement. All retired plan participants age 65 and over may be placed in a Medicare Risk HMO at the discretion of the District. [emphasis added.]

The District shall pay the actual cost of the health and welfare benefits up to the following specified maximum annual contributions, subject to the dependent contributions provided in Section 2.139. The District shall also make the same contributions for employees who elect to participate in the District offered PPO program. Active employees/retirees shall be assessed the difference between the agreed upon District maximum contributions as listed below and the actual PPO plan cost, which is commonly referred to as the employee/retiree buy-up cost for the PPO programs. Assessments shall be made through payroll deductions for active employees and monthly contributions paid by retirees. It is recognized that the District's payroll department will need to adjust employee payroll deductions in light of the increase in the District contribution amount. [emphasis added.]

2.313 District Annual Contributions for Eligible Retirees effective October 1, 2002

$3,082 for single coverage for eligible retirees

$6,433 for single plus one dependent coverage for eligible retirees

$9,206 for family coverage for eligible retirees

2.316 All Medicare eligible retirees and their dependents shall be enrolled in a Medicare Risk HMO plan offered by the District or eligible retirees and their dependents have the option of enrolling in the District provided PPO plan subject to the provisions of this article, including sections 2.311, 2.313, and 2.319.

2.320 All eligible retirees age 65 and over shall enroll in Medicare Parts A and B. The District shall pay one-half of the Medicare Part A premium for up to ten years for any eligible retiree age 65 and over who does not qualify for Medicare or the STRS pickup for Medicare Part A.

The Agreement indicates that on September 3, 2002, the OUEA-District Health Benefits Insurance Committee approved these modifications and that the changes were effective October 1, 2002.

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

The theory of this unfair practice charge is that OUEA and CTA violated the EERA's scope of representation provision by negotiating changes to retirees' benefits and thereby violated the associations' duty of fair representation. The Charging Party contends that as retirees are not employees as defined by the Act, OUEA and CTA may not negotiate changes to the retirees' benefits.[3]

The duty of fair representation is owed from the exclusive representative to the bargaining unit employees it represents. The California Teachers Association is a statewide organization and not the exclusive representative. As such, it does not owe a duty of fair representation to unit members. (California Teachers Association (Torres) (2000) PERB Decision No. 1386.) Thus, the charge fails to demonstrate a prima facie duty of fair representation violation with regard to CTA and this allegation must be dismissed. The allegation that OUEA violated its duty of fair representation is addressed below.

In order to state a prima facie violation of the duty of fair representation, Charging Party must show that the Respondent's conduct was arbitrary, discriminatory or in bad faith. (Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124.) The Board has determined that a union may violate its duty of fair representation by agreeing in negotiations to contractual language that violates certain statutory guarantees. (Oxnard Educators Association (Gorcey et al.) (1988) PERB Decision No. 664.) In Oxnard Educators, the Board concluded that a prima facie case of a violation is set forth when a charging party alleges that 1) a union was advised that a contract proposal violated a statute, 2) the union acknowledged the concerns, 3) the union provides no rationale for negotiating a provision in conflict with the statute, 4) a request to correct the conflict is made to the union and refused, and 5) the union "knowingly bargained away Charging Parties rights."

Rossmann alleges that OUEA's contract with the District violated EERA section 3543.2 which sets forth the scope of representation. By negotiating an agreement in violation of this provision, Rossmann argues OUEA violated its duty of fair representation. EERA section 3543.2 provides, in pertinent part:

> (a) The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by

[3] The Charging Party correctly notes that retirees are not employees as defined under the Act. (San Leandro Unified School District (1983) PERB Decision No. 450.)

> Section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8, the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code, and alternative compensation or benefits for employees adversely affected by pension limitations pursuant to Section 22316 of the Education Code, to the extent deemed reasonable and without violating the intent and purposes of Section 415 of the Internal Revenue Code. . . . All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating, provided that nothing herein may be construed to limit the right of the public school employer to consult with any employees or employee organization on any matter outside the scope of representation.

EERA section 3543.2(a) does not specifically address retirement benefits, but in Temple City Unified School District (1989) PERB Decision No. 782, the Board rejected the employer's argument that retirement benefits were outside the scope of representation. The Board explained that the future benefits of those currently employed were within the scope of representation. (Temple City, supra; Jefferson School District (1980) PERB Decision No. 133.) Only retirement benefits for current retirees were deemed outside the scope of representation. (Temple City, supra citing Allied Chemical and Alkali Workers v. Pittsburgh Plate Glass Co. (1971) 404 U.S. 157 [78 LRRM 2974].)

In the instant charge, taking the Charging Party's facts as true, OUEA negotiated changes in retirements benefits for active employees (future retirees) and current retirees when it negotiated the 2002-2005 Agreement. Under Temple City, supra OUEA had the right to negotiate retirement benefits for current employees as that subject is within the scope of representation or is a mandatory subject of bargaining. Although Temple City, supra indicates retirement benefits for current retirees are nonmandatory subjects of bargaining, that determination is not dispositive of whether OUEA violated the Act by negotiating about this subject with the District.

Employers and unions may negotiate over a nonmandatory subject of bargaining as if it were a mandatory subject of bargaining. (Chula Vista City School District (1990) PERB Decision No. 834; Poway Unified School District (1988) PERB Decision No. 680.) The employer may not, however, insist to impasse over such permissive subjects. (Poway, supra.)

Here, OUEA and the District negotiated over a nonmandatory subject of bargaining which PERB caselaw permits. (Chula Vista, supra.) The charge does not provide facts demonstrating how OUEA's conduct violated the Act, or why the rule set forth in Chula Vista, supra and Poway, supra should not be applied here. The charge fails to demonstrate that the

Respondent's conduct was arbitrary, discriminatory or in bad faith. Thus, this charge must be dismissed.

Even if retirees' benefits is an illegal subject of bargaining the charge fails to demonstrate the parties made substantial changes to the retiree benefits in the 2002 Agreement. Here the Charging Party alleges the new Agreement requires retirees to change to different HMO plans. However, it is unclear from the provided documents whether this change reduced the plan participants' benefits. As noted earlier, the OUEA also negotiated changes in the health benefits article in 1997, the charge does not establish what, if any, changes occurred as a result of the 2002 Agreement.

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 that 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 have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before January 22, 2002, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Tammy Samsel
Regional Attorney