STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

IUOE LOCAL 39, Charging Party, v. BERKELEY UNIFIED SCHOOL DISTRICT, Respondent.	Case No. SF-CE-2426-E PERB Decision No. 1729 December 22, 2004

Appearance: Weinberg, Roger & Rosenfeld by Stewart Weinberg, Attorney, for IUOE Local 39.

Before Duncan, Chairman; Neima and Shek, Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on appeal by IUOE Local 39 (Local 39) of a Board agent's dismissal (attached) of its unfair practice charge. The charge alleged that the Berkeley Unified School District (District) violated the Educational Employment Relations Act (EERA)[1] by unilaterally changing the health care benefit cost to employees. Local 39 alleged this constituted a violation of EERA sections 3543(a), 3543.5(a), (b) and (c), and 3543.7(a).

On appeal, the sole issue is whether there was waiver by Local 39 of the right to bargain an increase in heath benefits.

Upon review of the record, including the unfair practice charge, the amended charge, answer of the District, the warning and dismissal letters, and the appeal by Local 39, the Board adopts the Board agent's warning and dismissal letters as the decision of the Board itself.

[1]EERA is codified at Government Code section 3540, et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

BACKGROUND

Local 39 and the District are parties to a collective bargaining agreement (CBA) that expired on June 30, 2004. Health benefit costs are covered in Article 9 of that agreement.[2]

On March 15, 2004, Local 39 submitted a formal proposal to open negotiations for a successor contract. On April 14, 2004, the District made Local 39's first proposal available for public review. It was in May 2004, that the District learned that health insurance premiums would be increasing for the next fiscal year. On May 26, 2004, the District notified employees by letter that premiums would increase as of July 1, 2004, and if the parties did not reach agreement prior to that date.

The parties met May 28, 2004, to discuss ground rules and signed an agreement on ground rules at the next session on June 7, 2004.

On June 3, 2004, the District (after input from Local 39) sent a memo to District employees that included the following language:

> Enclosed please find important information regarding your increase in health care costs that you are obligated for under the current Local 39 contract. Please note that the District is currently negotiating a new contract with Local 39. If any of these provisions change, I will notify you immediately. However, the District wanted to get you this information as soon as possible so that you are aware of this change and its effective date of July 1, 2004.

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[2]Article 9 of the CBA provides as follows:

> 9.1.1 The District contribution to the cost of the health plan selected by the employee shall cover the cost of the premiums up to a maximum of the cost of Kaiser coverage for a subscriber and two or more dependents including domestic partners, for the term of the Agreement. . . .
>
> 9.1.2. The District shall not automatically assume responsibility for the increase in employee health and welfare premiums after expiration of this Agreement.

The June 23 negotiating session was canceled by Local 39. On July 1, 2004, the District sent a counterproposal to Local 39, responding to proposals Local 39 had made previously. The parties met on July 2, 2004, for a bargaining session. Local 39 orally declared impasse at that meeting. Local 39 on July 6, 2004, requested a declaration of impasse from the District.

The Board agent dismissed the unfair practice charge noting that while health benefits are within the scope of bargaining, Local 39 waived its right to bargain with the management rights clause in CBA section 9.1.2. She stated that this was a clear waiver as "[t]he waiver must specifically reserve for management the right to take certain action or implement unilateral changes regarding the issues in dispute. (CSEA v PERB (1996) 51 Cal.App.4th 923, 938-940.)"

DISCUSSION

In determining whether a party has violated EERA section 3543.5(c), 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 Union High School District (1982) PERB Decision No. 196.)

A waiver must be clear and unmistakable and cover all aspects of the matter in question. (Amador Valley Joint Union High School District (1978) PERB Decision No. 74.)

In California State Employees' Assn. v. Public Employment Relations Bd. (1996) 51 Cal.App.4th 923 [59 Cal.Rptr.2d 488], the court cited the National Labor Relations Board decision in Ador Corp. (1965) 150 NLRB 168 [58 LRRM 1033] where it was determined that, "management had the right to drop a production line without consulting union representatives because such a right was expressly reserved in the parties collective bargaining agreement in unmistakable language." That is the situation here.

CBA section 9.1.2 specifically reserves the District's right to charge increases in benefits to employees by stating, "[t]he District shall not automatically assume responsibility for the increase in employee health and welfare premiums after expiration of this Agreement."

This is consistent with section 9.1.1 of the CBA which does contemplate the District paying increases during the course of the contract. It is very clear from the clauses that once the contract expired, the District would no longer cover increases in health and welfare benefit payments.

The parties had agreed to that language in the CBA, therefore Local 39 had, in fact, waived its right to bargain over it. The waiver occurred before the new round of bargaining began.

The second amended charge alleges that in addition to increased costs in medical premiums, Kaiser coverage co-pays increased from zero to five dollars. There was no specificity in the charge as to how this increase came to be. Because no facts were included to state an allegation that this was done at the behest of the District, rather than Kaiser, Local 39 fails to state a prima facie case on this issue. There is insufficient detail regarding how this increase came to be.[3]

[3]The charge alleges, "The Union was informed on July 2nd that in addition to the above changes they had modified the Kaiser coverage from $0 co-pays to $5 co-pays, effective July 1, 2004." The charge does not indicate who "they" are.

Under PERB Regulation 32615(a)(5),[4] the charging party must present a "clear and concise statement of the facts alleged to constitute an unfair practice." In this instance, the second amended charge may imply the District is responsible for this but does not indicate any activity on the part of the District that lead to the increase. Because of the lack of details, Local 39 has failed to state a prima facie case. (Los Angeles Unified School District (2003) PERB Decision No. 1552.)

ORDER

The unfair practice charge in Case No. SF-CE-2426-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Neima and Shek joined in this Decision.

[4]PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1022
Fax: (510) 622-1027

October 25, 2004

Stewart Weinberg, Attorney
Weinberg, Roger & Rosenfeld
180 Grand Avenue, Suite 1400
Oakland, CA 94612

Re: IUOE Local 39 v. Berkeley Unified School District
Unfair Practice Charge No. SF-CE-2426-E
DISMISSAL LETTER

Dear Mr. Weinberg:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on July 7, 2004. IUOE Local 39 alleges that the Berkeley Unified School District violated the Educational Employment Relations Act (EERA)[1] by unilaterally changing the health benefit cost to employees.

I indicated to you in my attached letter dated October 14, 2004, 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 21, 2004, 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 14, 2004 letter.

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.

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

A document is considered "filed" when actually received before the close of business (5 p.m.) on 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.)

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 _____
Kristin L. Rosi
Regional Attorney

Attachment

cc: Janice Hein

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1022
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October 14, 2004

Stewart Weinberg, Attorney
Weinberg, Roger & Rosenfeld
180 Grand Avenue, Suite 1400
Oakland, CA 94612

Re: IUOE Local 39 v. Berkeley Unified School District
Unfair Practice Charge No. SF-CE-2426-E; Second Amended Charge
WARNING LETTER

Dear Mr. Weinberg:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on July 7, 2004. The IUOE Local 39 alleges that the Berkeley Unified School District violated the Educational Employment Relations Act (EERA)[1] by unilaterally changing the health benefit cost to employees.

Investigation of the charge revealed the following. Local 39 is the exclusive bargaining representative for the District's Operations and Support Services Unit. The District and Local 39 are parties to a collective bargaining agreement that expired on June 30, 2004. With regard to Health Benefits, Article 9 provides as follows:

> 9.1.1 The District contribution to the cost of the health plan selected by the employee shall cover the cost of the premiums up to a maximum of the cost of Kaiser coverage for a subscriber and two or more dependents, including domestic partners, for the term of the Agreement. All employees will be given the opportunity to change carriers during the open enrollment period.
>
> 9.1.2 The District shall not automatically assume responsibility for the increase in employee health and welfare premiums after the expiration of this Agreement.

On March 15, 2004, Local 39 submitted a formal proposal to open negotiations for a successor contract. On April 14, 2004, the District sunshined the union's first proposal for public review.

[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.

In May 2004, the District learned that health insurance premiums would be increasing for the next fiscal year. On May 26, 2004, the District drafted a letter to employees indicting that premiums would increase on July 1, 2004 if the parties did not reach agreement prior to that date. The District sent a copy of this draft to the union for approval prior to distributing the information to employees.

On May 28, 2004, the parties met for the first time to discuss negotiation ground rules. On June 7, 2004, during a second bargaining session, the parties signed an agreement over ground rules.

On June 1, 2004, after making changes suggested by Local 39, the District sent the memo to all affected employees. Included in the memo was the following:

> Enclosed please find important information regarding your increase in health care costs that you are obligated for under the current Local 39 contract. Please note that the District is currently negotiating a new contract with Local 39. If any of these provisions change, I will notify you immediately. However, the District wanted to get you this information as soon as possible so that you are aware of this change and its effective date of July 1, 2004.

On June 23, 2004, the parties were scheduled to meet for a negotiation session. This session was cancelled, however, by the union. On July 1, 2004, the District sent Local 39 a counterproposal to its earlier proposals. On July 2, 2004, the parties met for a scheduled bargaining session. At this meeting, Local 39 orally declared impasse. On July 6, 2004, Local 39 requested a declaration of impasse from PERB.

Based on the above stated facts, the charge as presently written, fails to state a prima facie violation of the EERA, for the reasons provided below.

Charging Party contends the District violated the EERA by unilaterally charging employees for increased health care premiums after expiration of the contract. In determining whether a party has violated EERA section 3543.5(c), 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 Union High School District (1982) PERB Decision No. 196.)

While it is clear that health care benefits and costs are matters within scope, it is also clear that Local 39 waived its right to bargain this issue. A waiver must be clear and unmistakable and

cover all aspects of the particular matter in question. (Amador Valley Joint Union High School District (1978) PERB Decision No. 74; Building Material and Construction Teamsters' Union v. Farrell (1986) 41 Cal.3d 651 [121 LRRM 3479].) A waiver of the right to bargain will not be lightly inferred. (Barstow Unified School District (1996) PERB Decision No. 1138.) The evidence must indicate an intentional relinquishment of the union's rights. (Moreno Valley Unified School District (1995) PERB Decision No. 1106.)

A union may waive its right to negotiate a matter within the scope of representation by consciously yielding that right in a management rights clause. The waiver must specifically reserve for management the right to take certain action or implement unilateral changes regarding the issues in dispute. (CSEA v PERB (1996) 51 Cal.App.4th 923, 938-940.)

Herein, Article 9.1.2 specifically reserves the District's right to charge increased benefits to employees by stating "the District shall not automatically assume responsibility for the increase in employee health and welfare premiums after the expiration of this Agreement." This is consistent with Article 9.1.1 which specifically states the District will pay the premiums until the expiration of the agreement. Given these provision, it is apparent the parties did not contemplate the District continuing to pay for health premium increases post-contract expiration. As such, the District's action in charging employees for these costs does not violate the EERA.

The charge also contends the District engaged in bad faith bargaining. However, facts provided fail to demonstrate any indicia of bad faith on the District's part. As such, this allegation fails to state a prima facie violation of the EERA.

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 Third 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 October 21, 2004, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Kristin L. Rosi
Regional Attorney

KLR