STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 21, AFL-CIO, Charging Party, v. BERKELEY UNIFIED SCHOOL DISTRICT, Respondent.	Case No. SF-CE-2401-E PERB Decision No. 1744 January 26, 2005

Appearance: Davis & Reno by Duane W. Reno, Attorney, for International Federation of Professional and Technical Engineers, Local 21, AFL-CIO.

Before Duncan, Chairman; Whitehead and Shek, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the International Federation of Professional and Technical Engineers, Local 21, AFL-CIO (Local 21) of a Board agent's dismissal (attached). The unfair practice charge alleged that the Berkeley Unified School District (District) violated the Educational Employment Relations Act (EERA) [1] by refusing to deduct dues from six formerly confidential employees now in the unit unless Local 21 agrees to negotiate for these six employees, different longevity and vacation schedules from other employees in the unit. Local 21 alleged that this conduct constituted a violation of EERA section 3543.5(b) and (c).

The Board has reviewed the entire record in this matter, including the unfair practice charge, amendments to the unfair practice charge, the District's response to the unfair practice

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

charge, the Board agent's warning and dismissal letters, and Local 21's appeal. As a result of this review, the Board affirms the Board agent's dismissal subject to the discussion below.

BACKGROUND

The charge alleges as follows: Local 21 is the exclusive representative for the classified supervisors unit. The parties' recognition agreement specifically excludes managerial and confidential employees. On August 3, 2003, EERA section 3540.1 was amended to change the definition of "confidential employee." In the fall of 2003, Local 21 Representative Carol Isen (Isen) told the District that based on this change in the law, six employees who were formerly excluded from representation were now eligible to be in the unit. A District representative (unnamed) agreed that these six employees could be included in the unit.[2]

On January 13, 2004, during negotiations, Local 21 Representative Susan Gwinn (Gwinn) handed six original membership/dues deduction authorization cards signed by the six formerly confidential employees to Brier. Gwinn informed Brier of her understanding that these six employees would be enrolled in Local 21 as members of the unit and that their dues would be deducted from their paychecks. Brier did not indicate that the District had a different position on the matter. However, dues were never deducted. On February 27, 2004, Gwinn asked Brier about this issue, and Brier responded that she would submit the authorization cards to payroll. Again, there was no indication of District disagreement with Local 21's position by Brier. On March 30, 2004, Gwinn stated that Local 21 had not yet received dues deductions for the six employees. In an e-mailed response, Brier stated that the District would not deduct dues for these six employees unless Local 21 agreed to negotiate different vacation and

[2]In its response, the District attached a letter from Isen to District Representative Tina Brier (Brier) dated November 20, 2003 in which Isen requested that the District add four job classifications to the bargaining unit.

longevity schedules for the six employees than those for other employees in the unit. On April 14, 2004, Local 21 filed this charge alleging that the District's conduct in linking the unit modification (non-mandatory) issue with mandatory subjects of bargaining is a refusal to bargain in good faith and thus a violation of EERA.

On April 19, 2004, Local 21 filed an amended charge that added the following claims. On April 16, 2004, allegedly in retaliation for filing the charge, Brier sent a letter to Gwinn stating that the District's position is now that EERA does not permit inclusion of confidential employees into the unit and that therefore confidential employees are not entitled to become members of Local 21. In the amended charge, Local 21 thus alleges that the District refused to bargain by repudiating the previous agreement to deduct dues for the six employees. As a remedy, Local 21 asks, among other items, that the District be ordered to process the authorization cards and initiate dues deductions from the payroll checks of the six employees, accrete the positions of the six employees to the unit, and meet and confer with Local 21 over wages and terms and conditions of employment for those positions, cease and desist tying a unit modification issue to a mandatory subject of bargaining, and post notices.

In its response, the District asserts that Brier never agreed that the six employees were no longer confidential. At most, according to the District, Brier stated that it would evaluate Local 21's claim to determine whether the employees fell within the new definition of confidential. On January 14, 2004, Brier informed Isen that after the District's review, it decided that the employees should be excluded from the unit and presented Isen with signature cards for three of the employees. On March 12, 2004, during negotiations, the District offered to add confidential employees to the recognition clause of the agreement if those employees could be placed on a second two-year vacation schedule. The parties did not reach impasse on this issue and the District eventually removed this proposal from the table. On April 9, 2004,

Gwinn wrote to Brier asking for the return of the authorization cards and stated that Local 21 could not bargain over confidential employees. In the April 16 letter from Brier to Gwinn, Brier stated that she was mistaken in her previous statements about inclusion into the unit and she returned the authorization cards.

BOARD AGENT'S DISMISSAL

The Board agent found that Local 21 failed to state a prima facie case. Although under EERA, units may be modified by agreement between the parties, the parties must use PERB procedures to obtain Board approval of changes to the unit and may not divest the Board of jurisdiction to make unit determinations. (State of California (Department of Personnel Administration) (1985) PERB Decision No. 532-S; PERB Regulation 32781[3]; Hemet Unified School District (1990) PERB Decision No. 820.) According to the Board agent, the charge does not state facts showing the parties' agreement that the six employees should be accreted to the unit. While there is evidence that the parties were discussing the issue in negotiations and the District had introduced a proposal to include the confidential employees in the unit, there is no evidence that Local 21 agreed to this provision. Further, the Board has held that such a provision is a non-mandatory subject of bargaining. As such, according to the Board agent, the revocation of the proposal does not demonstrate bad faith bargaining. The Board agent opined that Local 21 appears to be attempting to obtain unit review of the unit modification through the unfair practice charge procedure. However, the unit modification procedure, not the unfair practice charge procedure, is the appropriate forum to address disputes over the composition of bargaining units and to evaluate the duties of the employees

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

at issue in order to determine whether their positions should be designated as confidential. (Burlingame Elementary School District (2003) PERB Decision No. 1510 (Burlingame).)

DISCUSSION

Local 21 alleges that the District conditioned accretion of six formerly confidential employees into the bargaining unit with Local 21's agreement to negotiate different vacation and longevity schedules for those employees from other employees in the unit. Local 21 alleges that the District initially agreed to the accretion and withdrew its agreement once Local 21 filed the original unfair practice. From the remedy requested, it is clear that Local 21 wants the Board to order the accretion through the unfair practice procedure.

As stated by the Board agent, the appropriate forum for addressing a dispute over a change to the composition of a bargaining unit is to petition for unit modification before the Board. PERB Regulation 32781 provides, in pertinent part:

> Absent agreement of the parties to modify a unit, an exclusive representative, an employer, or both must file a petition for unit modification in accordance with this section. Parties who wish to obtain Board approval of a unit modification may file a petition in accordance with the provisions of this section.

The Board has held that parties may not utilize the unfair practice procedure to circumvent the unit modification process. (Burlingame.) Therefore, Local 21's attempt to accrete the six employees to the unit without the District's agreement is invalid.

However, Local 21 has also alleged that the District unlawfully reneged on an agreement to include the six employees in the unit in exchange for Local 21's agreement to bargain different vacation and longevity schedules for these employees from those already in the unit. Accepting Local 21's version of the facts as true (San Juan Unified School District

(1977) EERB Decision No. 12[4]; Golden Plains Unified School District (2002) PERB Decision No. 1489), in the fall of 2003, an unnamed District representative initially agreed to the unit modification. Then several months later, District Representative Brier conditioned the inclusion of the employees into the unit if Local 21 agreed to negotiate different benefits for the six employees. The letter dated April 16 from Brier to Gwinn attached to the District's response states that confidential employees are not entitled to join the union and denies ever stating that authorization cards would be turned over to payroll.

It is unclear whether there was an agreement to the unit modification in the fall of 2003 since the District representative who allegedly agreed to the change was not named and no date for such an agreement was provided. Further, there is no allegation of a written agreement on this issue. Yet in January 2004, according to Local 21, Brier agreed to turn the authorization cards over to payroll; this is a fact supporting a District agreement to include the six employees in the bargaining unit. In March, after months of requests about the dues deductions, Brier allegedly offered a proposal conditioning the accretion of the additional classifications to negotiations of separate benefits for those positions.

Unit modifications are non-mandatory subjects of bargaining (Chula Vista City School District (1990) PERB Decision No. 834); whereas, vacation schedules[5] are mandatory subjects of bargaining. (See e.g., Los Rios Community College District (1988) PERB Decision No. 684; Palos Verdes Peninsula Unified School District/Pleasant Valley School District (1979) PERB Decision No. 96.) Under Board precedent, a party may not negotiate to impasse a proposal that conditions agreement to a non-mandatory subject on acceptance of mandatory

[4]Prior to January 1978, PERB was known as the Educational Employment Relations Board or EERB.

[5]It is unclear what Local 21 means by longevity schedules.

subjects. (Lake Elsinore School District (1986) PERB Decision No. 603; Travis Unified School District (1992) PERB Decision No. 917.) However, Local 21 has not stated facts demonstrating that the District bargained to impasse over this proposal. Under PERB Regulation 32615(a)(5), a charge must state a clear and concise statement of the facts. On this issue, the charge did not contain the "who, what, when, where and how" of an unfair practice. (Santa Ana Unified School District (2002) PERB Decision No. 1495, citing State of California (Department of Food and Agriculture) (1994) PERB Decision No. 1071-S and United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision No. 944.) In addition, as alleged by Local 21, the District withdrew the proposal after Local 21 filed its charge. Since the District may not lawfully negotiate such a proposal to impasse, the District's action was appropriate. We therefore find that Local 21 failed to state a prima facie violation of EERA for failure to bargain in good faith.

ORDER

The unfair practice charge in Case No. SF-CE-2401-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Shek joined in this Decision.

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
Fax: (510) 622-1027

July 22, 2004

Duane Reno, Attorney
Davis Reno
22 Battery Street, Suite 1000
San Francisco, CA 94111-5524

Re: IFPTE, Local 21, AFL-CIO v. Berkeley Unified School District
Unfair Practice Charge No. SF-CE-2401-E
DISMISSAL LETTER

Dear Mr. Reno:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on April 14, 2004. The Ifpte, Local 21, AFL-CIO alleges that the Berkeley Unified School District violated the Educational Employment Relations Act (EERA)[1] by refusing to include confidential bargaining unit employees in Charging Party's bargaining unit.

I indicated to you in my attached letter dated July 12, 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 July 19, 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 July 12, 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

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July 12, 2004

Duane Reno, Attorney
Davis Reno
22 Battery Street, Suite 1000
San Francisco, CA 94111-5524

Re: International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Berkeley Unified School District
Unfair Practice Charge No. SF-CE-2401-E
WARNING LETTER

Dear Mr. Reno:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on April 14, 2004. The International Federation of Professional & Technical Engineers, Local 21, AFL-CIO alleges that the Berkeley Unified School District violated the Educational Employment Relations Act (EERA)[1] by refusing to include confidential bargaining unit employees in Charging Party's bargaining unit.

Investigation of the charge revealed the following. Charging Party is the exclusive representative of employees in the classified supervisory unit. The parties recognition agreement, dated August 28, 2002, specifically excludes all management and confidential employees. In January 2004, the EERA was amended with regard to the definition of confidential employees. With regard to confidential employees, Government Code section 3540.1(c) now provides as follows:

> (c) "Confidential employee" means any employee who is required to develop or present management positions with respect to employer-employee relations or whose duties normally require access to confidential information that is used to contribute significantly to the development of management positions.

On November 5, 2003, union representative Carol Isen sent a letter to District Director of Personnel Tina Brier indicating the union wanted to include the District's confidential employees in the union's bargaining unit. Ms. Brier indicated the District would look into the matter. Ms. Brier further indicated her belief that confidential employees were permitted to join the union under the new law.

[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 January 14, 2004, Ms. Brier informed Ms. Isen that the district had reviewed the confidential positions and decided that such positions would remain excluded from the union's bargaining unit. On that same date, Ms. Isen presented Ms. Brier with signature cards for three of the confidential employees.

On March 12, 2004, as part of a package proposal, the District offered to add the words "confidential employees" to the recognition clause of the unions agreements, if such employees could be placed on a second two-year vacation schedule. The parties did not reach impasse on this issue, and the District ultimately removed this proposal from the bargaining table.

On April 9, 2004, union representative Susan Gwinn sent a letter to Ms. Brier indicating the union had referred the issue to its attorneys. Ms. Gwinn further requested the District return the authorization cards previously provided to the District. Lastly, Ms. Gwinn indicated the union understood it could not bargain over the confidential employees as they were not included in the bargaining unit.

On April 16, 2004, Ms. Brier sent a letter to Ms. Gwinn indicating that confidential employees could not be included in Charging Party's bargaining unit. Ms. Brier further indicated that her previous statements regarding such inclusion had been mistaken. Lastly, as requested, Ms. Brier returned the union's authorization cards.

Based on the above presented information, the charge is currently written, fails to state a prima facie violation of the EERA, for the reasons provided below.

Units under the EERA, maybe modified or clarified through procedures set forth in PERB or regulations, or by agreement between the exclusive representative and the employer. (California Department of Personnel Administration (1985) PERB Decision No. 532-S; PERB Regulation 32781.) However, the parties must use the PERB procedures to obtain PERB approval of their unit changes, and the parties may not divest PERB of its jurisdiction to make unit determinations. (Hemet Unified School District (1990) PERB Decision No. 820.) A recognized or certified employee organization, may file a petition with the appropriate PERB regional office to modify its unit to add unrepresented classifications or positions.

Nothing provided herein demonstrates the parties reached an agreement regarding the accretion of confidential employees into the bargaining unit. Facts provided demonstrate the parties were in the process of negotiating over such accretion but that no agreement was reached over this issue. While it is clear the District proposed modifying the bargaining unit to include confidential employees, nothing provided herein demonstrates the union agreed to this provision. Additionally, PERB has held that a proposal dealing with the composition of a bargaining unit is a nonmandatory subject of bargaining. (Chula Vista City School District (1990) PERB Decision No. 834.) As such, the District's revocation of the recognition proposal does not demonstrate that bad faith bargaining.

Finally, it appears that the Charging Party is attempting to secure PERB's review of this unit modification issue through the unfair practice charge procedure. However, PERB's unit modification procedure is the proper method to address disputes in the composition of a bargaining unit. (Burlingame Elementary School District (2003) PERB Decision No. 1510.) It is also the proper method to evaluate the duties of disputed employees against the standard for designating a position confidential. Attempting to gain PERB review of a unit modification disputes by filing an unfair practice charge is improper. (Id.) As such the charge fails to state a prime facie case of bad faith bargaining.

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 July 19, 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