

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



TEMPLE CITY EDUCATORS ASSOCIATION,
CTA/NEA,

Charging Party,

v.

TEMPLE CITY UNIFIED SCHOOL DISTRICT,

Respondent.

Case No. LA-CE-4527-E

PERB Decision No. 1972

August 26, 2008

Appearances: California Teachers Association by Brenda E. Sutton-Wills, Staff Counsel, for Temple City Educators Association, CTA/NEA; Law Offices of Margaret A Chidester & Associates by Cathie L. Fields, Attorney, for Temple City Unified School District.

Before Neuwald, Chair; McKeag, Wesley and Rystrom, Members.

DECISION

WESLEY, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Temple City Unified School District (District) to an administrative law judge's (ALJ) proposed decision. The ALJ held that the District violated the Educational Employment Relations Act (EERA)¹ by failing to negotiate in good faith with the Temple City Educators Association, CTA/NEA (TCEA) when it unilaterally adopted a modified version of the parties' tentative agreement in December 2002; refused to implement a salary increase; and by reneging on an agreement for an off-schedule salary payment in April 2003.

The Board reviewed the entire record in this case, including the complaint, proposed decision, hearing transcript, exhibits, post-hearing briefs, the District's exceptions and TCEA's

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

response thereto.² For the reasons set forth below, we reverse the ALJ's proposed decision and dismiss the case.

PROCEDURAL HISTORY

TCEA filed an unfair practice charge on June 13, 2003. The General Counsel's office issued a complaint on August 8, 2003, alleging the District breached its duty to participate in impasse procedures in good faith when the District's negotiator failed to support the parties' tentative agreement, failed to present the parties' tentative agreement to the District board for ratification and when the District later reneged on an agreement to fund a salary increase in violation of EERA section 3543.5(a), (b) and (e).³

A settlement conference was held on October 2, 2003, but the matter was not resolved. The ALJ conducted a formal hearing on February 24, 25, June 17, 18 and 22, 2004. During the

²The District's request for oral argument is denied. The Board has historically denied requests for oral argument when an adequate record has been prepared, the parties submitted comprehensive briefs, and the issues before the Board are sufficiently clear to make oral argument unnecessary. (United Teachers of Los Angeles (Valadez, et al.) (2001) PERB Decision No. 1453; Monterey County Office of Education (1991) PERB Decision No. 913.) This criteria is met in this case.

³EERA section 3543.5 states, in relevant part, that it is 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. . . .
- (b) Deny to employee organizations rights guaranteed to them by this chapter.
- (e) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).

hearing, TCEA moved to amend the complaint to allege that the District's refusal to grant the salary increase was a continuing violation. The ALJ subsequently denied the motion.⁴

After the case was submitted for decision, the ALJ amended the complaint to eliminate the impasse bargaining allegation. Instead, the ALJ ruled the District breached its duty to bargain in good faith under EERA section 3543.5(c).⁵

BACKGROUND

The District is a public school employer within the meaning of EERA section 3540.1(k). The TCEA is a recognized employee organization within the meaning of section 3540.1(l), representing a unit of approximately 270 certificated employees.

In February 2002,⁶ the parties initiated negotiations for a successor collective bargaining agreement for the 2002-2003 school year. TCEA declared impasse in October and PERB certified the parties were at impasse on October 23. With the help of a mediator, the parties reached a tentative agreement (TA1) on December 2. Among other terms, TA1 provided for an increase in the District's contributions for health and welfare benefits and a 1.759 percent salary increase. Absent the District's agreement to fund a larger portion of employee health benefits, effective January 1, 2003, unit employees would be faced with up to \$500 per month in out-of-pocket premium costs.

TCEA members quickly ratified the agreement. The District Board of Education was scheduled to ratify TA1 at its next meeting on December 18. Before this occurred however, the Governor's office announced on December 6, that the state was facing a \$25 billion deficit and proposed unprecedented and severe mid-year cuts in education funding.

⁴TCEA did not appeal this determination. Thus, this issue is not addressed.

⁵EERA section 3543.5(c) states, in part, that it is unlawful for a public school employer to, "Refuse or fail to meet and negotiate in good faith with an exclusive representative."

⁶Dates hereafter refer to 2002, unless otherwise specified.

On December 13, District negotiators Beverly Jones (Jones), assistant superintendent personnel services, and David Jaynes (Jaynes), chief business official, met with TCEA bargaining team members Valerie Jahan (Jahan), chapter president, and Dick Cheney (Cheney), negotiating chair. The District informed TCEA that because of the Governor's proposed education funding cuts there was some indication the District board did not intend to ratify TA1. Jaynes described the impact of the proposed reductions on the District's budget. The Governor proposed a mid-year cut of \$1.9 billion in education funding, which for the District equated to a reduction of approximately \$834,000 for the 2002-2003 fiscal year. Assuming approval of TA1, District representatives indicated the need to cut \$784,854 by the end of the fiscal year to maintain the mandatory three percent reserve. By December 18, the date of the school board meeting, the Governor's office announced the State budget deficit had risen to \$35 billion.

At the December 13 meeting, the parties discussed alternatives to TA1. Jahan testified that during the meeting the District handed them a written proposal to amend TA1. Jones and Jaynes stated that TCEA asked them to provide a written proposal reflecting the District's discussions. A proposal was faxed to Jahan at approximately 7:00 p.m. on December 13. Jones delivered a copy to Cheney at his home on Saturday, December 14.

The proposed amended tentative agreement (TA2) preserved all terms of TA1, including the health benefit plan increases, modifying only the salary increase language as follows:

The District and TCEA agree to defer any salary schedule increase until mid-year 2002-2003 State budget reductions are determined, hopefully, in mid- or late January, 2003, at which time the District and TCEA will collaboratively work together to identify District budget cuts for recommendation to the Board of Education. It is the intent of both negotiation teams and the Board to fund the originally negotiated salary schedule increase,

or whatever portion of that increase can be supported through such cuts.

The TCEA bargaining team caucused on December 16. According to TCEA's witness, the bargaining team was discouraged and felt their backs were against the wall because unless a health benefit increase was put in place before January 1, 2003, some unit employees would be faced with premium costs of several hundred dollars each month. TCEA drafted a counter proposal (TA3), which also maintained all the terms of TA1, with the following modification to the salary increase language:

The District and TCEA agree to defer Article XV, Section 1.3 until February 1, 2003, retroactive to December 1, 2002. When the state budget reductions are determined in January 2003, the District and TCEA will collaboratively work together to identify District budget cuts for recommendation to the Board of Education. It is the intent of both negotiating teams and the Board of Education to fund the originally negotiated schedule increase.

District negotiators stopped by TCEA's meeting and the parties discussed both TA2 and TA3. The District negotiators explained that TA2 provided more flexibility as there was no date certain or a guarantee the 1.759 percent salary increase would be implemented. TCEA negotiators thought that cuts could be identified and the salary increase funded by February. Jaynes stated the District would not have sufficient information on budget reductions by February 2003 and was concerned with putting any dates in the amended tentative agreement. TCEA then suggested April and Jones commented that the Board might be able to work with April. There is no evidence, however, the bargaining teams had reached a consensus at the conclusion of the meeting that a particular amended tentative agreement would be submitted to the District board.

Thereafter, TCEA directed a letter to Superintendent Joan Hillard (Hillard) on December 16 asking the Board to ratify TA1 at the December 18 school board meeting. In the

alternative, TCEA asked the Board to adopt TA3 if it was not going to ratify the original tentative agreement. TCEA attached a copy of its proposed salary increase language with April 2003 as the implementation date for the 1.759 percent salary increase.

Jahan called Jones several times before the December 18 board meeting to inquire about whether the District board had any problems with the proposed TA3. Jones responded that she had not heard anything from the board.

On December 18, during the closed session portion of the school board meeting Hillard reviewed the proposals with the District board. The District negotiating team testified that they presented both TA2 and TA3 to the District board, but the board preferred TA2.⁷ During the public meeting, TCEA addressed the District board urging it to ratify TA1 or, if not, to approve TA3. The District board then voted to adopt TA2. Immediately following the vote, the District board announced that it understood that TCEA would have to ratify the proposal before it could be implemented.

In a letter to TCEA dated December 19, the District's legal counsel, Margaret Chidester (Chidester), described the District board's approval of TA2 as a proposal and reiterated that the tentative agreement would not be implemented absent ratification by the TCEA. If TCEA did not agree to TA2, Chidester stated the District was willing to resume negotiations with a mediator. She acknowledged the approaching deadline for health benefit cost increases and expressed the District's desire to reach agreement with TCEA before January 1, 2003, to avoid the imposition of increased health benefit costs on employees. The letter stated, in relevant part:

⁷The proposed decision states that the District negotiating team presented neither TA1 nor TA3 to the District's board but instead presented only TA2 for consideration. However, the record supports a different finding. Two District witnesses testified that TA3 was also discussed with the District board. Further, District witnesses testified that the board was aware of TA1 and would not adopt it after the Governor's budget proposal was released.

The governing board is fully aware that TCEA may elect not to accept the District's proposal. As stated in the board action, implementation of the agreement, side letter, and amendment is entirely dependent upon whether TCEA is in agreement. The District does not intend to unilaterally implement the amended agreement. Should TCEA elect not to accept this proposal, the District recognizes the mutual obligation of both parties to return to the bargaining table or to a mediation session to continue our efforts to reach agreement.

Chidester's letter was attached to a "Bargaining Update" that was distributed to bargaining unit employees on December 19. The Bargaining Update stated, "This agreement, as amended, can not be implemented until ratified by TCEA."

The TCEA bargaining team met on December 19 and decided to recommend that its members ratify the modified agreement adopted by the District board. TCEA negotiators believed they had no choice as they wanted to have the benefits package in place by January 1, 2003. TCEA believed the District had committed itself to implementing a salary increase if and when funds became available. TA2 was ratified by TCEA members on December 20.

Thereafter, the District initiated efforts to make reductions in the current year budget. In February 2003,⁸ the District approved budget reductions of \$250,000 in non-negotiable items for the 2002-2003 fiscal year.

The Governor's mid-year budget proposals were revised by the Legislature and approved in early March. Immediate drastic cuts in education were averted when the Legislature decided to defer a large portion of the cuts in education funding to the 2003-2004 fiscal year, resulting in reduced funding cuts for 2002-2003. In early March, the District learned that instead of a \$834,000 mid-year cut, the District would actually lose about \$200,000 for 2002-2003. Additionally, it appeared the State would not provide a cost-of-living increase for 2003-2004. On April 2, the District filed a report with the County Superintendent

⁸Dates hereafter refer to 2003, unless otherwise specified.

of Schools certifying the District's financial condition as "qualified," meaning that "this district may not meet its financial obligations for the current fiscal year or two subsequent fiscal years." The "Governor's May Revise" for the 2003-2004 fiscal year indicated the District would be six percent to seven percent below the 2002-2003 funding level, thus placing the District in a deficit. The District also projected deficit spending for 2004-2005 and 2005-2006.

TCEA and the District met on March 28, to discuss mid-year cuts in District expenditures for the 2002-2003 school year and whether the District could afford a salary increase. District representatives outlined the budget cuts already approved by the District board. During the meeting, TCEA consistently said it wanted the District to fund the salary increase before it would discuss any cuts in negotiable items.

TCEA asked if a raise would be implemented. Jaynes stated that even though a raise could be funded for the current year, uncertainty in future state budgets and the likelihood of further cuts in education funding would not allow the District to implement a raise and still maintain the mandatory three percent reserve over the following two years.⁹ This was the first time the District had mentioned the need to make a three-year budget projection. The meeting ended without agreement.

Prior to the parties' next meeting on April 22, the District board provided direction to its negotiating team to determine whether TCEA would agree to an off-schedule salary payment.¹⁰ The District board indicated that it probably could not afford a one-time payment of as much as 1.759 percent but would consider something less.

⁹The cost of the salary increase was calculated by the District at approximately \$235,000 for 2002-2003, \$300,000 for the second year, and \$335,000 annually thereafter. TCEA estimated the cost was somewhat lower.

¹⁰Off-schedule means the increase would not be continued into successive years, i.e., it would operate as a one-time "bonus."

During the April 22 meeting, TCEA suggested cuts in certain non-negotiable items, but cuts in negotiable subjects were not proposed or discussed. The parties did discuss an off-schedule payment. Ultimately, TCEA proposed a 1.759 percent off-schedule payment or, alternatively, a 1.2 percent on-schedule salary increase. District negotiators were not optimistic but agreed to discuss TCEA's counterproposal with the District board. Jahan testified the parties talked about an off-schedule payment, "but it never got past that stage." She stated TCEA "never agreed because we never got to the point of agreeing, but we had offered that."

On April 23, District negotiators communicated to TCEA that the District board had rejected TCEA's proposal. The parties did not meet again nor did TCEA request further bargaining or declare impasse before filing its charge with PERB on June 13.

The parties dispute whether the District could have afforded to fund the 1.759 percent salary increase. Jaynes testified that if a salary increase had or would become possible, he would recommend it to the District board and it would be up to the board to decide whether to implement it. Jaynes admitted that the District's 2002-2003 budget could have supported a salary increase because the Governor's mid-term budget had "righted itself," but he claimed that there was an "enormous amount of uncertainty" as to possible education funding cuts over the next two years. Thus, while a one-time off-schedule payment might have been feasible for 2002-2003, Jaynes contended that he could not have recommended an on-schedule raise at any time without wiping out the three percent reserve, unless substantial additional cuts could be made in the District's projected three-year budget.

Lee Lipps, a staff representative and financial consultant to the California Teachers Association, TCEA's parent organization, testified that of the 55 school districts on the

Los Angeles County Office of Education's (LACOE) qualified certification¹¹ list in April/May 2003, 22 gave on-schedule teacher raises for the 2002-2003 school year. TCEA contends that the District's Interim Reports, financial reports required to be filed with the LACOE, contained inaccuracies in its financial position, several of them so unreasonable as to reveal the District's bad faith in claiming its inability to pay the salary increase.

In general, TCEA contends that, as the Governor's proposed 2002-2003 mid-year budget ultimately "righted itself," the District was in no worse position than it was when it submitted the first Interim Report for 2002-2003 in December 2002, which included the 1.759 percent teacher salary increases. TCEA argues that the District has always been able to implement the increase but has manipulated its budget and its Interim Reports to reflect otherwise. The District contends that it was never able to implement a salary increase.

ALJ'S PROPOSED DECISION

The proposed decision sets forth the ALJ's determination that the District failed to negotiate in good faith with TCEA when it unilaterally adopted TA2. The ALJ concluded TA2 was adopted without TCEA's agreement, without TCEA's knowledge that TA2 would be presented to the District board, and without an opportunity to comment on the District's action or negotiate for another position. The ALJ viewed the District's ratification of TA2 as "a fait accompli, a 'take-it-or-leave-it' proposition."

The ALJ also found the District breached its duty to bargain in good faith in April 2003 by refusing to implement a salary increase when funds were available and by withdrawing an agreement to grant a one-time off-schedule payment.

¹¹Qualified certification indicates that a school district "may not meet its financial obligations for the current fiscal year or two subsequent fiscal years."

DISCUSSION

At issue is whether the District's actions demonstrate that it engaged in surface bargaining in violation of its duty to bargain in good faith. It is the essence of surface bargaining that a party goes through the motions of negotiations, but in fact is weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent agreement. (Muroc Unified School District (1978) PERB Decision No. 80.) Where there is an accusation of surface bargaining, PERB will resolve the question of good faith by analyzing the totality of the accused party's conduct. The Board weighs the facts to determine whether the conduct at issue "indicates an intent to subvert the negotiating process or is merely a legitimate position adamantly maintained." (Oakland Unified School District (1982) PERB Decision No. 275.)

The indicia of surface bargaining are many. Entering negotiations with a "take-it-or-leave-it" attitude evidences a failure of the duty to bargain because it amounts to merely going through the motions of negotiations. (General Electric Co. (1964) 150 NLRB 192, 194, enf. 418 F.2d 736.) Recalcitrance in the scheduling of meetings is evidence of manipulation to delay and obstruct a timely agreement. (Oakland Unified School District (1983) PERB Decision No. 326 (Oakland USD)). Dilatory and evasive tactics including canceling meetings or failing to prepare for meetings is evidence of bad faith. (Oakland USD, supra.)

Other factors that have been held to be indicia of surface bargaining include a negotiator's lack of authority which delays and thwarts the bargaining process (Stockton Unified School District (1980) PERB Decision No. 143 (Stockton USD)) and renegeing on tentative agreements the parties already have made (Charter Oak Unified School District (1991) PERB Decision No. 873; Stockton USD, supra; Placerville Union School District (1978) PERB Decision No. 69 (Placerville USD)).

District Adoption of TA2

The ALJ found the District engaged in surface bargaining at its December board meeting when it adopted TA2 without notice to TCEA and without TCEA's prior agreement.¹²

TCEA contends that after the District abandoned TA1, the District adopted TA2 even though it knew the proposal was unacceptable to TCEA. TCEA asserts the District approved TA2 without prior notice that the District found TA3 objectionable and would not take a vote on TA3. In light of the time constraints facing the parties, TCEA contends this conduct demonstrates bad faith bargaining.

The District contends it was faced with the prospect of unprecedented mid-year state budget cuts that threatened to slash education funding. Given these changed circumstances, the District declined to ratify TA1 and resumed negotiations and exchanged proposals with TCEA. The District asserts the District board did consider TCEA's salary modification proposal prior to adopting TA2. Further, the District contends the ALJ misstated the evidence in concluding that once the District board adopted TA2 it became "a fait accompli, a 'take-it-or-leave-it' proposition." Rather, the District offered to continue negotiations if TCEA requested to resume bargaining.

In the days prior to the District board meeting to consider ratification of TA1, the Governor proposed significant mid-year cuts in education funding. At the time, the extent of the proposed cuts was uncertain. Based on this uncertainty, the District signaled that it would

¹²After the hearing the ALJ amended the complaint on her own motion to replace the impasse bargaining allegation (EERA sec. 3543.5(e)) with the allegation the District violated the duty to bargain in good faith (EERA sec. 3543.5(c)). The ALJ held that impasse was broken when the parties discussed alternatives to TA1 in December 2002. The District asserts the ALJ had no authority to amend the complaint at this stage. Neither party contends that impasse procedures were concluded or that impasse was broken, and we do not so find. However, the ALJ did correctly note that the Board applies the same legal standard to determine whether a party has failed to negotiate in good faith prior to impasse and while engaged in impasse procedures. (Ventura County Community College District (1998) PERB Decision No. 1264.)

not ratify TA1. While a tentative agreement reached by the respective bargaining teams does not bind either side, the Board has held that, "where there has been a good faith rejection of the tentative agreement by the principles, the duty to bargain is also revived." (Alhambra City and High School Districts (1986) PERB Decision No. 560.)

The District board was not required to ratify the first tentative agreement. In this case the record demonstrates, and TCEA does not dispute, that the District's failure to ratify TA1 was excused by the proposed unprecedented and severe mid-year cuts in education funding.

Once the District notified TCEA of its likely rejection of TA1, the parties resumed negotiations. Both parties were cognizant of the time constraints that could result in higher employee health benefit premium costs absent an agreement by January 1, 2003. The parties discussed modifications to the salary proposal. The evidence indicates the bargaining teams were not in agreement on the salary provision modification prior to the District board meeting on December 18.

However, as discussed previously, the record demonstrates that the District board did consider TA3. District witnesses testified the proposal was discussed with the board in closed session. In addition, prior to taking a vote, TCEA representatives addressed the District board and urged approval of TA3 if it would not ratify the salary increase in TA1. When the vote was taken the District board approved TA2. Immediately after the vote, the board announced that TA2 would not be implemented absent approval by TCEA. In a letter to TCEA the next day, the District reiterated that TA2 was a proposal that needed to be ratified by union members before it could be implemented. The District stated it would resume negotiations if the proposal was unacceptable.

The ALJ relied on Placerville USD to find that the District's approval of TA2 represented an unlawful modification of the parties' tentative agreement. In Placerville USD,

the school district's negotiator recommended that the school board delete the organizational security provision before voting to ratify the parties' tentative agreement. After the school board vote, the district informed the union by letter of its decision to modify the tentative agreement without an offer to negotiate the change. PERB found the union did not have an opportunity to comment on the district's actions or engage in further negotiations.

Placerville USD is clearly distinguishable from the present case. In view of the approaching deadline for increased health benefit costs, the District board approved TA2 rather than merely giving guidance to its negotiators of its preferred proposals. Although the District approved TA2 without first reaching a tentative agreement with TCEA's negotiators, it did so with clear communication that TA2 would not be implemented unless TCEA agreed. The District offered to resume negotiations at TCEA's request. The finality of the school board's action in Placerville USD is not present in the instant case. The District's approval of TA2 was nothing more than a counterproposal that TCEA was free to accept or reject. Therefore, we do not find the District's adoption of TA2 amounted to a "take-it-or-leave-it proposition" that demonstrates surface bargaining.

The Failure to Implement a Salary Increase

The ALJ held that the District's conduct during the March and April 2003 negotiations evidenced a failure to bargain in good faith, citing the District's reliance on a three-year budget projection to deny a salary increase and the withdrawal of an agreement to grant a one-time off-schedule payment.

TCEA contends that because the proposed mid-year budget cuts were not as severe as originally anticipated, the District was obligated under the terms of TA2 to implement the originally negotiated salary increase.

The District argues that it did not repudiate any agreement during the March and April 2003 negotiations. The parties' agreement required them to "collaboratively work together," to seek an agreement on a salary increase. However, no agreement was reached. The April 22 meeting resulted in a TCEA counterproposal for a one-time payment that the District negotiators agreed to present to the District board. The District asserts its rejection of that proposal was not unlawful.

The parties' agreement states that TCEA and the District "will collaboratively work together to identify District budget cuts." Thereafter, it was the parties' intent "to fund the originally negotiated salary increase, or whatever portion of that increase can be supported through such cuts."

Contrary to TCEA's position, the language of the agreement does not mandate that a salary increase be implemented without further negotiations if sufficient funds were available. Furthermore, the agreement does not specify the actual amount of a salary increase to be paid once spending cuts were identified. This interpretation is buttressed by testimony that during the parties' discussions on TA2 and TA3, District negotiators stated they preferred TA2 because it did not guarantee a salary increase would be implemented.

Even the ALJ concluded the parties had never reached agreement on a salary increase.

The ALJ stated:

As to an on-schedule increase, after the District's withdrawal of TA1 in December 2002, which was not unlawful, the parties never agreed to a permanent on-schedule increase. Rather, in [TA2], they made an agreement-to-agree, i.e. to 'collaboratively work together' to recommend budget cuts and to fund the originally scheduled increase. Their collaborative work at the March and April, 2003 negotiating sessions did not result in any agreement to recommend budget cuts or to fund an increase.

Thus, TCEA's claim that the District was obligated to fund the original salary increase if there were sufficient funds is without merit. In essence, the parties agreed to continue negotiations over salary and no agreement was reached before TCEA filed its charge.

Furthermore, the ALJ found that the District reneged on a tentative agreement to grant a one-time off-schedule salary payment. The record does not support a determination that the parties reached a tentative agreement on an off-schedule bonus. District negotiators proposed an off-schedule payment of less than 1.759 percent. TCEA countered with a one-time 1.759 percent payment or a 1.2 percent on-schedule salary increase. TCEA negotiators testified that in discussing an off-schedule payment the bargaining team negotiators "never agreed because we never got to the point of agreeing, but we had offered that." Instead, District negotiators informed the TCEA bargaining team that was not optimistic but stated they would take TCEA's counterproposal back to the District board for consideration. The District board rejected both alternatives in TCEA's proposal. The District did not renege on its own one-time payment proposal. Rather, the District rejected TCEA's higher counterproposal. This conduct does not demonstrate the District breached its duty to bargain in good faith.

ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaint and underlying unfair practice charge in Case No. LA-CE-4527-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Neuwald and Members McKeag and Rystrom joined in this Decision.