STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

BERKELEY FEDERATION OF TEACHERS, Charging Party, v. BERKELEY UNIFIED SCHOOL DISTRICT, Respondent.	Case No. SF-CE-2597-E PERB Decision No. 1976 September 9, 2008

Appearances: Weinberg, Roger & Rosenfeld by Stewart Weinberg, Attorney, for Berkeley Federation of Teachers; Atkinson, Andelson, Loya, Ruud & Romo by David A. Soldani, Attorney, for Berkeley Unified School District.

Before McKeag, Rystrom and Dowdin Calvillo, Members.

DECISION

DOWDIN CALVILLO, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Berkeley Federation of Teachers (Federation) of a Board agent's dismissal of its unfair practice charge. The charge alleged that the Berkeley Unified School District (District) violated sections 3543.2(a), 3543.5(c), and 3543.7 of the Educational Employment Relations Act (EERA)[1] by refusing to renegotiate a provision in the parties' current collective bargaining agreement (CBA) that establishes a formula for funding the District's State-mandated reserve for economic uncertainties (reserve).[2]

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

[2]California Code of Regulations, title 5, section 15450 requires that each school district set aside an amount equal to a certain percentage of its expenditures as a reserve for economic uncertainties. The applicable percentage is determined by the school district's average daily attendance. Under this formula, the District must keep an amount equal to 3 percent of its expenditures in the reserve fund.

The Board has reviewed the entire record in this case, including but not limited to, the original and amended unfair practice charge, the District's position statement, the Board agent's warning and dismissal letters, the Federation's appeal and the District's response thereto. Based on this review, the Board affirms the dismissal of the charge for the reasons discussed below.

BACKGROUND

Unfair Practice Charge

On February 2, 2007, the Federation filed an unfair practice charge alleging that the District violated EERA by refusing to "re-open" negotiations over the CBA's reserve funding formula. The charge alleged that during negotiations for the CBA in the spring of 2005, the District told the Federation that it was "legally prohibited" from using parcel tax revenue to fund the reserve. As a result, the reserve would have to be funded entirely from "unrestricted" funds, thereby reducing the amount of funds available for employee wages and benefits.[3] The charge alleged that the District's statements induced the Federation to agree to section 14.2.1.4 of the CBA, which states in full:

> Subtract twenty percent (20%) of any total increase in the additional dollars identified in step 3 and dedicate this amount to the reserve fund obligation. This reserve fund deduction shall be removed from the formula as soon as joint BUSD/BFT budget analysis reveals that the reserve fund obligation has been met with the portion of unrestricted dollars, exclusive of parcel taxes.

After the CBA negotiations concluded, the Alameda County Office of Education (ACOE) approved the District's fiscal year 2006 budget even though it used parcel tax money

[3]The charge also alleged that the District failed to put available unrestricted funds into the Reserve fund. This appears to allege a violation of the CBA. PERB has no authority to adjudicate an alleged contract violation unless the violation also constitutes an unfair practice. (Grant Joint Union High School District (1982) PERB Decision No. 196.) However, because the Federation has not raised this issue on appeal, we need not address it.

to partially fund the reserve. In the District's approved budget for fiscal year 2007, the reserve was again funded in part by parcel tax money.

Sometime in the fall of 2006, ACOE Superintendent Sheila Jordan (Jordan) sent the District a letter which stated in part: "Without the parcel taxes, the District would be unable to meet its financial obligations and the 3% reserve for economic uncertainties." In November or December of 2006, Federation President Barry Fike (Fike) contacted Jordan, who told him that the District could legally use parcel tax revenue to fund the reserve.

On January 9, 2007, Fike sent a letter to District Superintendent Michele Lawrence (Lawrence) asserting that the District's message that it could not use parcel tax money to fund the reserve was either "a miscommunication mistake" or a "knowing and deliberate inaccuracy." The letter demanded that the District re-open negotiations over section 14.2.1.4 because the Federation agreed to the provision "under false pretenses and we now know the truth." On January 17, Lawrence sent Fike a letter refusing the Federation's bargaining demand. The charge alleged that the District had refused to bargain with the Federation over section 14.2.1.4 and sought an order compelling the District to do so.

Dismissal

The Board agent dismissed the charge for failure to state a prima facie violation of EERA. The dismissal stated that the charge did not allege facts establishing a violation of EERA section 3543.2(a), which sets forth the scope of representation under EERA. The dismissal also said that no facts were alleged to support a violation of Section 3543.7, which requires the parties to begin negotiations far enough in advance of adoption of the next fiscal year's final budget to allow for impasse resolution.

The Board agent treated the alleged Section 3543.5(c) violation as a bad faith bargaining allegation.[4] The dismissal stated that the only factual allegation supporting this violation was that the District misrepresented its ability to legally use parcel tax revenue to fund the reserve. The Board agent concluded that the misrepresentation, standing alone, was insufficient to establish bad faith bargaining under PERB case law.[5]

The Federation's Appeal

On appeal, the Federation has abandoned its assertion that the District intentionally misrepresented its inability to legally use parcel tax revenue to fund the reserve. Instead, the Federation relies solely on its claim that section 14.2.1.4 of the CBA "was the product of a mutual mistake of fact." In other words, both the Federation and the District mistakenly believed that it was illegal to use parcel tax revenue to fund the reserve. Because of this mistake, the Federation argues, section 14.2.1.4 must be rescinded and the parties therefore have an obligation to meet and confer over a replacement provision. The Federation contends that the District's refusal to meet and confer under these circumstances violates EERA section 3543.5(c).[6]

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[4]EERA section 3543.5(c) states in relevant part that it is unlawful for a public school employer to "[r]efuse or fail to meet and confer in good faith with an exclusive representative."

[5]In the warning letter, the Board agent also noted that the charge was untimely because it was filed more than six months after the alleged misrepresentation occurred. In the dismissal letter, the Board agent found this defect cured by the allegation in the amended charge that Fike first learned of the alleged misrepresentation in November or December 2006 when he spoke with Jordan.

[6]The Federation does not appeal the Board agent's dismissal of the alleged violations of EERA sections 3543.2(a) and 3543.7. For this reason, we do not address those alleged violations.

District's Response to Appeal

The District argues that the charge failed to allege facts establishing that the adoption of section 14.2.1.4 was the result of a mistake. The District also notes that the Federation provided no legal authority showing that a mutual mistake regarding a CBA provision obligates the parties to bargain over a replacement provision. Finally, the District asserts that the charge is barred by the statute of limitations because the Federation should have known of the District's allegedly false statement when ACOE approved the District's fiscal year 2006 budget, which used parcel tax revenue to partially fund the reserve.

DISCUSSION

The Board agent dismissed the Federation's charge because it failed to state a prima facie case of bad faith bargaining. However, it is apparent from both the original and amended charges that the Federation alleged the District violated EERA, not by bargaining in bad faith, but by refusing the Federation's demand to re-open negotiations over section 14.2.1.4 of the CBA. Accordingly, the charge is properly analyzed as a refusal to bargain charge.

Statute of Limitations

EERA section 3541.5(a)(1) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.) A charging party bears the burden of alleging that the charge is timely filed. (Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.)

The Federation has met its burden. The charge alleges that on January 9, 2007, the Federation demanded in writing that the District meet and confer over section 14.2.1.4.

Attached to the amended charge is a letter dated January 17, 2007, from District Superintendent Lawrence to Federation President Fike, refusing the Federation's demand to meet and confer. The charge was filed on February 2, 2007, less than one month after the District's refusal to bargain. Therefore, the charge was timely filed.

On appeal, the District asserts that the charge was untimely. According to the District, the Federation should have known of the alleged mutual mistake when ACOE approved the District's fiscal year 2006 budget, which used parcel tax revenue to partially fund the reserve. Thus, the District argues, the Federation was required to file its unfair practice charge within six months after approval of the 2006 budget and its failure to do so made the charge untimely.

PERB has often stated that "the limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge." However, "conduct underlying the charge" does not refer to any facts alleged in the charge but only to the conduct alleged to constitute an unfair practice. (See Los Banos Unified School District (2006) PERB Decision No. 1828 [unfair practice charge must be filed "within six months of the alleged illegal act occurring"].) PERB has not recognized mutual mistake of fact as an unfair practice. Thus, even if the Federation learned, or should have learned, of the mistake when the 2006 budget was approved, the statute of limitations period did not begin to run because the Federation had no cause of action before PERB at that time. Instead, the limitations period began to run when the conduct alleged to constitute an unfair practice, the District's refusal to re-open negotiations over section 14.2.1.4, occurred on January 17, 2007. As noted, the charge was timely filed within one month of the refusal and therefore the District's statute of limitations argument fails.

Duty to Bargain

It is axiomatic that a refusal to bargain is not an unfair practice if the refusing party had no duty to bargain. To establish that the District had a duty to bargain, the Federation argues that section 14.2.1.4 of the CBA is a product of the parties' mutual mistake of fact regarding the legality of using parcel tax revenue to fund the reserve. The Federation then asserts that the mistake entitles it to rescind section 14.2.1.4 and that, as a result, the District has a duty to meet and confer over a replacement provision.

In labor law, a party's entitlement to rescind a contract provision based on a mistake of fact has legal significance only in very limited circumstances. In San Diego Unified School District (2007) PERB Decision No. 1883 (San Diego), the Board recognized that "rescission based on a unilateral mistake of fact" could provide a defense to a bad faith bargaining charge. However, the Board cautioned that the defense should only be allowed "under extraordinary circumstances." In that case, the employer refused to implement a two-tiered leave accrual system pursuant to the parties' CBA because during negotiations it had mistakenly underestimated the cost of the system. The Board found that the employer's failure to exercise ordinary diligence during negotiations prevented it from establishing a mistake of fact defense.

Similarly, the National Labor Relations Board (NLRB) has recognized rescission based on a unilateral mistake of fact as a defense in cases where a party refuses to execute an agreed-upon CBA. For example, in Apache Powder Company (1976) 223 NLRB 191 [92 LRRM 1102], the Board recognized rescission based on a unilateral mistake of fact as a defense to a charge that the employer engaged in bad faith bargaining by refusing to execute a CBA that included an incorrect date for a change in pension multipliers. (Id. at p. 191.) In doing so, the Board noted that rescission based on unilateral mistake "is a carefully guarded remedy reserved for those instances where the mistake is so obvious as to put the other party on notice

of an error." (Ibid.; see also Hospital Employees Local 1199 (Lenox Hill Hospital) (1989) 296 NLRB 322, 326 [132 LRRM 1351] [unilateral mistake of fact did not provide defense to charge that union engaged in bad faith bargaining by refusing to execute CBA where employer had no reason to know of union's mistake because mistake was not obvious].)

The NLRB has also addressed rescission based on mutual mistake of fact in the context of a bad faith bargaining charge. In Teamsters Local 439 (Pittsburgh-Des Moines Steel Co.) (1972) 196 NLRB 971 [80 LRRM 1211], a newly-bargained CBA provided that wage rates for plant employees would be increased according to the area rate established by national negotiations between the employer and the union. (Id. at p. 972.) At the time of contracting, both parties believed that the increase would be $1.10. (Ibid.) However, the final area rate required a wage increase of $1.65. (Id. at p. 973.) The employer filed an unfair labor practice charge alleging that the union engaged in bad faith bargaining by refusing to execute the CBA because it did not contain the higher wage rate. (Id. at pp. 971, 975.)

After finding that the union had in fact executed the CBA, the Board went on to state that the parties' "mutual mistake of fact [regarding the wage rate] resulted in a contract which could be rescinded at the option of either party." (Id. at p. 975.) The Board then noted that the employer should be faulted for failing to raise the issue of mutual mistake when it learned of the higher area rate before sending the final draft of the CBA to the union. (Ibid.) Significantly, the Board did not find that the mutual mistake provided a defense to the bad faith bargaining charge. Indeed, in light of the Board's finding that the union did in fact execute the CBA, its mutual mistake discussion appears to be dicta.

The above cases establish that both PERB and the NLRB recognize the legal significance of a party's ability to rescind a contract provision based on mistake of fact only when: (1) the mistake is a unilateral one; and (2) rescission is raised as a defense to a bad faith

bargaining charge. Neither board has recognized rescission based on mutual mistake of fact as a defense to an unfair practice charge. Nonetheless, the Federation urges this Board to find that rescission based on mutual mistake of fact creates an affirmative duty to bargain. Yet the Federation has provided no authority to support this argument, nor has the Board found any such authority. Accordingly, we decline to extend the applicability of rescission based on mistake of fact beyond its current boundaries and hold that a party's entitlement to rescind a contract provision based on mutual mistake of fact does not create a duty to bargain over a replacement provision.

Strong policy reasons support this holding. In San Diego, the Board observed that "holding the parties accountable for their preparation is a necessary safeguard to protect the integrity of agreements between the parties and preserve stability in labor-management relations." Allowing a party to use rescission based on mutual mistake as a means to re-open the CBA would undermine the integrity and stability of the bargaining process by putting the CBA in a perpetual state of uncertainty. Moreover, such a rule would lead to careless bargaining by discouraging parties from verifying each other's statements during negotiations in the hopes that it will lead to an opportunity to renegotiate an unfavorable contract provision in the future. Neither result is desirable.

We recognize, of course, that mutual mistakes of fact will occur in the bargaining process. But the proper place to resolve such mistakes is at the bargaining table. Further, when a party is unwilling to voluntarily surrender a windfall it has received as the result of a mutual mistake, the other party may bring an action in court to rescind the contract. The Board's holding thus places the duty for correcting a mutual mistake of fact in the hands of the parties, where it appropriately belongs, and as a last resort in the courts, with their expertise in matters of contract law.

In sum, as a matter of law the charge fails to establish that the District had a duty to re-open negotiations over section 14.2.1.4. Therefore, the District did not commit an unfair practice by refusing the Federation's demand to re-open negotiations.

ORDER

The unfair practice charge in Case No. SF-CE-2597-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Rystrom joined in this Decision.