

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



IN THE MATTER OF:

FREMONT UNIFIED SCHOOL DISTRICT)

Charging Party,)

vs.)

FREMONT UNIFIED SCHOOL DISTRICT)
TEACHERS ASSOCIATION, CTA/NEA,)

Respondent, APPELLANT.)

Case Nos. SF-CO-19, 20

JOHN SWETT EDUCATION ASSOCIATION,)
CTA/NEA,)

Charging Party, APPELLANT,)

vs.)

JOHN SWETT UNIFIED SCHOOL DISTRICT,)

Respondent.)

Case No. SF-CE-53

PERB Order No. Ad-28

Administrative Appeals

April 5, 1978

Appearances: Arthur J. Krannawitter for Fremont Unified School District; Benjamin D. James, Jr., Attorney for Fremont Unified School District Teachers Association, CTA/NEA, and for John Swett Education Association, CTA/NEA; Keith Breon, Attorney (Breon, Galgani & Godino) for John Swett Unified School District.

Before Gluck, Chairperson; Cossack Twohey and Gonzales, Members.

OPINION

These cases are consolidated for the purposes of this decision because they are factually very similar. In each case, the Executive Assistant to the Board rejected alleged late-filed exceptions to the General Counsel's denial of an objection to the substitution of a new hearing officer. The Fremont Unified School District Teachers Association, CTA/NEA ("Fremont Association"),

and the John Swett Education Association ("John Swett Association"), respectively, appeal the rejection of exceptions.

FACTS

In each case, the hearing officer who presided at the hearing of the matters left the employment of the Board before she rendered a proposed decision. The General Counsel subsequently notified the parties of this fact, proposed to substitute another hearing officer to write the proposed decision, and requested each party to sign a consent to the substitution unless the party objected to the substitution.

In each case, the respective Associations did not sign the consent and instead filed a document which stated, respectively:

Charging Party, JOHN SWETT EDUCATION ASSOCIATION, CALIFORNIA TEACHERS' ASSOCIATION and NATIONAL EDUCATION ASSOCIATION hereby objects to the General Counsel's substitution of another hearing officer in this action.

Respondent, FREMONT UNIFIED DISTRICT TEACHERS' ASSOCIATION, CALIFORNIA TEACHERS' ASSOCIATION and NATIONAL EDUCATION ASSOCIATION hereby objects to the General Counsel's substitution of another hearing officer in this action.

In each case, by a letter dated January 10, 1978, the General Counsel denied the objection to the substitution. The letter from the General Counsel to the John Swett Association also advised that the John Swett Association could appeal the General Counsel's decision by filing exceptions with the Board itself within ten calendar days following receipt of his decision. The letter from the General Counsel to the Fremont Association was also intended to state that exceptions could be filed within ten calendar days, but because of a typographical error, the time within which the exceptions were required to be filed was not clearly stated.

The General Counsel's letter was received in the office of counsel of record for the John Swett Association on January 16, 1978 and the John Swett Association filed exceptions with the Board itself on January 23, 1978. Due to a clerical error the exceptions were rejected by the Executive Assistant to the Board as untimely filed and the Association appealed the rejection to the Board itself.

The General Counsel's letter was received by the Fremont Association on January 13, 1978 and the Fremont Association filed exceptions with the Board itself on January 24, 1978. The Executive Assistant to the Board rejected these exceptions on the grounds they were not timely filed.

The rejected exceptions in each case argued that a proposed decision can not properly be rendered by a hearing officer who has not heard the evidence at the hearing or observed the witnesses, and that the employment of a hearing officer to conduct hearings is a useless act unless the same hearing officer, as trier of fact, also issues the proposed decision. These exceptions also argued that California Administrative Code, Title 8, Section 35018(c) does not provide a basis for allowing substitution of hearing officers. The section provides:

At any time the Board itself may transfer a case to itself, a Board member or another agent.

DISCUSSION

It is found that the exceptions to the General Counsel's decision filed by the John Swett Association were timely and were inappropriately rejected by the Executive Assistant to the Board. The exceptions were filed seven days following the receipt of the General Counsel's decision, well within the ten days allowed for filing by the letter of January 10, 1978.

It is found that the Fremont Association's untimely filing of the exceptions to the General Counsel's decision is excused. Because of the typographical error in the letter of January 10, 1978, the Fremont Association did not have proper notice of the required filing date and therefore is not accountable for the late filing.

While California Administrative Code, Title 8, Section 35018(c) allows for the transfer of a case only by the action of the Board itself, in its Resolution #7 the Board itself, pursuant to the Government Code Section 3541.3(k), delegated to the General Counsel the power of transfer or substitution of hearing officers in unfair practice cases. Government Code Section 3541.3(k) provides:

The Board shall have all of the following powers and duties...

(k) To delegate its powers to...any person appointed by the Board for the performance of its functions...

and Resolution #7 provides in pertinent part:

4) The Board delegates to the General Counsel all responsibility for litigation and unfair practices, including informal conferences, formal hearings, dismissal of charges, and compliance.

The Board finds the General Counsel was within his authority in denying the objections to the substitutions. Generally, hearing officers may be substituted in administrative proceedings, and the hearing officer who hears the evidence need not be the same hearing officer who renders the proposed decision. This is especially so where, as here, the Board itself renders the final decision on appeal on the basis of the record and without having been present at the hearing. Morgan v. United States (1936) 298 U.S. 468; Cooper v. State Board of Medical Examiners (1950) 35 Cal. 2d 242;

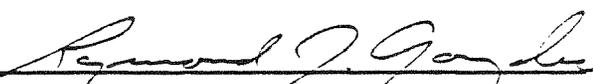
Helmick v. Industrial Accident Commission (1941) 46 Cal. App. 2d 651; National Automobile and Casualty Insurance Company v. Industrial Accident Commission (1949) 34 Cal. 2d 20; 18 ALR 2d 606, "Administrative Decision By Officer Not Present When Evidence Was Taken"; and 2 Davis, Administrative Law Treatise (1958 ed.) Section 11.18, p. 111.

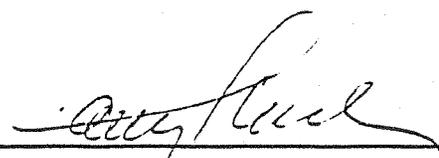
This decision does not preclude a party from filing exceptions to the proposed decision pursuant to California Administrative Code, Title 8, Section 32300.

ORDER

The decisions of the Executive Assistant to the Board, rejecting the exceptions filed by the Fremont Unified School District Teachers Association, CTA/NEA and the John Swett Education Association, CTA/NEA to the General Counsel's denials of their objections to the substitution of new hearing officers in the above-captioned cases, is overruled.

The decisions of the General Counsel to deny the objections of the Fremont Unified School District Teachers Association, CTA/NEA and the John Swett Education Association, CTA/NEA to the substitution of new hearing officers in the above-captioned cases, is sustained.


By: Raymond J. Gonzales, Member


Harry Gluck, Chairperson


Jerilou Cossack Twohey, Member

PUBLIC EMPLOYMENT RELATIONS BOARD

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January 27, 1978

Charles O. Triebel, Jr.
2050 Ordway Building
2150 Valdez Street
Oakland, CA 94612

Re: Fremont Unified School District vs. Fremont Unified School District
Teachers Assn., CTA/NEA
Case No. SF-CO-19, 20

John Swett Education Assn., CTA/NEA vs. John Swett Unified School District
Case No. SF-CE-53

Dear Mr. Triebel:

This will acknowledge receipt of your exceptions in the above-captioned case. Unfortunately, your document was not timely filed.

According to the General Counsel's letter of January 10, 1978, exceptions were due at the Public Employment Relations Board headquarters in Sacramento within ten (10) calendar days following receipt of the decision. Return receipt mail reveals that you received the decision on January 13, 1978, making exceptions due on or before January 23, 1978. Your exception was not received by this office until January 24, 1978.

As a result of this failure to timely file, the enclosed exception cannot be submitted to the Board itself for consideration. Please be advised that while there are no rules to this effect, you are welcome to appeal this rejection of your filing to the Board itself. Should you choose to do so, your appeal should be filed in this office on or before ten calendar days from service of this communication.

Additionally, it is incumbent upon any party submitting exceptions to the Board to include a proof of service by mail in the document. Since your exception contained no proof of service, this is a reminder that one must be included in exceptions if they are to be considered by the Board.

Sincerely,

A handwritten signature in cursive script that reads "Stephen Barber".

STEPHEN BARBER
Executive Assistant to the Board

Enclosure

