STATE OF CALIFORNIA

PUBLIC EMPLOYMENT RELATIONS BOARD

COLTON JOINT UNIFIED SCHOOL DISTRICT, Charging Party, v. ASSOCIATION OF COLTON EDUCATORS, Respondent.	Case No. LA-CO-136
RIALTO UNIFIED SCHOOL DISTRICT, Charging Party, v. RIALTO EDUCATION ASSOCIATION, CTN/NEA, Respondent.	Case No. LA-CO-137 PERB Order No. Ad-11 Administrative Appea July 22, 1981
SAN BERNARDINO CITY UNIFIED SCHOOL DISTRICT, Charging Party, v. SAN BERNARDINO TEACHERS ASSOCIATION, CTA/NEA, Respondent.	Case No. LA-CO-138

Appearances: James C. Romo, Attorney (Atkinson, Andelson, Ruud & Romo) for Colton Unified School District, Rialto Unified School District, San Bernardino City Unified School District; A. Eugene Huguenin, Jr., Attorney (California Teachers Association) and Edward B. Hogenson, Attorney (Citrus Belt, UniServ) for Association of Colton Educators, Rialto Education Association, CET/NEA, San Bernardino Teachers Association, CTA/NEA.

Before Gluck, Chairperson; Moore and Tovar, Members.

DECISION

This case is before the Public Employment Relations Board (hereafter PERB or Board) on interlocutory appeal of a hearing officer's evidentiary ruling jointly certified to PERB by the Association of Colton Educators, Rialto Education Association, CTA/NEA, and San Bernardino Teachers Association, CTA/NEA (hereafter respectively referred to as the Colton Chapter, the Rialto Chapter, and the San Bernardino Chapter, and collectively referred to as Respondents or CTA) and the hearing officer, pursuant to PERB rule 32200.[1]

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[1]PERB rules are codified at California Administrative Code, title 8, section 31000 et seq. All statutory references are to the Government Code unless otherwise specified. PERB rule 32200 provides:

> Objection to Ruling on Motions. A party may object to the ruling on a motion by the Board agent and request a ruling by the Board itself. The request shall be made in writing to the Board agent and a copy shall be sent to the Board itself. The board agent may refuse the request or join in the request and thereby certify the matter to the Board itself. The Board agent may join in the request only where all of the following apply:
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> (a) The issue involved is one of law;
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> (b) The issue involved is controlling in the case; and
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> (c) An immediate appeal will materially advance the resolution of the case.

PROCEDURAL HISTORY

On September 24, 1980, Colton Joint Unified School District, Rialto Unified School District, and San Bernardino City Unified School District (hereafter jointly referred to as Districts or Charging Parties) filed unfair practice charges against Respondents which were subsequently amended and consolidated for hearing. The common thrust of the charges is that, in preparation for the 1980 negotiations with the Districts, Respondents entered into a mutual aid commitment with one another which provided, inter alia, that none would enter into an agreement with its respective District until each of the others had arrived at an agreement and, further, that each would enter into a coordinated work stoppage with the others as part of the allegedly unlawful mutual aid commitment. All of the above conduct is alleged as a violation of section 3543.6(c) of the Educational Employment Relations Act.[2]

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[2]The Educational Employment Relations Act (hereafter EERA) is codified at Government Code sections 3540 et seq. Section 3543.6 states, in pertinent part:

> It shall be unlawful for an employee organization to:
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> . . . . . .
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> (c) Refuse or fail to meet and negotiate in good faith with a public school employer of any of the employees of which it is the exclusive representative.

On Monday, January 19, 1981, a hearing was held on the amended consolidated complaint before Hearing Officer Bruce Barsook. The parties made preliminary statements setting forth their respective theories. Then, the Districts called as their witness Joann Kuiper, a certificated employee in the Rialto Unified School District.

After several foundational questions regarding Kuiper's background as a long-time employee and negotiating committee member, counsel for the Districts established that Kuiper was a member of the Rialto Chapter's negotiating team for the 1980 negotiations which are the subject of the instant charge. He then proceeded to inquire into CTA's 1980 negotiating strategy, with a particular focus on alleged coordinated negotiating by Respondents. Before the matter could be inquired into in depth, counsel for Respondent objected on the grounds that Charging Parties were seeking to impermissibly query an employee witness regarding internal union matters such as formulation of negotiating strategies and the nature of employee participation in that process.

The hearing was adjourned at that point to enable the parties to submit briefs to the hearing officer on the matters raised by the objection. On January 21, 1981, when the hearing was resumed, the hearing officer overruled Respondents' objection and stated his intention to allow the Districts to pursue the line of questioning. Respondents excepted to that

ruling by means of this interlocutory appeal, and the hearing was adjourned pending resolution thereof. For the reasons set forth below, we hereby overrule the hearing officer and sustain Respondents' objection.

DISCUSSION

In support of their objection, Respondents raise a constitutional argument regarding rights to privacy and associational freedom.

While we are mindful of our duty to interpret and administer our statute in a manner consistent with relevant constitutional principles,[3] the agency lacks jurisdiction to adjudicate constitutional claims per se. Rather, our jurisdiction herein derives wholly from our mandate to enforce the EERA. We find ample guidance in the provisions and policies set forth in the EERA upon which to rule on the instant objection.

The State has expressed an interest in the promotion of improved employer-employee relations within the public school system. The Legislature has determined that this interest will be furthered by the scheme of collective negotiations set forth at section 3540 of EERA.

The establishment of goals for negotiations, and the process of communication involved in mapping out the strategy

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[3]Goldin v. Public Utilities Commission (1979) 23 Cal.3d 638 [153 Cal.Rptr. 802].

and tactics for the attainment of those goals, is activity which is of crucial importance to the entire scheme of employer-employee relations as established by the EERA. As noted recently by an Administrative Law Judge of the National Labor Relations Board, in Berbiglia, Inc., (1977) 233 NLRB 1476, 1495 [98 LRRM 1522]:

> If collective bargaining is to work, the parties must be able to forumulate their positions and devise their strategies without fear of exposure. This necessity is so self-evident as apparently never to have been questioned.

Negotiating team members should generally not be compelled to disclose the content or substance of communications regarding planning of strategy and tactics for negotiations.[4]

In the instant case, Charging Parties allege that each of Respondents' chapters unlawfully agreed with the others to condition the execution of an agreement by any Chapter with its respective District upon the reaching of an agreement by the other two chapters with their respective Districts and, further, agreed to combine with the others in an allegedly unlawful strike should any one of the chapters fail to reach an agreement with its District. Negotiating in a manner consistent with the placement of such a precondition upon the

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[4]The rationale expressed here is, of course, applicable to compelled disclosure by members of negotiating teams of districts and employee organizations alike.

execution of an agreement could constitute failure to negotiate in good faith within the meaning of section 3543.6(c).[5] However, we note that the statute does not proscribe the disposition to engage in such conduct in and of itself; rather, it renders it ". . . unlawful for an employee organization to . . . (c) refuse or fail to meet and negotiate in good faith with a public school employer . . . ."[6] It is the conduct of bad faith negotiating, not the agreement to engage therein without any act in furtherance thereof, which is statutorily proscribed.

Charging parties traditionally demonstrate a failure to negotiate in good faith by evidence of a respondent's course of conduct in negotiations, which is available to charging parties and may be developed through introduction of documents and testimony of their own, neutral, and adverse witnesses.[7]

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[5]See, for example, Standard Oil Co. v. N.L.R.B. (6th Cir. 1963) 322 F.2d 40 [54 LRRM 2076].

[6]Section 3543.6(c), supra.

[7]Charging Parties argue that the fact that PERB's procedures require them to prosecute their own unfair practice charges without the aid of an independent prosecutorial arm of the Board militates in favor of allowing them to probe into these evidentiary areas which are outside their control. We disagree. Labor boards and courts infer the lack of the requisite intent to bargain in good faith from affirmative evidence regarding a respondent's overall course of negotiating conduct, evidence which is available to the Charging Parties herein. For example, see N.L.R.B. v. Almeida Bus Lines (1st Cir. 1964) 333 F.2d 729 [56 LRRM 2548].

Evidence of the agreement alleged here would tend to explain the character of Respondents' conduct and thus be indicative of bad faith. However, given the present state of the evidence, with no showing as to Respondents' negotiating conduct, there is nothing to be explained or characterized.

In the instant case, Charging Parties have not introduced evidence of Respondents' negotiating conduct which would tend to demonstrate the alleged existence of an unlawful pre-negotiations agreement. Thus, no showing has been made that, for example, Respondents merely went through the motions of negotiating, or that one of Respondent chapters reached apparent agreement and then delayed execution thereof pending the reaching of an agreement in the other Districts, or that a concerted work stoppage or slowdown was called for or carried out by Respondents. Without some affirmative showing of conduct by Respondents tending to indicate the lack of good faith, we are not prepared to mandate testimonial disclosure of their private communications relating to negotiations strategy. Under the circumstances of this case, it is our view that to compel such disclosure would drastically chill the exercise of parties' negotiating rights established by the EERA.

ORDER

Upon the foregoing decision and the record as a whole, the Public Employment Relations Board ORDERS that:

The hearing officer's ruling on Respondents' objection to Charging Parties' line of questioning regarding bargaining strategy and tactics and communications relating thereto is hereby OVERRULED. The objection is thus SUSTAINED, for the reasons set forth in this decision.

Barbara D. Moore

Irene Tovar

Harry Gluck, Chairman, concurring and dissenting:

The majority finds that a pre-negotiation agreement on strategy and tactics is not "conduct" under the EERA. Apparently, however, they would nevertheless permit a charging party to compel the parties to such an agreement to testify as to its content where the purpose of such inquiry is to "explain" actual conduct which may be unlawful and concerning which some foundation evidence has been offered. I find it unnecessary to decide whether the distinction is valid since,

in any event, I would deny a party's request to compel disclosure of this sort.

Appellant organizations argue that their negotiating agreement is entitled to confidentiality as a matter of the internal affairs of their respective organizations. In essence, they claim a privilege against enforced testimony.

Sections 930-1070 of the California Evidence Code set forth those privileges which are available in an adjudicatory hearing. The "privilege" claimed by appellants is not among those listed and, except as otherwise provided by statute, no person has a privilege (sec. 911). The courts have held that none may be fashioned by the judiciary.[1] Further, even where the forum is not subject to the provisions of the Code, it is bound by section 911 (sec. 910). The question, then, is whether PERB can properly exclude testimony of the type sought by the Districts. I believe that EERA, read in its entirety, permits such a finding.

PERB, as a state agency, must administer the statutes entrusted to it as it finds them. EERA section 3541.3(n) directs this Board:

> To take such other action as the board deems necessary to discharge its powers and duties and otherwise to effectuate the purposes of this chapter. (Emphasis added.)

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[1]Montebello Rose Co., Inc. v. Agricultural Labor Relations Board (1981) 119 Cal.App.3d 1; Valley Bank of Nevada v. Superior Court (1975) 15 C.3d 652 [125 Cal.Rptr. 553].

Thus, if EERA intends that negotiation planning be protected from disclosure, PERB must exercise its adjudicatory powers accordingly.

In determining whether such is the Act's intent, it is well to recognize that EERA is the product of almost fifty years of pragmatic experience with labor relations legislation.[2] While contemplating the voluntary joint resolution of employer-employee disputes which tend to disrupt the public educational process, the Act, nonetheless, rings with adversarial overtones. Thus, it balances, often precariously, on the scales of competing interests.

It is inherent and inescapable that there be "gamesmanship" in the negotiating process. Contract settlements are demonstrations of the fact, if not always the art, of compromise. But compromise does not result solely from the reciprocal acts of reducing demands and increasing offers. It is both an aspect and a consequence of strategy, the track along which the process moves towards agreement.

Certainly the Legislature understood this when it provided for the use of mediation and advisory factfinding after both

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[2]The Wagner Act (1935) 29 U.S.C. Sections 151-168, as amended by Pub. L. No. 101 (Taft-Hartley Act). See San Diego Teachers Association v. Superior Court (1979) 24 Cal.3d 1 and Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507; 87 LRRM 2453] in which the California Supreme Court held that the federal law was an appropriate source of guidance in the interpretation of comparable California statutes.

parties had reached their respective "final" positions.[3] PERB may have recognized this when it directed the parties to resume negotiations, albeit on limited matters, even where factfinding had been completed.[4]

But it is clear that forced exposure of a party's strategy is inimical to the negotiating process. Without protection from such disclosure, parties proceeding to actual negotiations could not be assured that, by complying with the statutory mandate to do so, they would not be required to reveal their objectives and tactics to the kind of prying inquiry sought here. Any apparent delay in meeting at the table, any proposal made which is arguably outside of scope, any harsh language uttered under the emotional tensions of negotiations, could thus be characterized by a charging party as "unfair" and thereby open the door to "explanatory" intrusion into the respondents' internal plans and strategies.[5] Caucuses, taken during the course of negotiations, would be vulnerable to such

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[3]EERA sections 3548 and 3548.1.

[4]Modesto City Schools (3/12/80) PERB Decision No. IR-12.

[5]It is claimed here that appellants bypassed the employer's negotiating committees and met directly with individual school board members on negotiable matters, attended impasse proceedings in bad faith by refusing to cooperate with the mediator's request for a face-to-face meeting between the parties, filed spurious unfair practice charges to frustrate negotiations and directed harsh and inflamatory remarks at the employers.

inquiry if a party's conduct upon resumption of negotiation was made to look arguably improper by a well-drawn charge and some inconclusive preliminary evidence. Indeed, the very act of taking caucuses could be alleged to be a delaying tactic. It is not inconceivable that a party's "bottom line" negotiating position could eventually be extracted. Here, for example, appellants might be forced to reveal their alleged strike plans and the events that would trigger them or to openly confess that they have no such plans at all.

It seems clear that the Legislature recognized this essential character of the negotiating process. Section 3549.1 of the Act expressly exempts from various statutory public meeting requirements negotiating sessions and meetings with mediators, factfinders and arbitrators.[6] Section 3549.1(d) exempts:

> Any executive session of the public school employer or between the public school employer and its designated representative for the purpose of discussing its position regarding any matter within the scope of

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[6]Furthermore, mediators, who may be called in by PERB, are probably exempt by law from examination on matters learned in the course of their services. California Labor Code Section 65, which makes records compiled by the Department of Industrial Relations in the course of its mediation functions confidential, has been interpreted by the Attorney General to prevent mediators from being compelled to testify about mediation meetings. 51 Ops. Cal.Atty.Gen. 201. See also Tomlinson of High Point, Inc. (1947) 74 NLRB 681, holding in part, that public policy requires federal mediators not be required to testify on such matters.

> representation and instructing its designated representatives.[7]

It is logical to conclude that the Legislature desired both parties' internal planning processes and preparation for negotiations to be protected from disclosure and recognized that existing law would have to be amended to permit the employer to act in closed session. The same affirmative steps were not taken with respect to employee organizations simply because no existing statute requires them to discuss their plans at public meetings. Quite likely, too, the need for such legislation was not contemplated because

> [i]f collective bargaining is to work, the parties must be able to formulate their positions and devise their strategies without fear of exposure. This necessity is so self evident as apparently never to have been questioned. Berbiglia, Inc. (1977) 233 NLRB 1476, 1495 [98 LRRM 1522]. (Emphasis added).

While the case before us concerns the employers' effort to inquire into the plans of the exclusive representatives, there is no reason to believe that employers should not be concerned.[8] Strategy discussions among school officials and

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[7]An identical provision is contained in the Higher Education Employer-Employee Relations Act, Government Code section 3596. Senate Bill 376, currently in the California State Assembly, would amend the State Employer-Employee Relations Act, Government Code section 3512 et seq. to include an identical provision.

[8]See fn.4, majority opinion.

negotiators outside the closed meeting would, undoubtedly, be vulnerable to forced disclosure. Indeed, it appears that there is no absolute evidentiary privilege covering the contents of closed public agency meetings. Where testimony has been excluded, the court has found other grounds for its decision. For example, in County of Los Angeles v. Superior Court (1975) 13 Cal.3d 721 [119 Cal.Rptr. 631], the California Supreme Court found impermissible plaintiff's effort to inquire into the supervisors' motives and deliberations leading to the adoption of certain negotiated labor agreements following strike threats by various employee organizations. But, it is clear that the Court based its decision on the constitutional separation of powers between legislature and judiciary. Permitting the plaintiff's discovery would be inimical to the

> fundamental, historically enshrined legal principle that precludes any judically authorized inquiry into subjective motives or mental processes of legislators. (p. 726)

Yet, County of Los Angeles, supra, though it cannot be said to stand as authority for the proposition put forth here, provides a useful analogy. Just as the Constitution represents the public interest in a certain system of state government, so EERA represents the public interest in a system of employer-employee relations as the means of minimizing disruption of the educational process caused by labor disputes. And even as confidentiality is essential to the

deliberative processes of the legislature and the courts, so it is to the formulation of the parties' negotiating plans and strategies. Indeed, as Berbiglia, supra, implies, confidentiality is a "fundamental, historic principle" of labor negotiations.[9]

Finally, I would note that rejecting the District's request would present little, if any, damage to this Board's adjudicatory process or to its ability to provide to a charging party an effective means of pursuing its charge. Where the issue is actual conduct, as is the case here, necessary information as to the character of that conduct is almost always accessible

> . . . without delving deeply into specific ultimate factual circumstances and such searching probes ought to be avoided wherever possible.[10]

I conclude that in this combination of public policy, the essential character of collective negotiation and legislative action, one may reasonably find a legislative intent to prevent intrusion by one party to negotiation into the other's

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[9]In Montebello Rose Company, Inc., supra, the Court required production of written communications between the employer's general manager and its attorney-negotiator relating to conduct of negotiations. However, the Agricultural Labor Relations Act expressly makes the Evidence Code applicable to the board's unfair practice proceedings. Further, that Act contains no provision comparable to EERA section 3549.1(d).

[10]In re: Lifschutz (1970) 2.C.3d 415 [85 Cal.Rptr. 829].

negotiating plans and strategy. In furtherance of its obligation to effectuate the legislative intent, PERB should reject the Districts' request.

Harry Gluck, Chairman