STATE OF CALIFORNIA
DECISION OF THE EDUCATIONAL
EMPLOYMENT RELATIONS BOARD

CLARENCE OLSON, Charging Party	)	
and	)	Case No, LA-CE-43
MOUNTAIN VIEW SCHOOL DISTRICT, Respondent	)	EERB Decision No. 17

Appearances; Clarence Olson, Individual, representing himself.

Before Alleyne, Chairman; Gonzales and Cossack, Members.

OPINION

The charging party appeals from the dismissal of an unfair practice charge by the General Counsel of the Educational Employment Relations Board.

On November 4, 1976, Clarence Olson, an individual employee of the Mountain View School District (District), filed an unfair practice charge against the District. As supplemented by two amendments, the charge contains four allegations and alleges the District violated Government Code Sections 3543.5, 3543.2, 3543.6 and 3543.7.[1] While the General Counsel served the

[1] Sec. 3543.5 states;

> It shall be unlawful for a public school employer to:
>
> (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.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.
>
> (d) Dominate or interfere with the formation or administration of an employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

original charge upon the District, he subsequently dismissed the charge before the District was required to answer.

The first allegation of the charge states that the District violated the terms of a "Memorandum of Understanding" executed on or about September 22, 1976 by the District and the Mountain View-Teachers Association. In addition to providing for a salary increase the Memorandum of Understanding stated:

> Effective October 1, 1976, the District shall provide $1,487.00 per eligible employee to be utilized in the payment of premiums for;
>
> A, Medical insurance
> B, Dental insurance
> C, Tax sheltered annuity program
>
> All eligible employees must utilize the stipulated amount in the listed three areas.

The charging party alleged in essence that the above provisions meant that an employee could apply the funds to any one or two or all of the three listed programs but would not be required to make payments into any of them.

On or about October 15, 1976, the charging party signed a "Mountain View School District Benefit Selection Sheet" which allowed him to select the program benefits he desired, except that it contained the following two provisions:

> All employees are required to participate in the District's Family Dental Program costing $28.97 tenthly. The balance $119,73 may be used for optional plans listed below [referring to the medical and annuity programs].

and:

(continued)

> (e) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).

Sec. 3543.6, relating to unfair practices by an employee organization, was improperly cited by the charging party since he did not file the charge against an employee organization.

Sec. 3543.2 defines the "scope of representation" in the negotiations process. Section 3543.7 dictates the time that negotiations must begin.

All statutory references hereafter are to the Government Code unless otherwise noted.

> I am prepared to forfeit additional district contributions to my tax sheltered annuity should I make any withdrawal from the annuity account during my employment by the district.

The charging party alleges that the District's requirement in the Benefit Selection Sheet that all employees participate in the dental program is, "An Unfair Employment Practice, Discriminatory, Unconstitutional and not required in [the Memorandum of Understanding]"; further, it is "...arbitrary and capricious and unconstitutional under the first amendment (religious freedom)..."; and finally, there is "no authorization in state school law for...requiring employees to participate in a mandatory dental plan."

The charging party alleges that the provision in the Benefit Selection Sheet regarding the forfeiture of the annuity contribution is:

> ...an unfair employment practice, Is arbitrary and capricious. Is discriminatory.. Is unconstitutional under the equal protection clause of the fourteenth amendment. Is illegal in that the district purports to control the moneys rightfully due the employee once in the employee's account.

He further alleges that the provision is "...Unconstitutional and not required in [the Memorandum of Understanding]...." and that there is "no authorization in state school law for...Prohibiting employees from withdrawals of TSA funds... [or] Permitting a school district to refuse future TSA deposits if the employee withdraws funds."

The second allegation of the charge was the mere conclusory statement that,[2] "The respondent has allegedly violated Section 3543.7."

The third allegation is also a conclusory statement. Specifically, the charging party stated:

> After impasse was declared [by the District] on October 13, 1976, the respondent has allegedly provided health and welfare benefits without negotiating in good faith, therefore discriminating against employees pursuant to section 3543.5...

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[2] Gov. Code Sec. 3543,7 provides:

> The duty to meet and negotiate in good faith requires the parties to begin negotiations prior to the adoption of the final budget for the ensuing year sufficiently in advance of such adoption date so that there is adequate time for agreement to be reached, or for the resolution of an impasse.

Finally, the charging party alleges only the conclusion that the District "has failed to adopt a grievance processing procedure pursuant to Section 3543.2 and 3543.7."

In dismissing the charge, the General Counsel reasoned that:

> ...the amended charge does not state, with sufficient particularity, any facts to support the allegations. The allegation that a grievance processing procedure was not adopted does not state a cause of action under the Educational Employment Relations Act. The Educational Employment Relations Board unfair practice hearings are not the proper forum for alleged violations of "state school law"...or of the "equal protection clause of the fourteenth amendment..."

For the purpose of ruling on this appeal of the dismissal, we assume that the essential facts alleged in the charge are true.[3]

As previously stated, the first allegation of the charge stated that the District violated the Memorandum of Understanding. This action by the District, if true, would not state an unfair practice under the Educational Employment Relations Act (EERA). Section 3541.5(b) provides:

> The Board has no authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of such an agreement that would not also constitute an unfair practice under this chapter.

The charging party has alleged nothing more in the first allegation than that the District violated the terms of its agreement with the Association expressed in the Memorandum of Understanding. Nothing in the charge even hints that the facts also constitute an unfair practice under Section 3543.5. The charging party also alleged violations of "state school law"[4] and the federal Constitution, apparently independent of the unfair practice charge. The Board is not the proper forum to decide such unrelated civil matters. Therefore, the first allegation of the charge is dismissed.

None of the remaining allegations of the charge state any facts to support the alleged violations. The Board remands these allegations to the General Counsel who shall allow the charging party an opportunity to amend the

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[3] San Juan Federation of Teachers, EERB Decision No, 12, March 10, 1977, at page 4.

[4] The Board assumes the charging party has reference to "state school law" other than the EERA.

charge within 30 calendar days after the filing of this decision. If the charging party chooses to amend, he must state the facts on which he bases his charge. Further, he must specify which subsection or subsections of Section 3543.5 have allegedly been violated by the District with regard to each allegation of the charge, Noncompliance with Section 3543.2 or Section 3543,7 does not alone constitute an unfair practice. Such noncompliance must be related to a violation of a specific subsection or subsections of Section 3543.5.

The charging party has already twice amended the charge, yet still fails to allege a violation of Section 3543,5, The charging party may, within 10 calendar days after the filing of this decision, apply for Board assistance under 8 California Administrative Code Section 35006.[5] If the charging party demonstrates to the satisfaction of the General Counsel that he is unable to retain counsel, or shows other extenuating circumstances, the General Counsel may assign a Board agent to assist the charging party in drafting the charge.

The charging party did not serve a copy of this appeal upon the respondent District as is required by 8 California Administrative Code Sections 35007(b)[6] and 35002(b)[7]. Thus, the District did not have an opportunity to file the statement in opposition to the appeal allowed by 8 California Administrative

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[5] 8 Cal. Adm. Code Sec, 35006 provides:

> If the charging party is unable to retain counsel or demonstrates extenuating circumstances, as determined by the Board, a Board agent may be assigned to assist such party to draft the charge or gather evidence.

[6] 8 Cal. Adm, Code Sec. 35007 provides in pertinent part:

> (b) The charging party may obtain review of the dismissal by filing an appeal to the Board itself within ten calendar days after service of notice of dismissal. The appeal shall be in writing, signed by the party or its agent and contain the facts and arguments upon which the appeal is based.

[7] 8 Cal, Adm. Code Sec. 35002 provides in pertinent part:

> (b) An unfair practice charge, an application for joinder and a petition to submit an informational brief shall be considered "filed" by a party when actually received by the appropriate regional office. All other documents referred to in these rules and regulations shall be considered "filed" by a party when actually received by the appropriate regional office accompanied by proof of service of the document on each party.

Code Section 3500.7 (c)[8], If the charging party chooses to amend the charge, he must serve the District with the original charge, all amendments and all other documents filed in connection with this case.

ORDER

The General Counsel's dismissal of the first allegation of the unfair practice charge, relating to the District's alleged violation of the Memorandum of Understanding, filed by Clarence Olson against the Mountain View School District, is sustained.

The remainder of the charge is remanded to the General Counsel to allow the charging party, within 30 calendar days after the filing of this decision, an opportunity to amend the remanded allegations of the charge to state a violation or violations of Section 3543.5. The charging party, within 10 calendar days after the filing of this decision, may apply pursuant to 8 California Administrative Code Section 35006 for Board assistance in drafting an amendment. Within five calendar days after such application for assistance, the General Counsel shall notify the charging party whether or not he is entitled to assistance. The Board agent assisting the charging party shall obtain an affidavit from the charging party which states all the facts relevant to the alleged unfair practice and this affidavit shall be incorporated in the amendment.

If the charging party amends, the charge, he shall serve the District with, the original charge, all amendments and all other documents filed in connection with this case.

Any amendment, whether drafted with or without the assistance of the General Counsel, shall be subject to dismissal by the General Counsel if it fails to state an unfair practice. If the charge is not amended within

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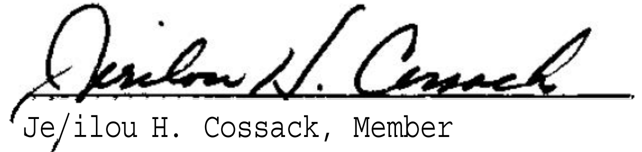
[8]Cal. Adm. Code Sec, 35007 provides in pertinent part:

> (c) Any party may file a statement in opposition to the appeal within ten calendar days after service of the appeal of the dismissal.

30 calendar days after the filing of this decision, the charge shall be dismissed by the General Counsel and no appeal may be taken from such dismissal.



By:" Raymond J. Gonzales-; Member

Jerilou H. Cossack, Member

Dated: May 17, 1977

Reginald Alleyne, Chairman, concurring in part, dissenting in part:

I agree that this individual charging party ought to be given an opportunity to qualify for Board assistance within the meaning of EERB Rule 35006, since that is what the rule provides. I think, though, that most, if not all, aspects of the charge are incapable of being amended to state an arguable claim that the District violated the law, and should be dismissed accordingly.

My colleagues recognize the well-established legal concept that some written allegations of a law violation are so defective on their face, that no amendment may cure the defect. For they correctly sustain, without leave to amend, the charge alleging a violation of the memorandum of understanding between the Association and the District, and the charge that the District violated "state school law" and the federal Constitution. I join the Board in sustaining those dismissals.

I dissent from the majority opinion to the extent that it fails to treat two other aspects of the charge in the same manner that it treats the alleged violation of a memorandum of understanding: (1) the allegation of this individual charging party that the District unlawfully failed to negotiate in good faith concerning health and welfare benefits; and (2) the allegation that the District "failed to adopt a grievance processing procedure pursuant to [Government Code] Sections 3543.2 and 3543.7."

The Charge Of Refusal 1b Negotiate

Health and Welfare Benefits

The refusal-to-negotiate portion of the EERA, Section 3543.5(c) provides:

> It shall be unlawful for a public school employer to:
> ***
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

The exclusive representative with whom the District is obligated to negotiate, the Mountain View Teachers Association, has not filed a refusal-to-negotiate charge against the District.

I know of no precedent in either the private or public sectors which permits an individual, alone, to successfully maintain a refusal-to-negotiate charge against an employer.

When an employee organization becomes certified or validly recognized as an exclusive representative, the employer must, as the term "exclusive representative" connotes, negotiate in good faith only with that representative during the term of the employee organization as exclusive representative. The exclusive representative, alone, may formulate the tactics it will employ at the negotiating table. If an employee organization other than the exclusive representative may not represent employees represented by the exclusive representative, it follows that no individual, acting in a purely individual capacity, as is this individual charging party, may, in negotiations with the employer, represent those employees. It follows that no individual employee, acting purely in an individual capacity, ought to be able to control the course of negotiations between the employer and the exclusive representative.

The refusal-to-negotiate charge may be part of an exclusive representative's negotiating tactics. The refusal of an exclusive representative to file a refusal-to-negotiate charge might also be part of the exclusive representative's negotiating tactics. If an exclusive representative does not file a refusal-to-negotiate charge against an employer, its interests at the negotiating table may be impeded to its detriment if an individual is allowed to successfully pursue such a charge and, consequently, to compete with the exclusive representative.

It is true that these events are not likely to occur unless an agency or court ultimately finds valid a refusal-to-bargain charge filed by an individual, alone, and issues or approves a cease and desist order against the employer. But that is precisely why this charge should be dismissed without a hearing at this stage of the process. On the assumption that the facts alleged in this aspect of the charge are true (including the fact that the exclusive representative is not the charging party), then, for policy reasons going to the core of the collective negotiations process, no violation of the law has been validly alleged.

The majority opinion does not discuss at all the startling implications of its decision not to dismiss a refusal-to-negotiate charge filed by an individual, alone. After sustaining the dismissal of the charge in respect to an alleged violation of the memorandum of understanding, and stating the reasons for that dismissal, my colleagues only rationale for the decision not to dismiss the refusal-to-negotiate allegation is:

> None of the remaining allegations of the charge state any facts to support the alleged violations....

Like the charge alleging a violation of the memorandum of understanding, which stands dismissed, I believe that no facts alleged by the charging party can cure the defect inherent in this individual's charge of refusal to negotiate. I would accordingly dismiss this portion of the charge.[1]

[1]The exclusive representative could become a party to the refusal-to-negotiate charge, but not by an amendment of the charge by the present individual charging party. To become a party to the charge, the exclusive representative would have to affirmatively file a signed refusal-to-negotiate charge against the District and apply for joinder under EERB Rule 35016, or pursue a separate charge against the District. If, in conjunction with that possibility, the charging party qualifies: for Board assistance under EERB Rule 35006, following the remand of this case to the General Counsel, the Board's image as a neutral decision-maker in disputes arising under the EERA will, in my judgment, be imperiled, if "Board assistance" means that the Board agent assisting the charging party will advise the charging party to encourage the exclusive representative to file a refusal-to-negotiate charge against the District. I would be less troubled by that prospect, if I could think of anything short of joinder by the exclusive representative to make this individual's refusal-to-negotiate charge valid in its face.

The "Grievance Processing Procedure"

The individual charging party's allegation that the District violated the EERA by failing "to adopt a grievance processing procedure pursuant to Sections 3543.2 and 3543.7" of the EERA is also a refusal—to-negotiate allegation by an individual, alone. The EERA sections relied upon by the charging party state that a grievance-arbitration procedure is a negotiable subject within the meaning of the EERA. Therefore, even though this aspect of the charge is not expressly characterized as a refusal-to-negotiate charge, the charging party's allegation is, in this respect, essentially a complaint that the employer and the exclusive representative did not negotiate and reach an agreement containing a grievance-arbitration clause. Accordingly, for the same reasons expressed earlier, this aspect of the charge should be dismissed on the ground that it was not filed by the exclusive representative.

More so than the individual's charge of refusal to negotiate in respect to health and welfare benefits, the charge that the employer "has failed to adopt a grievance processing procedure" is illustrative of the potential for disruption of the negotiations process if both the exclusive representative and an individual are permitted to simultaneously foster and implement negotiating table strategy and tactics.

As a matter of sound and valid negotiating tactics, a union may open negotiations by insisting on a grievance-arbitration clause, among other things, even though the union may not really want a grievance-arbitration clause. The union may prefer to make the employer think that it wants a grievance-arbitration clause and then, at a later stage in the bargaining process, trade off the arbitration demand for a larger increase in economic benefits. This is a legitimate bargaining tactic. Yet, if in the interim, an individual employee were able to convince a board like the EERB that the employer unlawfully refused to bargain in good faith on failing to include a grievance-arbitration clause in the agreement, the union's interests and the individual charging party's interests would collide, to the detriment of those elements of give-and-take and accommodation that are the foundation of the bargaining process.

Like the memorandum of understanding issue, which stands dismissed, and the refusal-to-negotiate charge on health and welfare benefits, which should be dismissed, no conceivable facts can make this aspect of the charge valid, as filed by an individual and not by the exclusive representative. I would accordingly dismiss this aspect of the charge.

The Affidavit Requirement In the Board's Order

I further dissent from the Board's order to the extent that it requires the Board agent assisting the charging party (should the charging party qualify for assistance) to "obtain an affidavit from the charging party which states all the facts relevant to the alleged unfair practice and this affidavit shall be incorporated in the amendment."

Affidavits are ordinarily taken by advocates for the general purpose of preserving evidence to be used in litigation, and to supply the facts in support of a position taken in a pleading, all to support the advocates' contentions. EERB hearing officers hear and decide representation and unfair practice cases; they are not advocates for charging parties or respondents. I fail to see how, when an EERB agent takes an affidavit from a charging party, the EERB's role of neutral decision-maker can be maintained.[2]

To the extent that the new affidavit-taking procedure announced in today's decision is meant to be modeled after the National Labor Relations Board practice, the attempted analogy will not withstand close analysis. The NLRB itself, like the EERB, is a neutral agency. But there the parallel ends. By act of Congress, the NLRB is separated from its General Counsel, who is independently appointed

[2] The taking of a charging party's affidavit differs materially from the Board agent's power, as stated in EERB Rule 35005(b) to "assist the charging party to state in proper form the information required by [EERB Rule] 35004...." The difference is one between "form", as used in EERB Rule 35005(b), and the substantive matters ordinarily placed in an affidavit to support a party's position.

by the President of the United States and independently confirmed by the United States Senate. The NLRB General Counsel's chief function is to investigate unfair practice charges through a staff in regional offices throughout the United States, in order to decide which of those charges to prosecute before administrative law judges of the NLRB and on appeal to the NLRB itself and in the courts, those charges found to be meritorious and which do not settle.[3] The NLRB itself does not prosecute unfair practice cases, but only decides unfair practice cases. The NLRB General Counsel does not decide unfair practice cases, as does the General Counsel of the EERB at the hearing officer level.

In conducting the investigation leading to the decision to prosecute or not to prosecute, the NLRB General Counsel's representatives in the field, among other things, take affidavits from parties in unfair practice cases. These are used to complete the investigation file and may be used by the General Counsel's attorneys in the unfair practice prosecutions conducted before Administrative Law Judges.[4] The Administrative Law Judges before

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[3]Section 3(d) of the National Labor Relations Act, 29 U.S.C. 153 (d) provides in part:

> There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, <u>and in respect of the prosecution of such complaints before the Board</u>, and shall have such other duties as the Board may prescribe or as may be provided by law. [Emphasis added.]

[4]The NLRB's internal policies governing the use of affidavits is contained in NLRB Case-Handling Manual Section 10394.6, governing the use of statements or affidavits during litigation, and Section 10058.2 describing the procedure for taking affidavits during an investigation. These provisions illustrate the complex nature of the affidavit-taking procedure and its importance as a tool for an advocate during the course of a hearing. A few short quotes from the NLRB's manual are illustrative. Section 10058.2 of the NLRB Case-Handling Manual provides in part:

> The keystone of the investigation is the <u>affidavit</u>. Every effort should be made to reduce statements of witnesses, friendly or hostile, to affidavit form.

whom unfair practice litigation is conducted, only hear and decide unfair practice cases.

The EERA, does not provide for a separate investigatory-prosecutorial arm within the EERB structure, and it seems clear that the Legislature did not intend to create one. If the Legislature had so intended, it would very likely have made known its intent by, among other things, providing for the same kind of separation of the decision-making and prosecutorial roles that is found in the National Labor Relations Act. Also, the prospect of one agency of government (EERB) acting as on-going prosecutor of another agency of government (school boards), is so unique and unusual that one may not assume the prosecutorial function in the absence of a clear legislative intent.

The affidavit requirement, as set out in the Board's order, is inappropriate for another reason. The hearing officer dismissed the charge because it failed on its face to state a violation of the EERA. At that stage of the case, the only issue then before the hearing officer, and the only issue now before the Board, is the validity of the charge on its face, unsupported by documents extrinsic to the charge, like affidavits. If we extend to charging parties, individual or otherwise, the right to support their charges with affidavits, we alter the whole nature of our pleading requirements, which up until now have been relatively simple.

(continued)

Section 10394.6 of the NLRB Case-Handling Manual provides in part:

> The affidavit—or, in its absence, the unsworn statement—is highly important. It can be used in advance of a witness taking the stand, as a basis for questioning. It can be given him while he is on the stand if his memory has failed and he says that it may refresh his memory.

Section 10394.7 of the NLRB Case-Handling Manual describes the circumstances under which an affidavit in the possession of the General Counsel must be produced and given to an adversary of the General Counsel during litigation, for use in cross-examining a General Counsel's witness. This sensitive aspect of litigation has given rise to a series of court decisions on the subject of the circumstances under which such a statement must be produced. See, generally, Alleyne, The "Jencks Rule" in NLRB proceedings, 9 Boston College Industrial and Commercial Law Review, 891 (1968). Under the affidavit-taking procedure announced in today's EERB decision, the same General Counsel, or one of his agents, who prepared the affidavit for the charging party, may have to rule on its production at the request of another party.

If a charging party nay support a charge with an affidavit, a respondent, in fairness, may support an answer with an affidavit; and if a single affidavit is permitted any party, any party may file as many affidavits and counter affidavits in support of the charge and answer, respectively as they desire. (Even if charging party is limited to a single affidavit, it may take any number of affidavits from different individuals to support the respondent's case.) Up until now, we have dismissed charges failing to state a violation of the EERA on the face of the charge alone; in all other cases, where a violation of the law is alleged on the face of the charge, alone, a charging party is entitled to a hearing if the charging party desires a hearing, and the case is not settled to the mutual satisfaction of both parties.[5] Today's action of the Board converts the procedure of determining the validity of a charge on its face to the more complex summary judgment practice used in civil litigation,[6] where a case may be decided on the basis of pleadings, affidavits and other documents if they reveal no triable issue of fact and only a question of law that may be decided without a trial. Whether to establish a separate summary judgment procedure is at least debatable; to convert a procedure to test the validity of a charge on its face, to a summary judgment procedure, through a decision, is unwarranted.

[5]EERB Rule 35017 provides for an informal conference by a Board agent "for the purpose of clarifying the issues and exploring the possibility of voluntary resolution and settlement of the case." Approximately 40 percent of the unfair practice charges so far filed with the EERB have been settled and closed without the need for a formal hearing. Of the remaining unfair practice charges, approximately 40 percent of those are at various stages of pleading or have been held in abeyance at the request of the parties, and are not yet ready for a hearing. It is not an unlikely possibility that most of these cases will settle without the need for a hearing.

[6]See Cal. Code of Civil Procedure 437(c), and, generally, Witkin, Calif. Procedure 2829-2846.

The problem is compounded by the requirement in the Board's order that the affidavit of the charging party will be taken by an agent of the EERB, assuming the charging party qualifies for Board assistance. I think that elevates to a higher level, the right of the respondent to file affidavits with its answer. It will confuse the role of advocate and decision-maker and heighten tensions between the EERB and respondents, since it will be known that the nonneutral role of preparing a charging party's affidavit was played by the EERB.[7]

Reginald Alleyne, Chairman

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[7] In the absence of service of the appeal on the District, it is one matter for the EERB to sustain the dismissal; it is another matter for the EERB to make a finding adverse to the District without providing the District an opportunity to respond to the appeal from the hearing officer's dismissal. Should the District respond to the charging party's appeal _after_ receiving this EERB decision and order, I believe that this decision and order may not, as it would ordinarily, stand as having concluded these issues against the District.