

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



ROBERT QUARRICK and THELMA O'BRIEN,)
)
Charging Parties,)
)
v.) Case No. SF-CE-147
)
MT. DIABLO UNIFIED SCHOOL DISTRICT,)
)
Respondent.) PERB Decision No. 68
)
)
ROBERT QUARRICK and THELMA O'BRIEN,)
)
Charging Parties,)
)
v.) Case No. SF-CO-34
)
MT. DIABLO EDUCATION ASSOCIATION,)
)
CTA/NEA,) August 21, 1978
)
Respondent.)

Appearances: Stewart Weinberg, Attorney (Van Bourg, Allen, Weinberg & Roger) for Robert Quarrick and Thelma O'Brien; Robert A. Galgani, Attorney (Breon, Galgani & Godino) for Mt. Diablo Unified School District; Francis R. Giambroni, Attorney (White, Giambroni and Walters) for Mt. Diablo Education Association, CTA/NEA.

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

DECISION

Charging parties, members of the Mt. Diablo Unified School District faculty, are appealing a hearing officer's dismissal of two jointly filed unfair practice charges. One charge is against the Mt. Diablo Unified School District (hereafter District) and the other is against the Mt. Diablo Education Association, CTA/NEA (hereafter MDEA), the exclusive representative of the unit to which the charging parties belong,

FACTS

The hearing officer's dismissal is based on his finding that each of the charges, as amended, fails to state a prima facie case of unfair practices. Consequently, for the purposes of this appeal, the facts stated therein are deemed to be true.¹ They are summarized as follows:

(1) Charging parties initially filed grievances alleging that the District had involuntarily transferred them to new assignments;

(2) Subsequently, charging parties requested MDEA to submit their unresolved disputes to binding arbitration in accordance with Article V, section 13² of the agreement negotiated by the District and MDEA;

¹See San Juan Unified School District (3/10/77) EERB Decision No. 12, at p. W.

²Article V, section 13 of the contract between the District and the MDEA reads as follows:

The Association may submit the grievance to final and binding arbitration if either:
a. The grievant is not satisfied with the disposition of the grievance at Step 2 or
b. No written decision has been rendered within ten (10) days after the first meeting with the superintendent or designee.

In either case, such submission by the Association must be made within fifteen (15) days after receipt of the decision, in writing, of the superintendent or his/her designee. That demand shall identify each aspect of the superintendent's decision with which the grievant disagrees. The parties shall select a mutually acceptable arbitrator. Should they be unable to agree on an arbitrator within fifteen (15) days of the Association's submission of the grievance to arbitration, submission of the grievance shall be made to the California State Conciliation Service with a request that a list of arbitrators be submitted.

(3) MDEA did submit the issue to arbitration with the "understanding"³ it would represent the charging parties in the arbitration;

(4) Charging parties had been represented "up to that point" by an attorney⁴ and preferred to continue that representation in the arbitration hearing "as provided by Article V, section 9;"⁵

(5) MDEA indicated it was willing to pursue the arbitration "so long as they [MDEA] were the representatives;"

(6) The District said it would discuss the matter only with MDEA.

Charging parties contend that the foregoing facts constitute the following violations of the Educational

³All words and phrases in quotation marks are taken verbatim from the charges.

⁴Both charging parties' original and amended charges stated:

Both grievants had been represented by the undersigned up to that point and indicated that they preferred that representation to continue as provided by Article 5, section 9 of the grievance procedures.

The undersigned on the original charge was one R. Hemann, and the amended charge was signed by one S.W., an attorney. The actual identity of this individual is immaterial. The rationale of this decision is equally applicable to both individuals and the result would be the same; whichever was the actual representative.

⁵Article V, section 9 of the contract between MDEA and **the District**, which reads:

The grievant may be represented by the Association or any eligible representative of his own choosing, whether or not that representative is a teacher, at any formal step of this procedure.

Employment Relations Act⁶ (hereafter EERA) by both the District and MDEA:

- (1) Rights under section 3543,⁷ to represent themselves;

⁶The Educational Employment Relations Act is codified at Government Code sec. 3540 et seq. All statutory references hereafter are to the Government Code unless otherwise specified,

⁷Gov. Code sec. 3543, which states:

Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public school employees shall also have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public school employer, except that once the employees in an appropriate unit have selected an exclusive representative and it has been recognized pursuant to Section 3544.1 or certified pursuant to Section 3544.7, no employee in that unit may meet and negotiate with the public school employer.

Any employee may at any time present grievances to his employer, and have such grievances adjusted, without the intervention of the exclusive representative, as long as the adjustment is reached prior to arbitration pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8 and the adjustment is not inconsistent with the terms of a written agreement then in effect; provided that the public school employer shall not agree to a resolution of the grievance until the exclusive representative has received a copy of the grievance and the proposed resolution and has been given the opportunity to file a response.

(2) Rights under section 3543.1(a)⁸ in that both charging parties are members of another, nonexclusive employee organization and "that the other organization is being denied the right to represent its members;"

(3) The District has violated the charging parties rights under 3543.5(a)⁹ in that it discriminated against the charging parties by withdrawing from the arbitration;

⁸Gov. Code sec. 3543.1(a), which states:

Employee organizations shall have the right to represent their members in their employment relations with public school employers, except that once an employee organization is recognized or certified as the exclusive representative of an appropriate unit pursuant to Section 3544.1 or 3544.7, respectively, only that employee organization may represent that unit in their employment relations with the public school employer. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership.

⁹Gov. Code sec. 3543.5(a), which 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.

(4) MDEA violated the charging parties rights under section 3543.6(a) and (b)¹⁰ because its action caused the District to violate section 3543.5(a) and MDEA thus discriminated against the charging parties; and

(5) MDEA violated its duty of fair representation mandated by section 3544.9.H

DISCUSSION

The basic issues raised by the charges, as amended, may be stated as follows:

(1) Do charging parties have a statutory right to represent themselves in an arbitration?

(2) May a nonexclusive representative employee organization represent the charging parties in the arbitration?

(3) May an individual who is not acting for the exclusive representative represent charging parties in the arbitration?

¹⁰Gov. Code sec. 3543.6(a) and (b) , which state .
It shall be unlawful for an employee organization to:

(a) Cause or attempt to cause a public school employer to violate Section 3543.5.
(b) 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.

¹¹Gov. Code sec. 3544.9, which states:
The employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit.

(4) Was there a violation of the negotiated agreement which also constitutes a violation of the EERA subject to an unfair practice charge?

(5) Did MDEA breach its duty of fair representation towards the charging parties?

I. The Right to Self-Representation in Arbitration

Charging parties fail to overcome the clear meaning of section 3543. The pertinent portion of that section bears repeating:

Any employee may at any time present grievances to his employer, and have such grievances adjusted, without the intervention of the exclusive representative, as long as the adjustment is reached prior to the arbitration...

On its face, the statutory right of self-representation falls short of the right to resort to the arbitration process. This legislative limitation is consistent with the practice in the private sector and takes cognizance of the unique nature of arbitration and its role in employer-employee relations. Through arbitration, the very meaning of the negotiated agreement may be decided. It is logical that its use be restricted to the parties who negotiated that agreement and who are, therefore, the most appropriate advocates of its intentions."¹²

The frequent reference to arbitration as the quid pro quo for the surrender of more dramatic means of seeking contract enforcement testifies to its role in promoting stability in

¹²Vaca v. Sipes (1967) 383 U.S. 171, 191 [64 LRRM 2369, 2377].

employer-employee relations through the orderly resolution of contract disputes.¹³ That stability could be further endangered if rival employee organizations were authorized to use the arbitration process to harass the exclusive representative or derogate the negotiated agreement.¹⁴ To the contracting parties, arbitration entails financial obligations potentially so substantial as to threaten the security of the exclusive representative and the viability of the public budget should the process be indiscriminately used or abused.¹⁵ It is unreasonable to conclude that the Legislature would impose on the exclusive representative the onus of acceding to every demand for arbitration, or of entrusting the integrity of the agreement to the offices of any individual employee who prefers to "do it himself."

We conclude, therefore, that the right to represent oneself provided for in section 3543 expressly excludes the right to do so in an arbitration case.

II. The Right to be Represented by a Nonexclusive Employee Organization

In another case involving the same negotiated agreement, the Educational Employment Relations Board (now Public Employment Relations Board, hereafter PERB) decided that a

¹³Steelworkers v. American Manufacturing Co. (1960) 363 U.S. 564, 567 [46 LRRM 2414, 2415]

¹⁴Hughes Tool Co. v. NLRB (5th Cir. 1945) 147 F.2d 69 [15 LRRM 852]

¹⁵ See footnote 12, ante, page 7.

nonexclusive employee organization loses the right to represent its members in grievances once an exclusive representative has been recognized or certified.¹⁶

While, in that case, the issue involved grievance procedures prior to arbitration, the rationale is equally applicable to the facts at hand. Charging parties' allegation of a violation of section 3543.1 (a) therefore fails to state a prima facie unfair practice case.

III. The Right to Be Represented by an Individual

Charging parties may have anticipated the foregoing result. It is their alternative position, advanced in the appeal, that their individual representative must be considered to be eligible to represent them irrespective of his association with the nonexclusive organization. The argument is apparently grounded on language found in another portion of the first Mt. Diablo case.¹⁷

...Section 3543 would be primarily relevant here if the Districts, instead of refusing to process grievances filed by employee organization representatives, had refused to process grievances filed by individual employees. Concerning grievance-representation rights, Government Code Section 3543 separates and treats differently exclusive representative rights on the one hand, and individual employee rights, on the other. Unlike Government Code Section 3543.1 (a), Government Code

¹⁶Mount Diablo Unified School District, Santa Ana Unified School District, Capistrano Unified School District (12/30/77) EERB Decision No. 44.

¹⁷Mount Diablo Unified School District, Santa Ana Unified School District, Capistrano Unified School District, supra, at page 6.

competing employee organization which is not an exclusive representative. The cases before us do not concern the right of an individual to present a grievance under Government Code Section 3543, but whether an employee organization, other than the exclusive representative, may present a grievance. This case therefore falls under Section 3543.1(a) alone.

If so, their reliance is misplaced. In the earlier case, the charging parties' right of self-representation in grievance procedures prior to arbitration was never in question. The contested issue was simply who could act as the charging parties' representative. But we have already decided here that the statutory right of self-representation does not extend to the arbitration stage. Their representative's identity, therefore, is irrelevant. His right, if any, to act as the charging parties' advocate is born of their right. He cannot derive from the charging parties what they themselves do not have.

IV. The Alleged Contract Violation

In the original Mt. Diablo trilogy, the Educational Employment Relations Board found that the District and MDEA did not intend that the representation clause (Article V, Section 9) in the negotiated grievance procedure constitute a waiver of their statutory right to bar the charging party from representation by other than the exclusive representative.^{18 18} While that finding related solely to the attempted selection of

¹⁸Id. at page 11.

a nonexclusive organization, the principle is the same in the case at hand. Neither the District nor MDEA waived their right to bar the selection of an individual representative.

Beyond that, we are mindful that section 3541.5(a)¹⁹ specifically prohibits PERB from issuing a complaint based on an allegation of breach of the negotiated agreement unless the facts alleged independently constitute an unfair practice. The allegations considered up to this point fall short of satisfying this requirement.

V. The Duty of Fair Representation

A matter preliminary to the consideration of the charge that MDEA violated section 3544.9 should be addressed. Is an unfair practice charge an appropriate vehicle for processing this claim? Section 3541.3(1) eliminates any doubt as to PERB's jurisdiction in matters of this kind. The section reads:

--¹⁹Gov. Code sec. 3541.5(b), which states:

The initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board. Procedures for investigating, hearing, and deciding these cases shall be devised and promulgated by the board and shall include all of the following:

.
(b) The board shall not have authority to enforce agreements between the parties, and shall not issue a complaint on any charge based of alleged violation of such agreement that would not also constitute an unfair practice under this chapter.

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

• • • • •

(i) To investigate unfair practice charges or alleged violations of this chapter, and take such action and make such determinations in respect of such charges or alleged violations as the board deems necessary to effectuate the policies of this chapter.

The word "chapter" refers, of course, to the Educational Employment Relations Act in its entirety. Yet at first blush, this section seems to preclude us from answering this affirmatively. PERB's authority is "to investigate unfair practices or alleged violations of this chapter...." (Emphasis added.) These alternatives indicated by the use of the word or suggest that certain violations are not considered to be "unfair practices." The commonly perceived unfair practices are enumerated in the various subdivisions of sections 3543.5 and 3543.6. The duty of fair representation, however, is found elsewhere in the statute.

However, the acts prohibited by section 3543.5 and 3543.6 are described not as "unfair practices" but as "unlawful." No definition of unfair practices appears in the chapter. It is possible, therefore, that the range of actions which may be deemed as unfair practices may have been left to PERB's own determination and might include statutory violations other than those in 3543.5 and 3543.6.

This is the nature of the protection afforded employee organizations. Section 3543.5 (b) makes it unlawful to "deny to

employee organizations rights guaranteed to them by this chapter." (Emphasis added.) By this omnibus provision, any distinction between the unlawful acts specified and other violations of the chapter is effectively erased. While no directly comparable language is to be found which is applicable to individual employees, we find that "omission" to be without significance in this case. Individual employees are provided with broad protection against unlawful employers' acts by section 3543.5 (a) and employee organizations' acts by section 3543.6(a) and (b). The latter subsection seems broad enough to shelter the allegations contained in the current charge.

Section 3543.6(b) prohibits discrimination or threat of discrimination against employees by an employee organization. Charging parties specifically allege that MDEA violated its duty to fairly represent each employee in the unit by discriminating against them in denying their request because of their membership in another employee organization. The right to be fairly represented must be read into the section 3543.6(b) guarantee against discrimination or threat of discrimination by an employee organization. Therefore, a default of this kind in the performance of obligations under section 3544.9 amounts to an infringement of section 3543.6(b) rights and is properly the subject of an unfair charge.

However, we find no basis for reversing the hearing officer's order of dismissal. Since MDEA was under no statutory obligation to permit the charging parties to represent themselves, or to be represented by others, its

refusal to accommodate the demand made upon it cannot in itself constitute an act of discrimination or breach of the duty of fair representation. Absent an allegation of fact indicating that MDEA treated other requests for self-representation in arbitration proceedings in a favorable manner, the charge is merely an unfounded conclusion and is insufficient to support a prima facie showing of discrimination.

Beyond that, charging parties acknowledge that MDEA offered to, and actually did, submit their grievances to arbitration and to act as their representative in the subsequent proceeding. The charging parties turned MDEA away. Only in the face of this uncompromising rejection of its services, did MDEA decline to go further with the case. We find in this unequivocal admission no basis of a charge of violation of section 3544.9.

Other charges against the District and MDEA are derivative of those considered above and share their disposition.

ORDER

Upon the foregoing Decision and the entire record in this case, IT IS ORDERED that:

The hearing officer's dismissal of the two charges filed jointly by Robert Quarrick and Thelma O'Brien against the Mt. Diablo Unified School District and the Mt. Diablo Education Association, CTA/~~NEA~~, is sustained.

Harry Gluck, Chairperson

Jerilou Cossack Twohey, Member