STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

AMADOR VALLEY SECONDARY EDUCATORS ASSOCIATION, Charging Party, ~~APPELLANT~~, v. AMADOR VALLEY JOINT UNION HIGH SCHOOL DISTRICT, Respondent.	)	Case No. SF-CE-49 PERB Decision No. 74 October 2, 1978

Appearances; Joseph G. Schumb, Attorney (La Croix & Schumb) for Amador Valley Secondary Educators Association; Jon A. Hudak, Attorney (Breon, Galgani & Godino) for Amador Valley Joint Union High School District.

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

DECISION

The Amador Valley Secondary Educators Association (hereafter Association) appeals the dismissal by a hearing officer for the Public Employment Relations Board (hereafter PERB or Board) of its unfair practice charge against the Amador Valley Joint Union High School District (hereafter District).

FACTS

Since the charge was dismissed without a hearing on the merits, the facts alleged therein are deemed true for the purpose of this appeal.[1]

[1]San Juan Unified School District (3/10/77) EERB Decision No. 12.

The Association was certified as the exclusive representative of a unit of certificated employees in April 1976. After the opening of negotiations, the District on July 19, 1976, unilaterally froze certain certificated employees' salaries. These were so-called column and step increases, based on acquisition of additional education and experience, bonuses for the attainment of masters degrees and longevity pay increments. The Association alleges that this action was taken to decrease anticipated employee income and put pressure on the employee bargaining committee.

On December 10, 1976, the District, through the superintendent, wrote each employee in the unit incorrectly stating that the District had accepted the Association's proposals even though the superintendent knew this statement to be untrue.

On December 17, 1976, immediately prior to the Christmas vacation recess, the District again wrote to each employee in the unit setting forth what purported to be the District's proposals to the Association. On January 4, 1977, immediately upon return from the vacation period, the Association representatives met with the District representatives and accepted the proposals as set forth in the District's December 17th letter to the employees. Thereupon, the District "reinstated" proposals it made on December 13, 1976, and "withdrew" the proposals ostensibly presented in its letter of December 17.

On January 14, 1977, the Association filed the instant unfair practice charge.

Negotiations between the parties nevertheless continued and on April 26, 1977, agreement was finally reached. The written agreement included the following two pertinent provisions:

> V. SALARIES
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> . . . . . .
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> C. All personnel covered under this agreement are to be placed on the appropriate current salary schedule according to provisions in effect at the time of placement, their training, experience and length of service.
>
> D. Employees shall be paid in accordance with their placement on the District's salary schedule.
>
> XII. COMPLETION OF AGREEMENT
>
> A. This document comprises the entire AGREEMENT between the District and the Association on the matters within the lawful scope of negotiation. District shall have no further obligation to meet and negotiate, during the term of this Agreement, on any subject whether or not said subject is covered by this Agreement, even though such subject was not known nor considered at the time of the negotiations leading to the execution of this Agreement.

At some time after July 19, 1976, the Association filed an action in the Superior Court to compel payment of the withheld salary increases. Following a decision favorable to the Association, the District made retroactive restoration of the withheld increases.

The hearing officer opened the unfair practice hearing on August 2, 1977, at which time he indicated that he intended to dismiss the charge as moot and would take evidence only on that

specific question. Following the taking of testimony, the hearing officer did dismiss the charge. In essence, the proposed decision reasoned as follows:

1. In reaching agreement on April 27, the parties reached a settlement on the wage issue. They "surpassed any obstacles which may have inhibited such agreement." An unfair practice charge is moot, the recommended decision continues, where there is "a clear settlement of the issues embodied in an agreement reached by the parties." For that reason, the issue of the withheld wages was deemed moot by the hearing officer.[2]

2. The same agreement rendered the District's communications to the employees a moot issue since such conduct "no longer is relevant."

3. The Association's fear that the District's conduct may be repeated in the future is "too speculative" a basis upon which to grant relief.

4. In any event, PERB could accomplish nothing more by order than the parties have accomplished by themselves.

DISCUSSION

The hearing officer has misunderstood the nature of the allegations contained in the unfair practice charge. Both allegations assert violations of the Educational Employment

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[2]The hearing officer reasoned that the absence of a reference in the agreement to the retroactive pay increase and the "zipper clause" constituted settlement of the issue in dispute.

Relations Act (hereafter EERA)[3] in that the District engaged in unlawful conduct during collective negotiations. The first allegation claims that the District negotiated in bad faith by unilaterally withholding due and owing salary increases in order to improperly pressure the employee negotiating committee. The second allegation alleges misrepresentations by the District in direct communications with the employees, impliedly to discredit the Association with the employees by making it appear that the employee committee was reneging on its proposals to the District, and, by falsifying its own offers to the employees, making it appear that the committee was not accepting reasonable offers.

Mootness. A case in controversy becomes moot when the essential nature of the complaint is lost because of some superseding act or acts of the parties.[4] Mere discontinuance of wrongful conduct does not ordinarily end the underlying controversy. There must be evidence that the party acting wrongfully has lost its power to renew its conduct.[5]. In cases clarifying parties' rights and obligations under a new law, the public interest is served by deciding the underlying issue.[6] Where a public employee was denied the right to take

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[3]Government Code section 3540 et seq.

[4]Witkin, California Procedure (2nd ed. 1972) pp 4010 - 4428.

[5]Pittenger v. Home Savings & Loan Assoc. (1958) 166 Cal.App.2d 32.

[6]United States v. W. T. Grant Co. (1953) 345 U.S. 629,

a civil service examination, filed an action in mandamus, was given tentative permission to take the test and failed that test, a motion to dismiss the mandamus action was denied. The underlying legal issue was the right of the employee to take the examination. This issue was not mooted by the fact that he had taken and failed the exam.[7] If any material question remains to be answered, the case is not moot and an appeal will not be dismissed.

> Whenever the judgment, if left unreversed, will preclude the party against whom it is rendered as to a fact vital to his rights...it cannot be said that there is left before the appellate court but a moot question, even though on account of changed conditions the relief originally sought by appellant cannot be granted...[8]

The question in this case, therefore, is whether the underlying issues of alleged unlawful conduct survived the retroactive increase or the execution of the negotiated agreement.

The agreement as a settlement. The negotiated agreement was prospective. That is to say, it included a salary provision to be effective for the ensuing term of that newly executed agreement. Its silence on the question of the salary increases which had been withheld by the District is explained by the fact that the Association had already recovered that claim in its Superior Court action. As the hearing officer

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[7]Terry v. Civil Service Comm. (1952) 108 Cal.App.2d 861.

[8]Hartke v. Abbott (1930) 106 Cal.App. 388.

himself acknowledged in the footnote to his proposed dismissal order:

> This concession by the Association is not surprising in light of the previous Superior Court Decision invalidating the previous salary freeze.

While the use of the term "concession" in reference to the fact that no retroactive salary provision existed in the agreement is baffling, it is evident that there was no need for reference to the retroactive increases in the agreement since those had already been recovered pursuant to court order.

Beyond that, however, the salary settlement in court, based on an employment contract obligation was just that and nothing more. It did not refer to or impliedly settle a charge that the District had acted unlawfully by taking unilateral action on a negotiable matter. The monetary effect of that action was remedied by the court order, but that order did not deal with the nature of the District's conduct which was a matter not in issue in the civil suit.

Nor does the "zipper clause" bar the processing of the unfair charge. That clause merely seeks to define the limitations on the District's future obligation to engage in collective negotiations during the contract term. It is totally irrelevant, therefore, to the issue at hand which is the behavior of the District in the course of previous negotiations with the Association.

It is apparently the hearing officer's view that the District's communications to the employees, which could have

inhibited negotiations, were rendered irrelevant by the ultimate reaching of an agreement. This train of thought is difficult to follow. It is not clear whether the rationale is that conduct is unlawful only if it proves to be ultimately successful or that a charging party is required to forego continued negotiations pending the processing of an unfair practice charge, thus incidentally assuring that such conduct will actually inhibit negotiations. At any rate we do not find the conclusion of negotiations to have exonerated any unlawful conduct which may have occurred during the course of negotiations.

Waiver. While the term is not used therein, the proposed decision seems to indicate that the Association waived its statutory rights by the execution of the collective agreement, even though that agreement is silent on the issues raised in the unfair charge. Waiver is frequently raised as a defense against a charge of unilateral action. But generally, waiver must be established by clear and unmistakable language,[10] and particularly where waiver of a statutory right is asserted.[11] Thus, even a zipper clause does not, alone, constitute a clear and unmistakable waiver as to a

[9]Morris, The Developing Labor Law (1971) p. 332 et seq.

[10]NLRB v. Perkins Machine Co. (1st Cir. 1964) 326 F.2d 488 [55 LRRM 2204].

[11]Timkin Roller Bearing v. NLRB (6th Cir. 1963) 325 F.2d 746 [54 LRRM 2785].

specific item.[12] Surely, silence does not constitute clear and unmistakable waiver.

PERB's role in this proceeding. Finally, the hearing officer indicates that PERB can accomplish no more than the parties have accomplished for themselves. What the parties have not accomplished is clarification of their mutual legal rights and obligations under EERA. PERB can certainly do that and should. If violations of EERA are eventually proven to have occurred in this case, the Board can issue an appropriate remedial order. The hearing officer's view that the Association's fear that future repetitions of the District's allegedly unlawful conduct will occur is "too speculative" a basis for relief, may be of small comfort to the Association if, indeed, its rights have already been infringed and the District is neither so informed nor given appropriate direction by this Board as to its future conduct.

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[12]New York Mirror (1965) 151 NLRB 834 [58 LRRM 1465].

ORDER

On the foregoing decision and the entire record in this case, the Public Employment Relations Board ORDERS that:

The proposed order dismissing the unfair practice charge filed by the Amador Valley Educators Association against the Amador Valley Joint Union High School District is reversed.

The said unfair practice charge is remanded to the general counsel for a hearing on its merits.

By: Harry Gluck, Chairperson Raymond J. Gonzales Member

Jerilou Cossack Twohey, Member

STATE OF CALIFORNIA

EDUCATIONAL EMPLOYMENT RELATIONS BOARD

In the matter of:	)	
	)	
AMADOR VALLEY SECONDARY EDUCATORS ASSOCIATION, Charging Party,	)	
	)	
vs.	)	Case No. SF-CE-49
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AMADOR VALLEY JOINT UNION HIGH SCHOOL DISTRICT, Respondent.	)	

Appearances: Joseph G. Schumb, Attorney (La Croix and Schumb) for Amador Valley Secondary Educators Association; Jon A. Hudak, Attorney (Breon, Galgani & Godino) for Amador Valley Joint Union High School District.

Before Gerald A. Becker, Hearing Officer

PROCEDURAL HISTORY

The Amador Valley Secondary Educators Association (Association) filed an unfair practice charge against the Amador Valley Joint Union High School District (District) on January 14, 1977. The Association alleged in its charge that during negotiations the District unilaterally froze employee salaries. The Association further alleged that the District negotiated in bad faith "by direct communications to members of the Bargaining Unit."

In its Answer, the District denied the charges.

A formal hearing on the unfair practice charge was scheduled on August 2, 1977. On motion of the hearing officer it was indicated that the charge would be dismissed as moot in view of the fact that the parties had entered into a collective negotiations

agreement. Evidence was taken solely on the question of the mootness of the charge.

FINDINGS OF FACT

On April 26, 1977 the parties entered into a collective negotiations agreement covering matters within the scope of negotiation.

The term of the agreement is from April 26, 1977 until June 30, 1978. It contains the following pertinent clauses:

> V. SALARIES
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> C. All personnel covered under this agreement are to be placed on the appropriate current salary schedule according to provisions in effect at the time of placement, their training, experience and length of service.
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> D. Employees shall be paid in accordance with their placement on the District's salary schedule.
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> XII. COMPLETION OF AGREEMENT
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> A. This document comprises the entire AGREEMENT between the District and the Association on the matters within the lawful scope of negotiation. District shall have no further obligation to meet and negotiate, during the term of this Agreement, on any subject whether or not said subject is covered by this Agreement, even though such subject was not known nor considered at the time of the negotiations leading to the execution of this Agreement.

David A. Woolworth, president of the Association at the time the unfair practice charge was filed, testified that the leadership of the Association believed ratification of the agreement would not affect the unfair charge. However, the Association made no express reservation of any legal rights related to the charge at the time the agreement was signed.

Mr. Woolworth further testified that the Association fears the District will continue to communicate directly with members of the unit during future negotiations.

The Association brought suit in Alameda County Superior Court over the frozen salary increments and obtained a decision in its favor. The District then retroactively paid the previously frozen salary increments.[1]

ISSUE

Does the signing of the collective negotiations agreement by the parties subsequent to filing an unfair practice charge alleging unilateral action and bad faith negotiating on the part of the employer, render the charge moot?

CONCLUSIONS OF LAW

The parties to this proceeding have executed an agreement purporting to cover all matters within the scope of representation. In reaching this agreement the parties apparently have negotiated and reached a settlement regarding wages. The existence of the signed agreement indicates that the parties have surpassed any obstacles which may have inhibited reaching such agreement.

The National Labor Relations Board has held unfair labor practice charges moot where there has been a clear settlement of the issues embodied in an agreement between the parties. Raybestos-Manhattan, Inc., 168 NLRB 396, 405-406, 67 LRRM

[1] This payment did not include interest.

1012 (1967); Puerto Rican American Sugar Refinery, 136 NLRB 428, 49 LRRM 1811(1962).

Here, the parties settled their differences regarding wages for the 1976-77 and 1977-78 school years. Although the agreement provides for a salary increase only from April 26, 1977 onward, absent evidence to the contrary it must be presumed that the lack of a provision for retroactive salary is a result of the mutual concessions and compromises which are the heart of the collective negotiations process.[2] See Medical Manors Inc. (1973) 201 NLRB 188, 192, 82 LRRM 1222.

The Association, by the agreement, has traded certain rights in exchange for others. NLRB v. Auto Crane Co. (10th Cir. 1976) 536 F.2d 310,92 LRRM 2363. Despite its belief that there would be no effect on the unfair practice charge, there is no evidence that the Association made an express reservation of its legal rights regarding the unfair practice charge at the time of the agreement. As to wages, therefore, the issue is mooted by the parties' agreement.

The second allegation by the Association is that the District communicated directly with members of the negotiating unit during negotiations. Even if true, the parties subsequently reached a mutual agreement, and any conduct on the District's part which could have inhibited such mutual agreement no longer is relevant. Therefore, this allegation also is moot. The Association's fear of similar behavior by the District in future negotiations is too

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[2] This concession by the Association is not surprising in light of the previous Superior Court decision invalidating the previous salary freeze.

speculative a basis upon which to grant relief since the negotiations presently at issue have been successfully concluded.

California Administrative Code, Title 8, Section 35001 provides that:

> It is the policy of the Board to encourage parties to resolve among themselves any unfair practice disputes provided such resolution is not inconsistent with the purposes and policies of the Act.

In the present case no order of the Board could now accomplish more than the parties already have accomplished on their own.

Under these circumstances, the hearing officer finds that no issues are presented the resolution of which would further the policies of the EERA., and therefore concludes that the issues in the present unfair practice charge are moot.

RECOMMENDED ORDER

It is the Recommended Decision based on the foregoing findings of fact, conclusions of law, and the entire record in this case that the instant charge be dismissed.

Pursuant to California Administrative Code, Title 8, 35029, this Recommended Decision and Order shall become final on November 2, 1977 unless a party files a timely statement of exceptions. See California Administrative Code, Title 8, Section 35030.

Dated October 21, 1977.

GERALD A. BECKER
Hearing Officer