

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



CALIFORNIA SCHOOL EMPLOYEES)
ASSOCIATION, LOCAL 228,)
Charging Party,)
v.)
KONOCTI UNIFIED SCHOOL DISTRICT,)
Respondent.)

Case No. SF-CE-340

PERB Decision No. 217

June 29, 1982

KONOCTI UNIFIED SCHOOL DISTRICT,)
Charging Party,)
v.)
CALIFORNIA SCHOOL EMPLOYEES)
ASSOCIATION, LOCAL 228,)
Respondent.)

Case No. SF-CO-78

Appearances: Steven T. Nutter and Ruth Rokeach, Attorneys for California School Employees Association; William Wood Merrill, Attorney for the Konocti Unified School District.

Before Gluck, Chairperson; Morgenstern and Jaeger, Members.

DECISION

In these consolidated unfair cases, each party appeals portions of the hearing officer's proposed decision which held: (1) that the Konocti Unified School District (District) violated subsection 3543.5(a) of the Educational Employment

Relations Act (EERA)¹ by disciplining a classified employee because of his position as president of the exclusive representative and chairman of its bargaining committee, and (2) that the California School Employees Association, Local 228 (CSEA) did not violate subsections 3543.6(c) and (d)² by taking a strike authorization vote of its membership and by the actions of the classified employee who is the subject of the organization's unfair practice charge.

¹The EERA is codified at Government Code section 3540 et seq. All statutory references are to the Government Code unless otherwise noted.

Subsection 3543.5(a) provides:

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.

²Subsections 3543.6(c) and (d) provide in relevant part:

It shall be unlawful for an employee organization to:

(c) Refuse or fail to meet and negotiate in good faith with a public school employer or any of the employees of which it is the exclusive representative.

(d) Refuse to participate in good faith in the impasse procedure

FACTS

CSEA and the District began renegotiations in June 1978 with CSEA declaring impasse in October. On November 14, CSEA's membership authorized the bargaining committee to call a strike "when and if necessary to get a contract." The parties met with a mediator on December 6 and 7, at which time a tentative agreement was reached.

On the morning of December 6, Wesley Franklin, a District driver, stopped his bus inside school grounds, but not at an authorized stopping point, to address the students. He told them that he would not be driving that afternoon or the following day because of negotiations. Such driver notification of projected absences apparently was a standard practice since students tended to identify their bus by the driver. Franklin, however, went on to explain that a strike was possible (a student testified that Franklin thought the strike might occur as early as the next day) and that the classified employees would appreciate student and parent support. He suggested that one means of support would be non-attendance at school, which would cause the District to lose average daily attendance monies. He, however, did emphasize that the students should consult their parents about boycotting classes and, if their parents disagreed, a second means of expressing support would be to have the parents call the school on behalf of the striking employees. Franklin

testified that he told the students that, while he believed the District would not use noncertified drivers as strike replacements, he personally would have the highway patrol pull over any unqualified replacement.

Franklin had joined CSEA shortly after it was certified as the exclusive representative in 1977. He subsequently became president of the chapter and chairman of its negotiating committee. Franklin apparently had a satisfactory work record, although he did receive at least one written reprimand in the early 1970s for stopping a school bus, while transporting students, to preach about Christ.³

On January 2, 1979, Superintendent Carle recommended to the District Board of Trustees that Franklin be dismissed. The superintendent cited the foregoing speech and charged Franklin with violating ten sections of the District's policy manual and bus driver handbook by: discourteous and offensive conduct or language toward a pupil; engaging in political activities during work hours; incompetency or inefficiency; insubordination; negligence; misuse of District property; and conduct which discredited the District.

³While no evaluations were entered into the record, District Superintendent William Carle testified that Franklin had not received any written reprimands or other forms of discipline since the described event in the early 1970s.

The board of trustees conducted a hearing on these charges on January 23, 1979, and found merit in five of the charges.⁴ The superintendent's recommendation was modified to reduce the discipline to a five-month suspension.

CSEA filed unfair practice charges on January 18, 1979, alleging that Carle's actions violated subsection 3543.5(a) by discriminating and threatening reprisals against Franklin for his participation in a protected activity. The charge was amended on January 26 to incorporate the disciplinary action taken by the District Board of Trustees and amended again on March 1 to include the allegation that the District's disciplinary action interfered with the rights of all unit employees.⁵

The District filed unfair practice charges on January 31, 1979, alleging that Franklin's conduct on the bus and the strike authorization vote constituted a refusal on CSEA's part to negotiate in good faith and to utilize the statutory impasse proceedings in good faith.

The hearing officer proposed to find that Franklin's bus conduct was unprotected but that the District's disciplinary

⁴The District found that Franklin violated its policies as to participation in political activities, incompetent and inefficient performance, careless and negligent performance, and misuse of District property.

⁵CSEA filed another amendment on March 20, but it is identical to its amendment of March 1.

action was actually motivated by Franklin's role as president of the local and its negotiating chairperson and was therefore unlawful. He also proposed to dismiss the District's charges and CSEA's charge alleging interference with employee rights.

CSEA excepts to: (1) the proposed finding that Franklin's conduct on the bus is unprotected; (2) the dismissal of its interference charge; and (3) the hearing officer's failure to consider its argument, raised for the first time in its post-hearing brief, that the District policy which Franklin was found to have violated was overbroad and constituted invalid no-solicitation rules.

The District noted some 30 exceptions to the hearing officer's findings of fact and conclusions of law. In view of the result we reach here, it was necessary to consider only the following District exceptions: (1) that its discipline was based on Franklin's role within CSEA; (2) that Carle's alleged anti-union animus may be attributed to the District Board of Trustees and (3) the dismissal of its charge concerning CSEA's negotiation conduct.

DISCUSSION

Franklin's Conduct as Protected Activity

To be protected, employee activity must be in pursuit of lawful objectives and carried out in a proper manner. The United States Supreme Court has held that, where employee objectives were within the scope of those authorized by the

National Labor Relations Act, the means used in pursuit of those objectives nevertheless deprived employees of protection. NLRB v. Local Union 1224, International Brotherhood of Electrical Workers (1953) 346 U.S. 464 [33 LRRM 2183]. In Elk Lumber Co. (1950) 91 NLRB 336 [26 LRRM 1493] the National Labor Relations Board found that:

. . . not every form of activity that falls within the letter of this provision is protected. The test . . . is whether the particular activity is so indefensible as to warrant [disciplinary action]. Either an unlawful objective or the adoption of improper means of achieving it may deprive employees engaged in concerted activities of the protection of the Act. P. 336, 337; citations omitted.

The Board finds that Franklin's actions on the bus were conducted in an indefensible manner and are, consequently, unprotected. The incident occurred while Franklin was on duty and while transporting students to school. By making such an unauthorized stop, he temporarily interrupted his work to conduct organizational business without authorization and probably in violation of existing work rules. Further, he delivered his appeal to boycott classes to young students, likely to be impressionable and who were forced to hear it without being given the opportunity to leave.

The New Jersey Public Employment Relations Commission has held that certain teacher communications to parents via letters

hand-carried by the students was not protected activity, stating:

This is particularly true where the instruction by a classroom teacher to take home a message to parents really amounts to the involuntary involvement of students. Manalapan-Englishtown Regional Board of Education (7/5/78) PERC No. 78-91, 4 NJPER 262. (Emphasis added.)

CSEA argues that public employees have a legitimate interest in communicating with students about labor disputes between the District and employee organizations, citing Stevens Institute (1979) 241 NLRB 833 [101 LRRM 1052]; St. Joseph's High School (1978) 236 NLRB 1623 [99 LRRM 1380]; and Tinker v. Des Moines Independent Community School District, 393 U.S. 503 [216 Ed 2d 751].

By its holding here, the Board does not find that school employees may never communicate with students about labor relations matters. We do find that the means employed by Franklin to do so are unprotected. Stevens Institute, supra, is clearly distinguishable from the conduct before us. There, a teacher was invited by a student association to attend and speak at one of their meetings. The teacher did not address the students during work hours nor did the students constitute a "captive audience." The case does not stand for the proposition that employees have an absolute right to address students at any time or place.

The facts of St. Joseph High School, supra, are also distinguishable. There, a teacher sent letters directly to adult third parties who sat on various school committees.

Tinker, supra is a First Amendment case involving the right of students to wear armbands at a public school in protest of American policies in Vietnam. It is clearly inapposite to the facts before us.

CSEA further argues that an employer cannot limit the right of employees to communicate with others at the work site in nonwork areas, during nonworking times, unless the employer can show that such communications would adversely impact the employer's business operations. The argument misses the mark. Franklin's speech was in a working area during working time.

Franklin's Discipline

The hearing officer found that, although Franklin's conduct on the bus was unprotected and the District had cause to take some disciplinary action against him, it would not have imposed the discipline that it did but for his participation in other protected activities.

In Novato Unified School District (4/30/82) PERB Decision No. 210, we recognized that direct proof of unlawful motivation, the essential element of reprisal charges, is rarely available; nevertheless, we found that it can be established by circumstantial evidence and inferred from the record as a whole.

Here, CSEA has failed to present evidence permitting an inference that the District harbored anti-union animus and that its discipline of Franklin was motivated by his protected activity. The Association only produced evidence as to the alleged animus of Superintendent Carle. The hearing officer found that Superintendent Carle's recommendation was motivated by Franklin's role as president of the local and negotiating committee chairman. He then imputed this animus to the District, citing Antelope Valley Community College District (7/18/79) PERB Decision No. 97, and found a subsection 3543.5(a) violation.

Assuming, without so finding, that Carle possessed the ascribed animus,⁶ we do not find that it can automatically be imputed to the District's Board of Trustees who imposed the discipline. The hearing officer's reliance on Antelope Valley Community College District is misplaced. There, the acts of various employee agents were attributed to the employer who approved their appointment as managers and who took no action

⁶CSEA produced the following circumstantial evidence during the hearing, designed to prove that the District's action was based on anti-union animus: (1) Carle's angry response to a CSEA filed grievance; (2) the District's unilateral implementation of changes without negotiations; (3) Carle's comments to employees that CSEA representation is not needed in negotiations; (4) the District's favorable treatment of an employee who led a decertification drive; and (5) Carle's personal initiation of discipline against Franklin and recommendation of discipline which was too severe for the alleged offense committed.

to repudiate their unlawful conduct. Here, the District conducted an independent disciplinary hearing and rejected the superintendent's recommendation.⁷

The facts here are also distinguishable from Novato, supra, where a school principal, on his own, made the decision to transfer the employee and then unilaterally implemented it. See also Marin Community College District (11/19/80) PERB Decision No. 145, where school officials recommended an employee for dismissal and the recommendation was simply accepted by the employer without a hearing.

There is nothing in the record to indicate that the District's Board of Trustees would not have suspended Franklin "but-for" his protected activities. Although the transcript of this disciplinary hearing was not placed in evidence, the record of the PERB hearing reflects that the school board only considered Franklin's school bus actions.

CSEA failed to meet its burden of demonstrating unlawful motive on the part of the District. The charge related to Franklin's discipline is dismissed.

The District's Subsections 3543.6(c) and (d) Charges

While a union's conduct may take on more of the character of coercion than of collective bargaining, the mere fact that a

⁷There is no allegation that the Trustee's hearing was unfair or impartial.

given employer claims to have been coerced is insufficient to support such a finding. The conduct must, at the least, be of such a nature as to permit the reasonable expectation that such would be the effect. Strike votes - like strike talk - are commonplace in labor relations, particularly in the face of approaching deadlines. They cannot be viewed as per se violations of the good-faith obligation. In otherwise judging CSEA's good faith, we look to the totality of its conduct⁸ and find no other relevant evidence. The District's charge rests solely on these two incidents. By themselves, they cannot sustain the District's charge. It is accordingly dismissed.

Interference - Subsection 3543.5(a) Charge

CSEA excepts to the finding that the District did not interfere with the rights of other unit employees by its disciplinary action against Franklin.

To establish a violation of subsection 3543.5(a) by interference, a charging party has the initial burden of presenting evidence establishing a nexus between the employer's conduct and the exercise of an employee's right protected by EERA. Carlsbad Unified School District (1/30/79) PERB Decision No. 89; Novato, supra.

⁸Pajaro Valley Unified School District (5/22/78) PERB Decision No. 51; NLRB v. Stevenson Brick and Block Co. (4th Cir. 1968) 393 F.2d 234 [68 LRRM 1605].

We have already found Franklin's conduct to be unprotected and the District's disciplinary action not to be a violation of the Act. Therefore, the District's disciplinary action cannot reasonably be found to have interfered with the protected rights of others. The pertinent charge is dismissed.

Overbroad District Policies

CSEA excepts to the hearing officer's failure to consider its claim that the District violated subsection 3543.5(a) by disciplining Franklin for violating District policies which were overbroad, ambiguous no-solicitation rules. CSEA raised this argument for the first time in its post-hearing brief. The issue was never fully and fairly litigated. Accordingly, we do not consider it.

ORDER

Based on the foregoing Decision and the entire record in this case, the Public Employment Relations Board ORDERS that the unfair practice charges in Case Nos. SF-CE-340 and SF-CO-78 are DISMISSED.

By: Harry Gluck, Chairperson

John W. Jaeger, Member

Marty Morgenstern, Member