STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MONROVIA TEACHERS ASSOCIATION, CTA/NEA,	)	
Charging Party,	)	Case No. LA-CE-1552
v.	)	PERB Decision No. 460
MONROVIA UNIFIED SCHOOL DISTRICT,	)	December 13, 1984
Respondent.	)	

Appearances: Sandra H. Paisley, A. Eugene Huguenin, Jr., and Jerry B. Allen, Attorneys for Monrovia Teachers Association, CTA/NEA; O'Melveny & Myers by Robert A. Siegel and Diane L. Whiting for Monrovia Unified School District.

Before Tovar, Jaeger, and Burt, Members.

DECISION

BURT, Member: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions filed by both parties. The Monrovia Unified School District (District) excepts to the proposed decision of the administrative law judge (ALJ) finding that the District violated sections 3543.5(a), (b), and (c) of the Educational Employment Relations Act (EERA)[1] by its unilateral imposition of discipline. The Monrovia Teachers Association, CTA/NEA, (Association or MTA) excepts to the remedy provided by the ALJ. For the reasons set

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

out below, we reverse the ALJ's finding that the District violated EERA and dismiss the complaint in its entirety.

FACTS

We have reviewed the ALJ's findings of fact in light of the entire record. Finding them to be free of prejudicial error, we adopt them as the findings of the Board. A summary of those findings follows.

Marcia Wilson is a physical education teacher who has been employed in the District for 19 years. In February of 1982, Ms. Wilson received a letter of reprimand from Terry Giboney, director of personnel services, arising out of a complaint by a parent. The letter, which noted that Ms. Wilson could file a rebuttal statement, was placed in her personnel file.

On March 12, 1982, Ms. Wilson received a written five-day suspension with pay because of a separate incident in which Wilson had allegedly refused to report to the office when requested to do so to help with a student who had become ill in her class. The letter recited specific grounds deemed to constitute insubordination and breach of professional responsibilities, and directed Wilson to report to a non-teaching assignment at another school site for the five days of the following week, beginning March 15.

The Contract

The Association and the District have been parties to two successive collective bargaining agreements since February of

1978. The agreement in effect at the time of this incident ran from July 1980 through August 1982. It had no language specifying procedures, grounds or methods of discipline, but it mentioned discipline several times. Article III, outlining retained management rights, provided:

> A. All matters not specifically enumerated as within the scope of negotiations in Government Code 3543.2 are reserved to the District. It is agreed that such reserved rights include, but are not limited to, the exclusive right and power to determine, implement, supplement, change, modify or discontinue, in whole or in part, temporarily or permanently, any of the following:
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> . . . . . .
>
> 7. The selection, classification, direction, promotion, demotion, discipline and termination of all personnel of the District; . . .

Article IX, governing evaluation procedures provides as follows:

> J. Discipline/Discharge Proceedings - While evaluation procedures may in many cases be related for evidentiary purposes to disciplinary/discharge proceedings, discipline and discharge procedures may in appropriate cases be undertaken independently of the evaluation procedures contained in this Article.

That article also details the right of a unit member to examine and respond to derogatory material placed in the personnel file.

The language of the management rights article and the evaluation article in the 1980-1982 agreement was taken directly from the previous agreement.

1982 Negotiations

In 1981, the Legislature adopted AB 777 and AB 61, both of which amended EERA section 3543.2 with the effect that the previous scope section was denominated (a), and section (b) was added effective January 1, 1982:[2]

> (b) Notwithstanding Section 44944 of the Education Code, the public school employer and the exclusive representative shall, upon request of either party, meet and negotiate regarding causes and procedures for disciplinary action, other than dismissal, affecting certificated employees. If the public school employer and the exclusive representative do not reach mutual agreement, then the provisions of Section 44944 of the Education Code shall apply[3]

AB 777, passed and chaptered first, specified in subsection (b) that the "public school employer and the exclusive representative shall meet and negotiate. . . ." AB 61, effective on the same date but passed as cleanup to AB 777 and chaptered thereafter, added the qualifying language "upon request of either party."

On February 16, 1982, Sandra Paisley, associate counsel of the California Teachers Association, sent a letter to

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[2]The 1982 amendments also added a subsection (c), and the 1983 amendments added subsection (d), neither of which are relevant here.

[3]Education Code section 44944 is contained within Chapter 4, Article III, relating to resignations, dismissals and leaves of absence of certificated employees. Section 44944, itself, provides hearing procedures for an employee notified of intended dismissal.

Terry Giboney, the director of personnel services, demanding that the District "stop harassing and threatening Ms. Marcia Wilson." The letter complains about meetings which an Association representative was not allowed to attend and about "verbal insults and abuse" suffered by Ms. Wilson at a conference with a parent and the principal. The letter continues as follows:

> You also threatened Ms. Wilson with suspension without pay during the February 9 meeting. Effective January 1, 1982, amendments to the Government Code provide that either the District or the exclusive representative may request the other party to negotiate discipline. Since there is no such provision in the contract with MTA, I can only assume that your threat manifests an intent to negotiate this topic.
>
> If you will put your initial proposal in writing, MTA will respond. The District can then "sunshine" both proposals, adopt its position, and we can go to the table.

The letter went on to complain about other incidents of harassment. Neither the District nor the Association ever made a proposal to negotiate. The Association contends that this letter constitutes a valid request to negotiate.

In March, the parties were preparing to negotiate a successor agreement. As an attachment to its proposal, there was a cover letter from the District summarizing the goals and objectives to be sought by the District in negotiations, including its wish "[T]o increase the ability of the District to discipline." The issue was dropped, however, and a proposal

was never forthcoming from the District. The Association made no proposal relating to discipline for the subsequent contract.

In April, Paisley wrote to Robert A. Siegel, the District's attorney as follows:

> The Monrovia Teachers Association, by this letter, hereby notices the Monrovia Unified School District that Articles III, V, IV, and XVII[4] have been found to be invalid by operation of law as they are in conflict with various provisions of the EERA. Pursuant to Article XVI, Separability and Savings, the Association in notifying you that since the above articles have been found to be in contravention of state law, that they are hereby severed from the Agreement.
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> The Association, of course recognizes that the remainder of the Agreement shall remain in full force and effect and will have its negotiating team available to meet and negotiate with the District's representatives, upon request, regarding replacement of the above articles with substitute and legally acceptable provisions if so desired.

The District responded, deeming the Association's assertions that these sections were invalid to be "unfounded and irresponsible," and declaring the entire agreement to be in full force until expiration.

The parties discussed this interchange at the bargaining table, since there were, at the time, Association proposals on the table which were unchanged from those which had been

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[4]Retained Management Rights, Grievance and Arbitration Procedures, Work Stoppage and Entire Agreement.

asserted to be null and void; for example, the management rights article. After discussion of the inconsistency of the Association's position--that these sections were unlawful but still should be negotiated--the Association withdrew its claim that the sections were somehow defective.

Past Practice

Denita Polk, an Association officer, testified about her personal knowledge of past instances of discipline in the District. She knew of one reprimand and of no suspensions.

Giboney, the personnel director, testified that he had reviewed District records and found various forms of disciplinary action totaling 25 since 1977. Most of these incidents involved warning letters placed in a teacher's file. There were also three official reprimands and one suspension with pay and one suspension without pay, both arising out of the same incident. The suspensions occurred in 1977, after passage of the EERA, but before the parties had a collective bargaining agreement. The ALJ credited Giboney's testimony regarding past practice since the personnel director was custodian of personnel records and had been employed in that capacity for years.

The District had no formal procedures for imposing discipline, although there was testimony that teachers were always permitted to file their disagreement with derogatory material placed in personnel files. The District did have a

general school board policy setting out the duties and responsibilities of certificated employees and referencing various sections of the Education Code. (This policy was not offered as an Exhibit.)

Charge Amendment

On March 17, 1982, just after the imposition of the suspension of Marcia Wilson, the Association filed a charge against the District alleging that it violated sections 3543.5(a), (b) and (c) of EERA. The facts recited that an official reprimand was issued to a unit member (Attachment A), a letter was sent to the District (Attachment B), and "the response to that letter (Attachment C) does not indicate an intent to negotiate in good faith as to matters of discipline." Further, the charge continued, the bargaining unit member was later suspended (a copy of the suspension is Attachment D). It concludes:

> At no time has Respondent indicated that it wished to negotiate discipline. Charging Party at no time waived its right to negotiate this topic which was added to the scope of representation effective January 1, 1982. Not even minimal procedural due process (i.e., Notice and an opportunity to be heard) standards were followed by the District.
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> Such unilateral action taken by Respondent has denied Charging Party Rights guaranteed by Government Code sections 3540 et seq.

Attached to the charge were the various letters and memos noted above, including the February 16 letter from Paisley to

Giboney complaining, among other things, about the lack of representation in two meetings.

The District answered briefly, denying the allegations and asserting that it disciplined Ms. Wilson in accordance with past practice and that it never received a request to bargain from the Association. The District's Answer, at paragraph 3, asserts that the District did allow the presence of an Association member at the disciplinary hearing preceding the decision to discipline Ms. Wilson, but was not required to do so at an earlier parent/teacher conference.

At the commencement of the hearing, the Association moved to amend the complaint to include the charge of denial of representation in the parent/teacher conference. Even though he specifically found that the District was not surprised by the amendment, the ALJ refused to allow the amendment, finding that the events complained of were beyond the statute of limitations, and that this allegation was neither included in the original charge nor sufficiently related to the original charge of unilateral action. The ALJ, therefore, refused to permit testimony related to this charge.

DISCUSSION

Charge Amendment

The Association excepts to the ALJ's refusal to allow the amendment of the complaint to reflect its charge that the District refused to allow an Association representative to be

present at the parent conference which led to disciplinary action against Ms. Wilson. It argues that the charge sufficiently raised the issue of denial of representation and that there was no prejudice to the District, since it indicated in its Answer that it was on notice that this issue was included.

The ALJ found that the denial of representation complained of occurred more than six months before the motion to amend, and that it therefore fell outside the requirement in Government Code section 3541.5(a) that PERB "shall not issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of a charge." Although a series of letters and memos attached to the charge, one of which mentioned the District's failure to permit representation at the parent conference (as well as numerous other chargeable issues), there was no mention whatsoever in the charge itself of that allegation.

As noted by the ALJ, PERB regulation 32615[5] requires that a charge must contain "a clear and concise statement of the facts and conduct alleged to constitute an unfair practice." Here the alleged failure to permit representation was simply not mentioned. We find, therefore, that this issue was not

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[5]PERB regulations are codified at California Administrative Code, title 8, section 31001 et seq.

raised by the initial charge, notwithstanding that some mention of it was buried in the attachments.

The Association cites several National Labor Relations Board and PERB cases to the effect that uncharged violations may be found where the issues have been fully litigated, but acknowledges that is not the case here, since the ALJ would not permit evidence of this charge to be offered.

The Association finally argues that, even if the charge did not allege this violation, the fact that the District's formal Answer included reference to the denial of representation indicates that the District understood it to be at issue. While it is clear from the District's Answer that it was covering all bases, we agree with the ALJ that the District's mention of this issue in its Answer does not cure the fact that this violation was never charged. Nor can we find the proposed amendment sufficiently related to the original charge alleging a unilateral change so as to find the amendment appropriate. We, therefore, uphold the ALJ's refusal to allow amendment to include an allegation that Wilson was denied representation in a meeting leading to discipline and decline to remand the case to the ALJ for amendment and the taking of evidence on this issue.

Unilateral Change

The Association claims that the District's action in disciplining Wilson in March was a unilateral change in a

matter within scope. It also claims that neither the language of the collective bargaining agreement, nor its conduct in negotiations, demonstrated waiver of its right to negotiate about discipline. Even if the management rights clause gave the District the right to discipline previously, the Association argues that the January 1, 1982 amendments to EERA required new negotiations which the Association claims to have requested by its February 16 letter to Giboney. It argues also that there was no past practice justifying the suspension, since past District practice concerned only reprimands.

The District claims that the contract explicitly gave the District the right to discipline. Further, it contends that it had a consistent past practice of taking necessary disciplinary steps without protest from MTA and that this particular incident does not constitute a change. Finally, it contends that the new legislation was not intended to wipe out existing contractual rights.

The Board has dealt previously with the issue of the negotiability of discipline and, briefly, with section 3543.2(b). In Arvin Union School District (3/30/83) PERB Decision No. 300, the District asserted its inherent authority to impose discipline short of dismissal for certificated employees by virtue of Education Code section 35160, which gives the governing board of any district the right to carry on its business by any means not in conflict with the purposes for

which school districts are established. PERB there acknowledged the District's inherent right to discipline, and then went on to find no conflict between the right of the District to discipline and the scope of negotiations under EERA, since a finding that disciplinary procedures are within scope means only that the District has an obligation to negotiate in good faith before making any changes in disciplinary policy.

The Board in Arvin, supra, rejected the District's argument that the enactment of section 3543.2(b), adding discipline short of dismissal to the scope of negotiations for the first time, indicated the Legislature's intention to include a subject that was not included previously. The Board disposed of this argument, finding that:

> The addition of a new enumerated subject to the scope section doesn't mean such a subject was not previously related to an enumerated item. The change in the law means that the negotiability of specific procedures for disciplinary action arising after January 1, 1982 no longer need be analyzed in terms of the Anaheim balancing test. . . . (P. 9.)

The Board reached a similar conclusion in Mammoth Unified School District (12/29/83) PERB Decision No. 371. The Board there found that a disciplinary suspension was permitted by section 35160 of the Education Code, and found as well that the District had the right to impose the suspension based on the language of the management rights clause which incorporated the Education Code provision.

We reach a similar conclusion here. We find that the language of the contract's management rights clause giving the District the right to "determine implement, . . . change, [and] modify [discipline]" is sufficient to give the District discretion in disciplinary matters sufficient to authorize the action taken here. Because we find that the District's action in disciplining Ms. Wilson was consistent with the past policy established by the contract, we find that there was no unilateral change in disciplinary policy. Grant Joint Union High School District (2/26/82) PERB Decision No. 196. Further, we find the language of the contract sufficiently clear that we need not go beyond it to examine the past practice of the parties to interpret the meaning of the contract. Grossmont Union High School District (5/26/83) PERB Decision No. 313.

In so deciding, we reject the Association's suggestion that the amendment to EERA effective January 1, 1982, which added "causes and procedures for disciplinary action, other than dismissal" to the scope of negotiations, somehow abrogated existing contract provisions dealing with discipline short of dismissal. As the Board noted in Arvin, supra, the new language simply added as an enumerated subject one which had already been determined to be a subject related to matters within scope. It further made clear that parties could negotiate causes and procedures for discipline short of discharge, as they apparently did here, but, if they do not

reach mutual agreement, the specified provisions of the Education Code would apply. It did not, however, void the parties' negotiated agreements nor impose on school districts the requirement that discipline must be negotiated before imposed regardless of past practice.

ORDER

Based upon the foregoing findings of fact and conclusions of law, and the entire record in this case, the charges in Case No. LA-CE-1552 are hereby DISMISSED.

Members Tovar and Jaeger joined in this Decision.