STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ESCONDIDO ELEMENTARY EDUCATORS ASSOCIATION, CTA/NEA,	)	
Charging Party,	)	Case No. LA-CE-1792
v.	)	PERB Decision No. 475
ESCONDIDO UNION SCHOOL DISTRICT,	)	December 31, 1984
Respondent.	)	

Appearances: Michael R. White, Attorney for Escondido Elementary Educators Association, CTA/NEA.

Before Hesse, Chairperson; Jaeger and Morgenstern, Members.

DECISION

HESSE, Chairperson: The Escondido Elementary Educators Association (Association) appeals the regional attorney's dismissal of its unfair practice charge alleging that the Escondido Union School District (District) violated section 3543.5(a), (b), and (c) of the Educational Employment Relations Act (EERA).[1]

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

Section 3543.5 reads, in pertinent part, as follows:

> It shall be unlawful for a public school employer to:
>
> (a) Impose or threaten to impose reprisals

For the reasons which follow, we affirm the regional attorney's determination. We do, however, find the existence of a procedural irregularity in the handling of this case and, therefore, dismiss the charge with leave to amend.

FACTS AND PROCEDURAL HISTORY

On April 27, 1983, Kay Gibson, the chairperson of the Association's bargaining team, addressed the Escondido Union School District Board at a public meeting. During her presentation, she was interrupted by Evelyn Penfield, the president of the board.

Gibson's address, as recorded in the minutes of the school board meeting, consisted of the following:

> In the strike settlement of February 1982 both parties agreed that the following items could be reopened for bargaining for the 1983-84 school year. The issues submitted to factfinding which include concerted activities, binding arbitration, work hours provisions relating to the total number of duty days and students days adjunct duty hours, elementary preparation periods and required number of on-site duty hours, wages, Health and Welfare benefit's [sic]

> 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.

> carriers. Consistently throughout that bargaining period the Board stipulated that the agreement must be for three years with limited reopeners. In the interest of settling the strike the teachers agreed to that position. Now the Board has made initial proposals in areas clearly outside the scope of bargaining this year and [Interrupted]

Penfield interrupted Gibson's address with the following statement:

> Excuse me, I'm sorry we are not allowed to discuss bargaining in public. We have each of us agents to go to the table to bargain. An (sic) if you wish to speak to bargaining items in a positive or negative fashion (I'm) this is not the place to be doing that.

Gibson responded that "[y]ou (Penfield) are denying the Association the right to give input then."

Penfield replied:

> No, I'm not denying the Association the right to give input. What I am saying to you is, it is improper to bargain in public. If you want to give your litany of the things that we agreed upon to bargain that's fine, but if you want to give me comments about what your position is and so on then that is not. This is not the arena for that. Thank you.

The board minutes do not reflect that any further discussion took place, or that Gibson took the opportunity to further address the board, or that she was denied an opportunity to do so.

On May 12, 1983, the Association filed its unfair practice charge against the District.

Originally, the charge included two allegations: one concerning the District's refusal to permit Gibson to discuss negotiations at the April 27, 1983 board meeting (discussed supra), and the other concerning statements a board member made at the April 11, 1983 board meeting.

On October 17, 1983, according to the Association, its attorney was told by the regional attorney that the charge stated a prima facie case with regard to the first allegation, but not with regard to the second allegation. In this discussion, the Association agreed to amend its charge, deleting the second allegation.[2]

On October 21, 1983, the Association filed an amended unfair practice charge, deleting the second allegation.

Notwithstanding the alleged discussion, on November 4, 1983, the regional attorney dismissed the amended charge.

DISCUSSION

The Association appealed the dismissal on two grounds. First, the Association restates its allegation that Gibson was prevented from addressing the school board on "matters involved in negotiations between the parties and other matters relating to employer/employee relations." The Association alleges that, contrary to the findings of the regional attorney, "Gibson

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[2]In its appeal, the Association has not attempted to renew its second allegation. Therefore, we need not determine whether the charge stated a prima facie violation with regard to the second allegation.

could not comment in any way on negotiations or on the items discussed in negotiations." (Emphasis added.)

Second, the Association argues there was a procedural error in the regional attorney's dismissal. It urges that "[e]ven if the facts were found to be insufficient, the General Counsel was obligated to request additional facts to support the allegations." Such a request would have allowed the Association either to amend the charge and assert additional facts, or to withdraw the charge prior to dismissal.

Appearance at School Board Meeting

The Association asserts that it was prevented "from addressing the school board on matters relating to employer-employee relations other than for the purpose of negotiating or litigating grievances or arbitrations."

The Public Employment Relations Board (PERB) has held that employee organizations have the right to address school boards at public meetings; such a right, however, is limited by their concurrent obligation under the EERA to meet and negotiate with the public school employer. An attempt to negotiate directly with the school board is an attempt to bypass the District's negotiators, and is an unfair practice under EERA. (San Ramon Valley Unified School District (8/9/82) PERB Decision No. 230, and in Sierra Joint Community College District(9/22/83) PERB Decision No. 345.) In these cases, however, Association representatives were not allowed to address the respective boards at all.

Unlike the San Ramon and Sierra cases, in the present case the District did not prohibit the Association from addressing the school board. Indeed, Gibson discussed the parties' bargaining history without any interference by the board. Only when Gibson began to discuss the District's initial proposals was she interrupted. Penfield merely advised Gibson that the board had elected to bargain only through its agents, and then she told Gibson her understanding of the law; that is, she in essence warned Gibson not to attempt to bargain with the board directly.

The dissent argues that Gibson's comments constituted "permissible advocacy rather than negotiations." But we cannot know that, because Gibson chose not to continue, not because she was forbidden to speak. Since Gibson's remarks at the time the interruption occurred were, at best, ambiguous in their legality, and since Penfield's warning in and of itself was merely a statement of warning and not a prohibition from speaking at all, Gibson had the right to continue her remarks. That she did not continue was her choice, and it would be improper to fault the employer on the basis of what she might have said.

Accordingly, we find that the Association failed to allege facts sufficient to state a prima facie violation of EERA.

The Dismissal Without Leave to Amend

After finding that the Association failed to allege

sufficient facts to state a prima facie case, the regional attorney dismissed the charge without leave to amend. The Association asserts that the general counsel must allow the charging party an opportunity "to amend the charge to cure any perceived deficiencies."

PERB Regulation 32621[3] does allow a charge to be amended. The Association did file an amended charge, but only to delete its second allegation. The Association claims that it did not receive a warning that a dismissal was going to be issued. The regulations do not require, nor even address the issue, of whether the general counsel must give such a warning.

It appears, however, that the regional attorney possibly mislead the charging party into believing that its charge as to the April 27 meeting stated a prima facie case when, in fact, it did not so state. On the peculiar facts of this case, to cure any possible irregularity, we will dismiss the charge with leave to amend within 30 days of issuance of this decision.

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[3]Regulation 32621 states:

> Amendment of Charge. Before the Board agent issues or refuses to issue a complaint, the charging party may amend its charge pursuant to the requirements specified in Section 32615.

ORDER

Based upon the foregoing findings of fact and conclusions of law, and the entire record in this case, the Escondido Elementary Educators Association's charge, LA-CE-1792, is DISMISSED WITH LEAVE TO AMEND.

Jaeger, Member, concurring: Based upon my reading of the facts alleged in the Association's unfair practice charge, I would find that its spokesperson was attempting to negotiate directly with the governing board. Therefore, I find that the District's denial of her right to speak did not constitute a prima facie violation of the Act.

I agree with Chairperson Hesse's rationale for dismissing the charge with leave to amend to cure any possible procedural defects in the processing of the charge.

Member Morgenstern's dissent begins on page 9.

Morgenstern, Member, dissenting: The Association's charge alleges that Gibson was exercising her "protected right to make a presentation on behalf of the exclusive representative" and "was not attempting to negotiate" when that right was denied by Penfield. These allegations are amply supported by the transcript of the meeting which is attached to the charge and quoted in pertinent part in the majority decision. Thus, Gibson's actual remarks contain nothing which could be considered negotiating so as to forfeit their protected status, while Penfield's actual comments, on their face, deny Gibson's right to engage in such permissible advocacy.

My colleagues ignore both these uncontroverted facts and well-established law to find no prima facie violation in these circumstances.

PERB has recognized that an employee organization's right to represent its members necessarily includes a right to advocate and present its position on matters of employment relations at public meetings of the school board. San Ramon Valley Unified School District (8/9/82) PERB Decision No. 230. Matters of employment relations which may properly be addressed to the school board include, but are not limited to, negotiable subjects within the scope of representation. Sierra Joint Community College District (9/22/83) PERB Decision No. 345. Further, we have previously considered the very circumstances at issue here, and held that a representative of an employee organization may lawfully comment on the course and progress of

negotiations which are underway, so long as she does not intentionally or inadvertently negotiate directly with the school board, thereby bypassing and undermining the negotiations process. Westminster School District (12/31/82) PERB Decision No. 277.

Thus, the preliminary issue here is whether Kay Gibson's statement constitutes negotiations. In making this determination in Westminster, we carefully reviewed the extensive statements regarding negotiations made by the association representatives there and, based on the following considerations, concluded that they constituted permissible advocacy.[1]

> [The comments] merely summarized and explained the Association's most recent proposal, adding nothing which had not been presented and discussed at the bargaining table. His language was too general to be considered realistically as an offer. Such statements at a public meeting require no direct response from the board and cannot be viewed as substitutes for the give and take of negotiations.
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> In addition, both Mann and Kaelter expressed the Association's willingness to negotiate and participate in mediation and urged the board to become directly involved in the negotiation and mediation process. They did not, however, refuse to meet with the board's negotiator or other representative.

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[1]The factors considered in Westminster are those which have long been applied to the analogous employer right to communicate its position on negotiations directly to its employees. See, e.g., Procter & Gamble Mfg. Co. (Post Ivory) (1966) 160 NLRB 334, 340; Wantagh Auto Sales, Inc. (1969) 177 NLRB 150; NLRB v. J. H. Bonck Co. (5th Cir. 1970) 424 F.2d 634; Obie Pacific, Inc. (1972) 196 NLRB 458, 459 [80 LRRM 1169].

> . . . Nothing was said to disparage the District's negotiator or to undermine the board's confidence in him. . . .
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> In sum, the statements of the Association representatives evidence no intent to obstruct the negotiation and mediation process but, rather, indicate a good faith desire to facilitate and expedite it.

Here, when Gibson was interrupted, her sole, allegedly objectionable statement was, "Now the Board has made initial proposals in areas clearly outside the scope of bargaining this year . . . ." This brief, innocuous comment on the District's proposals does not offer a counterproposal, requests no response from the board, and says nothing to disparage the District's negotiator, to undermine the board's confidence in him, or to otherwise obstruct the negotiations process. Thus, her comments constitute permissible advocacy rather than negotiation, and are well within the Association's right to represent its members.

Member Jaeger's glib characterization of Gibson's statement as an attempt to negotiate rests on pure speculation amounting to a flagrant prior restraint of speech and represents a radical departure both from traditional concepts of negotiation and from the specific standard articulated in Westminster.

Chairperson Hesse asserts two apparently inconsistent views of Gibson's comments. On the one hand, she finds it impossible to determine the legality of what Gibson actually said without knowledge of "what she might have said" if permitted to

continue. On the other hand, she finds that "Gibson had the right to continue her remarks," necessarily acknowledging that the statement does not constitute negotiation.

Remarkably, however, the Chairperson then finds that Gibson freely "chose not to continue." As the transcript of the school board meeting indicates, the chair, board President Penfield, interrupted Gibson almost as soon as the word "bargaining" was mentioned and told her that "we are not allowed to discuss bargaining in public." (Emphasis added.) When Gibson protested, she was told that, "if you want to give me comments about what your position is . . . [t]his is not the arena for that." Having been interrupted and twice incorrectly informed that the subject she wanted to address could not be discussed or commented on, Gibson spoke no more.

On this evidence, the Chairperson has decided that Gibson was not forbidden to speak but quieted herself voluntarily. It appears that an employee representative who would exercise the right to address a school board on an appropriate matter must refuse to be silenced until bound, gagged and dragged from the podium before the Chairperson will find a prima facie case.

I fear this Decision will do little to enhance the demeanor of future public school district board meetings in this State.

As to the Chairperson's curious observation that "it would be improper to fault the employer on the basis of what she [Gibson] might have said," one could hardly disagree. But the

question before us is not related to what might have been said or any other such conjecture; rather we must decide if the employer explicitly and illegally prevented Gibson from addressing the school board even though she had said nothing improper.

Had Penfield merely warned Gibson that she would not bargain in public, the school board president would have acted well within the law. But her actual remarks were not nearly so limited. Rather, she said three times in three different ways that it is improper to "discuss," "speak to" or "comment" on bargaining. Under the authority cited above, this is an incorrect statement of the law as it existed until today. It is also an overbroad prohibition on representational activity, and a prima facie violation of the Act. In reaching a contrary conclusion, my colleagues simply ignore the actual recorded comments of the parties.

Under such circumstances, the grant of leave to amend seems without purpose.