STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

LYNN PRAGER, ERROL JACOBS, LARRY MERKEN, MICHAEL BOYER, Charging Parties, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondent.	)	Case No. LA-CE-2813 LA-CE-2814 PERB Decision No. 737 May 24, 1939

Appearance: Michael John Boyer for Lynn Prager, Errol Jacobs, Larry Merken and Michael Boyer.

Before Porter, Craib and Camilli, Members.

DECISION AND ORDER

CAMILLI, Member: These cases[1] are before the Public Employment Relations Board (Board) on appeal by the charging parties of the Board agent's dismissal, attached hereto, of their charge that respondent violated sections 3543.5, 3543.6, and 3541.5 of the Educational Employment Relations Act. We have reviewed the dismissal and, to the extent that the Board agent found that the unfair practice charges alleged a pure contract violation and that there was no prima facie case, we adopt it as the decision of the Board itself.

[1]Except for the fact that service in Case No. LA-CE-2813 was on Dr. Leonard Britton, Superintendent of Los Angeles Unified School District, and that service in Case No. LA-CE-2814 was on Los Angeles Unified School District, the unfair practice charges are identical. Therefore, the Board hereby consolidates these two cases.

The unfair practice charges in Case Nos. LA-CE-2813 and LA-CE-2814 are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Member Porter joined in this Decision.

Member Craib's concurrence begins on page 3.

Member Craib, concurring: I do not agree that the charges merely allege a "pure contract" violation. Because the charges allege that the respondent has repudiated a provision of the parties' contract, that conduct would constitute a unilateral change in policy and, thus, an unfair practice. (Grant Joint Union High School District (1982) PERB Decision No. 196 [6 PERC par. 13064].)

However, I concur in the dismissal for two reasons. One, as explained by the Board agent in the attached dismissal letter, the case must be deferred to arbitration because the charging parties have failed to show that resort to the contractual grievance procedure would be futile. Two, though the allegation is in the nature of a change in policy, I would find that the charges fail to state a prima facie case of contract repudiation.

In essence, the charges allege that the respondent has refused to follow the first step in the grievance procedure. However, another provision of the contract provides that, should the respondent fail to respond in a timely manner at any step of the procedure, the grievant may proceed directly to the final step of the procedure. Thus, the contract expressly recognizes the possibility of the conduct alleged herein and provides a remedy for that conduct. Given such a provision, I would conclude that, as a matter of law, the charging parties have failed to allege a prima facie case of contract repudiation.

STATE OF CALIFORNIA GEORGE DEUKMEJIAN. *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Boulevard. Suite 650
Los Angeles, CA 90010-2334
(213)736-3127

January 13, 1989

Lynn Prager
Errol Jacobs
Larry Merken
Michael Boyer

Re: DISMISSAL OF UNFAIR PRACTICE CHARGE / REFUSAL TO ISSUE COMPLAINT
Lynn Praqer, et al. v. Los Angeles Unified School District (Board of Education)
Lynn Praqer, et al. v. Leonard Britton (Superintendent, Los Angeles Unified School District)
Case Nos. LA-CE-2813; LA-CE-2814

Dear Ms. Prager:

The above-referenced unfair practice charges, filed on December 9, 1988, allege that the Los Angeles Unified School District (District), acting through the Board of Education and Leonard Britton, Superintendent, has directed that the local school administrator refrain from meeting with Charging. Parties or issuing a written decision concerning their grievances at the first step of the grievance procedure. This conduct is alleged to violate Government Code sections 3543.5, 3543.6 and 3541.5 of the Educational Employment Relations Act (EERA).

I indicated to you in my attached letter dated January 3, 1989 that the above-referenced charge did not state a prima facie case. You were advised that if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, you should amend the charge accordingly. You were further advised that unless you amended the charge to state a prima facie case, or withdrew it prior to January 12, 1989, the charge would be dismissed.

I have not received either a request for withdrawal or an amended charge. I am therefore dismissing the charge based on the facts and reasons contained in my January 3, 1989 letter.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, you may obtain a review of this dismissal of the charge by filing an

appeal to the Board itself within twenty (20) calendar days after service of this dismissal (California Administrative Code, title 8, section 32635(a)). To be timely filed, the original and five copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing (California Administrative Code, title 8, section 32135). Code of Civil Procedure section 1013 shall apply. The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty calendar days following the date of service of the appeal (California Administrative Code, title 8, section 32635(b)).

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See California Administrative Code, title 8, section 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail postage paid and properly addressed.

Extension of Time

A request for an extension of time in which to file a document with the Board itself must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party (California Administrative Code, title 8, section 32132).

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

CHRISTINE A. BOLOGNA
General Counsel

By DONN GINOZA
Regional Attorney

Attachment

cc: Michael J. Boyer
Richard N. Fisher

STATE OF CALIFORNIA

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional office
3530 Wilshire Blvd.
Los Angeles, CA 90010-2334
213-736-3127

January 3, 1989

Lynn Prager
Errol Jacobs
Larry Merken
Michael Boyer

Re: WARNING LETTER
Lynn Praqer, et al. v. Los Angeles Unified School District (Board of Education)
Lynn Prager, et al. v. Leonard Britton (Superintendent, Los Angeles Unified School District)
Case Nos. LA-CE-2813; LA-CE-2814

Dear Ms. Prager:

The above-referenced unfair practice charges, filed on December 9, 1988, allege that the Los Angeles Unified School District (District), acting through the Board of Education and Leonard Britton, Superintendent, has directed that the local school administrator refrain from meeting with Charging Parties or issuing a written decision concerning their grievances at the first step of the grievance procedure. This conduct is alleged to violate Government Code sections 3543.5, 3543.6 and 3541.5 of the Educational Employment Relations Act (EERA).

My investigation revealed the following facts. Charging Parties are employed by the District as credentialed teachers and are members of the bargaining unit represented by United Teachers - Los Angeles (UTLA). Beginning in September 1988, UTLA initiated a boycott of certain activities traditionally performed by teachers. UTLA contends that these activities are voluntary and hence that the teachers are free to refrain from performing them. The boycott was initiated as a response to UTLA's dissatisfaction with progress in negotiations with the District for a collective bargaining agreement.

Charging Parties, who are assigned to Taft High School, participated in the boycott by refusing to fill out progress reports on the District's computerized forms. In response, the principal of Taft High School, Ron Berz, deducted the equivalent of twenty minutes of wages for each class assigned to the teachers. Charging Parties then filed timely grievances with Berz challenging the docking of pay.

Charging Parties allege that under directives of the Board cf Education and the District's Superintendent, Leonard Britton, Berz has refused to meet with Charging Parties at the first step

of the grievance procedure or issue a written decision regarding **the grievances filed. Berz informed Charging Parties** that **he** was **obligated to follow the Board's directive.**

Charging Parties allege that the District is obligated under the terms of the collective bargaining agreement to meet with grievants at Step One of the grievance procedure and issue a written decision following the meeting. Article V ("Grievance Procedure"), section 8.2, pertaining to the processing of a grievance at Step One of the procedure, states:

> **A meeting between the grievant and the immediate administrator shall take place within five (5) days from presentation of the grievance. The administrator shall reply in writing within five (5) days following the meeting. The receipt of such reply will terminate Step One.**

Article V, section 5.0 of the agreement, concerning effects of the grievance procedure time limits, states in pertinent part:

> **. . . The District shall respond, in writing, in a timely manner as provided in this Article. If the District fails to respond to the grievance in a timely manner at any step, the grievant has the option to proceed directly to the final step of this procedure)...**

The Charging Parties indicate that the District has claimed that this provision obviates any claim of harm because grievants may simply proceed to the next step of the grievance procedure. They argue that this contention misses the point. They claim that they have been denied their full contract rights, including the right to have the grievances resolved expeditiously at the lowest **step** in the grievance process and to avoid the **expense** and inconvenience of **arbitration.**

Article V, section 1.0 defines a grievance and states in pertinent part as follows:

> A grievance is defined as a claim that the District has violated an express term of this Agreement and that by reason of such violation the grievant's rights under this Agreement have been adversely affected. Grievances as so defined may be filed by:

> **a. An employee; . . .**

The contract provides for binding arbitration of **grievances. Article V, section 19.0.**

Based on the facts stated above, the charges as present written must be dismissed and deferred to arbitration.

Section 3541.5(a)(2) of the EERA states, in pertinent part, that PERB:

> shall not. . . issue **a** complaint against conduct also prohibited by the provisions of the. . . [collective **bargaining** agreement in **effect] between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted either by settlement or binding arbitration.**

In Lake Elsinore School District, (1987) PERB Decision No. 646, PERB held that this section established a jurisdictional rule requiring that a charge be dismissed and deferred if: (1) the grievance machinery of the agreement covers the matter at issue and culminates in binding arbitration; and, (2) the conduct complained of in the unfair practice charge is prohibited by the provisions of the agreement between the parties. PERB Rule 32620(b)(5) (California Administrative Code title 8, section 32620(b)(5)) also requires the investigating board agent to dismiss a charge where the allegations are properly deferred to binding arbitration.

These **standards are** met with respect **to** this case. First, the grievance machinery of the agreement covers the dispute raised by the unfair practice charge and culminates in binding arbitration. Second, the conduct complained of in this charge that the District has deprived Charging Parties of their rights under the contract to participate in formal Step One meetings and receive a written decision is arguably prohibited by Article V, section 8.2 of the collective bargaining agreement. That section mandates that the local administrator meet with a grievant within five days of the presentation of the grievance and issue a written decision within five days thereafter.

Charging Parties advance the argument that the above-cited jurisdictional limitation does not apply to these charges because attempts to obtain an administrative remedy would be futile. This claim is without merit for three reasons. First, there are no facts alleged demonstrating that grievances which may be filed

alleging violations of the grievance procedure would not be processed by the District.[1] Second, there are no facts alleged indicating that the District has refused to arbitrate any matters raised in the grievances already filed challenging the docking of pay. The concept of futility under Government Code section 3541.5(a) requires a demonstration that the arbitration step of the grievance procedure cannot be invoked and/or completed. State of California (Department of Corrections) (1986) PERB Decision No. 561-S. The denial of meeting rights prior to arbitration does not demonstrate futility. Third, the contract itself appears to contemplate that Step One rights may be dispensed with where the District fails to comply with the requirements of a timely meeting with the local administrator and a written response.

Accordingly, this charge must be deferred to arbitration and will be dismissed. Such dismissal is without prejudice to the Charging Party's right, after arbitration, to seek a repugnancy review by PERB of the arbitrator's decision under the Dry Creek criteria. See PERB Regulation 32661 (California Administrative Code, title 8, section 32661); Los Angeles Unified School District (1982) PERB Decision No. 218; Dry Creek Joint Elementary School District, supra.

If you feel that there are any factual inaccuracies in this letter or any additional facts which would require a different conclusion than the one explained above, please amend the charge accordingly. This amended charge should be prepared on a standard PERB unfair practice charge form clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must be served on the respondent and the original proof of service must be filed with PERB. If I do

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[1] Although PERB has held that arbitration will not be ordered where the challenged conduct involves the refusal to process a grievance in good faith (California State University (1984) PERB Decision No. 392-H), the reasoning of that case is not applicable here. PERB's decision in California State University involved an application of the deferral policy of Collyer Insulated Wire (1971) 192 NLRB 837 [77 LRRM 1931] and Dry Creek Joint Elementary School District (1980) PERB Decision No. Ad-81a (see also: Native Textiles and Communications Workers of American, Local 1127 (1979) 246 NRLB 228 [102 LRRM 1456]}. Lake Elsinore School District, supra, overrules Dry Creek Joint Elementary School District, rejecting the applicability of Collyer Insulated Wire to the EERA.

not receive an amended charge or withdrawal from you before January 12, 1989, I shall dismiss your charge without leave to amend. If you have any questions on how to proceed, please call me at (213) 736-3127.

Sincerely,

DONN GINOZA
Regional Attorney