



STATE OF CALIFORNIA
 DECISION OF THE
 PUBLIC EMPLOYMENT RELATIONS BOARD

BUILDING AND CONSTRUCTION TRADES)	
COUNCIL OF ALAMEDA COUNTY,)	
)	
Charging Party,)	Case No. SF-CE-1558
)	
v.)	PERB Decision No. 989
)	
OAKLAND UNIFIED SCHOOL DISTRICT,)	April 13, 1993
)	
Respondent.)	
)	

Appearance: Van Bourg, Weinberg, Roger and Rosenfeld by Stewart Weinberg, Attorney, for Building and Construction Trades Council of Alameda County.

Before Blair, Chair; Hesse and Caffrey, Members.

DECISION AND ORDER

BLAIR, Chair: This case is before the Public Employment Relations Board (Board) on an appeal by the Building and Construction Trades Council of Alameda County to the Board agent's partial dismissal (attached hereto) of its unfair practice charge. The charge alleged that the Oakland Unified School District violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA)¹ by failing to meet

¹EERA is codified at Government Code section 3540 et seq. Section 3543.5 states, in pertinent part:

It shall be unlawful for a public school employer to do any of the following:

- (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. For purposes of this subdivision, "employee" includes an

and confer in good faith on the issue of an annuity program.

The Board has reviewed the Board agent's warning and dismissal letters and, finding them to be free of prejudicial error, adopts them as the decision of the Board itself.

The Board hereby AFFIRMS the Board agent's partial dismissal in Case No. SF-CE-1558.

Member Caffrey joined in this Decision.

Member Hesse's dissent begins on page 3.

applicant for employment or reemployment.

(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.

Hesse, Member, dissenting: I find a prima facie case has been stated with respect to the alleged charge that the Oakland Unified School District violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act by failing to meet and confer in good faith on the issue of an annuity program.

I would reverse the Board agent's partial dismissal and remand the charge to the General Counsel for the issuance of a complaint.

PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415) 557-1350

December 30, 1992

Stewart Weinberg
Van Bourg, Weinberg, Roger and Rosenfeld
875 Battery Street, 3rd Floor
San Francisco, California 94111

Re: **PARTIAL DISMISSAL OF UNFAIR PRACTICE CHARGE/REFUSAL TO ISSUE COMPLAINT**
Building and Trades Construction Trades Council of Alameda County v. Oakland Unified School District
Unfair Practice Charge No. SF-CE-1558

Dear Mr. Weinberg:

The above-referenced unfair practice charge, filed on April 27, 1992 and amended on June 3, 1992, alleges that the Oakland Unified School District (District) unilaterally eliminated a medical plan for employees, refused to provide information and refused to bargain over an annuity program. This conduct is alleged to violate Government Code sections 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA).

I indicated to you, in my attached letter dated December 18, 1992, that certain allegations contained in the charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended these allegations to state a prima facie case or withdrew them prior to December 29, 1992, the allegations would be dismissed.

I have not received either an amended charge or a request for withdrawal. Therefore, I am dismissing those allegations which fail to state a prima facie case based on the facts and reasons contained in my December 18, 1992 letter.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, you may obtain a review of this dismissal of certain allegations contained in the charge by filing an appeal to the Board itself

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December 30, 1992
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within twenty (20) calendar days after service of this dismissal. (Cal. Code of Regs., tit. 8, sec. 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 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing. (Cal. Code of Regs., tit. 8, sec. 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 (20) calendar days following the date of service of the appeal. (Cal. Code of Regs., tit. 8, sec. 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 Cal. Code of Regs., tit. 8, sec. 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 (3) 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. (Cal. Code of Regs., tit. 8, sec. 32132.)

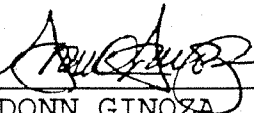
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Final Date

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

Sincerely,

ROBERT THOMPSON
Deputy General Counsel

By 

DONN GINOZA
Regional Attorney

Attachment

cc: Julian Cane

PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415) 557-1350



December 18, 1992

Stewart Weinberg
Van Bourg, Weinberg, Roger and Rosenfeld
875 Battery Street, 3rd Floor
San Francisco, California 94111

Re: **WARNING LETTER**

Building and Trades Construction Trades Council of Alameda
County v. Oakland Unified School District
Unfair Practice Charge No. SF-CE-1558

Dear Mr. Weinberg:

The above-referenced unfair practice charge, filed on April 27, 1992 and amended on June 3, 1992, alleges that the Oakland Unified School District (District) unilaterally eliminated a medical plan for employees, refused to provide information, and refused to bargain over an annuity program. This conduct is alleged to violate Government Code sections 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA).

Investigation of the charge revealed the following facts. The Building and Trades Construction Trades Council of Alameda County (Council) is the exclusive representative of a bargaining unit of classified employees in the District.

The original charge alleges that the District unilaterally eliminated the "Oakland Public School medical plan" without negotiating with the Council and refused to provide relevant and necessary information. The first amended charge repeated these allegations and added additional allegations concerning the District's failure to bargain in good faith over an annuity plan.

At the present time, some members of the bargaining unit participate in a District Annuity plan. According to contractual language provided by the District, under the current agreement the District contributes to the Annuity Program at the rate of 8% of the employee's salary. New District employees from outside of the District hired after November 1983 are not entitled to participate in the program. The Council sought to reopen the issue of the Annuity Program during negotiations in May 1992. It proposed to allow everyone to participate in the Annuity Program and to have the annuity placed on the salary schedule.

The amended charge alleges that the District has engaged in surface bargaining as evidenced by the District's "casual disregard of the separate character of the Building Trades unit."

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Specifically, the Council alleges the District submitted a proposal to the Council which was not only identical to the proposal given to Local 790/Oakland School Employees Association, the exclusive representative of another unit of classified employees, but was actually addressed to Local 790 rather than the Council. The Council further alleges that it has an agreement with the District providing for the right to negotiate an annuity which Local 790 does not have. No particulars are given with respect to this allegation. The Council also alleges that during the course of negotiations on May 13 and 28, 1992, the District "failed and refused to permit the [Council] to negotiate on the issue of an annuity notwithstanding the [District's] previous agreement to do so . . ." Finally, the charge alleges that the District failed to respond to the Council's request for a list of the unit members participating in the Annuity Program.

Based on the facts stated above the allegation that the District failed to negotiate in good faith concerning the issue of the Annuity Program fails to state a prima facie violation of the EERA for the reasons that follow.

Under the EERA, PERB utilizes two tests for determining whether a public school employer has violated section 3543.5(a) by failing to negotiate in good faith. Some types of conduct standing alone, such as a unilateral change, violate section 3543.5(c) under the "pre se" test. Under the "totality of the conduct" test, PERB seeks to determine whether all of the employer's alleged conduct evidences the lack of subjective intent to reach a negotiated agreement. (Stockton Unified School District (1980) PERB Decision No. 143.) "Surface bargaining" is a term used to describe a violation under the "totality of the conduct" test.

The Council alleges that the District has engaged in a course of conduct which demonstrates surface bargaining. The Council alleges that the District has casually disregarded the independent status of the Council as an exclusive representative, separate from Local 790, by making the same proposal concerning the Annuity Program as it did to Local 790 and by addressing the proposal to Local 790 rather than the Council. In addition the District failed to provide information in response to a request for the names of all employees in the unit not participating in the Annuity Program.¹ The charge further alleges that the District refused to negotiate with the Council over the annuity issue during the bargaining sessions on May 13 and 28, 1992.

¹ The undersigned has concluded that this allegation by itself states "per se" violation of section 3543.5(c).

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However, this latter claim fails to contain any allegations of specific conduct on the District's part to support it. There are no other allegations of "surface bargaining" conduct. The undersigned concludes that these allegations are insufficient to establish that the District lacked the requisite subjective intent to reach an agreement over the issue of annuities.

For these reasons, the allegation that the District failed to negotiate in good faith concerning the issue of the Annuity Program as presently written, do not state a prima facie case. If there are any factual inaccuracies in this letter or any additional facts that would correct the deficiencies explained above, please amend the charge accordingly. The amended charge should be prepared on a standard PERB unfair practice charge form clearly labeled Second Amended Charge, contain all the facts and allegations you wish to make, and must 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 not receive an amended charge or withdrawal from you before December 29, 1992, I shall dismiss the above-described allegations from your charge. If you have any questions, please call me at (415) 557-1350.

Sincerely,



DONN GINOZA
Regional Attorney

