STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

EL CENTRO ELEMENTARY TEACHERS ASSOCIATION, Charging Party, v. , EL CENTRO SCHOOL DISTRICT, Respondent.	)	Case No. LA-CE-3561 PERB Decision No. 1154 June 7, 1996

Appearances: California Teachers Association by Charles R. Gustafson, Attorney, for El Centro Elementary Teachers Association; Littler, Mendelson, Fastiff, Tichy & Mathiason by William Wood Merrill, Attorney, for El Centro School District.

Before Caffrey, Chairman; Garcia, Johnson and Dyer, Members.

DECISION

GARCIA, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the El Centro Elementary Teachers Association (Association) to a Board agent's dismissal and refusal to issue complaint. The Board agent found that the Association had not stated a prima facie violation of section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA).[1] The charge alleged that the El Centro

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. 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

School District (District) violated EERA by unilaterally eliminating a bargaining unit position (certificated librarian), transferred work out of the bargaining unit, and adopted a revised job description for a non-bargaining unit library technician, without affording the Association notice and an opportunity to negotiate the decision to implement the change in policy and/or the effects of the change in policy.

The Board has reviewed the entire record in this case, including the unfair practice charge, amended charges, the warning and dismissal letters, the Association's appeal and the District's response thereto. Based upon this review, the Board remands the case to the Board agent for further processing in accordance with the following discussion.

FACTUAL SUMMARY

In a letter dated April 6, 1995,[2] the Assistant Superintendent for the District notified the Association of his intent to recommend to the District Board of Trustees (hereafter trustees) the elimination of a bargaining unit position (certificated librarian) and the reduction and/or elimination of

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> guaranteed by this chapter. For purposes of this subdivision, "employee" includes an 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.

[2]Unless otherwise noted, all dates referred to occurred in 1995.

library services. The letter also described how the certificated librarian's duties would be transferred to others outside the unit or eliminated. By letter to the District dated April 13, the Association stated its position that the District's proposed action to transfer bargaining unit work would violate the "collective bargaining act." However, the Association did not make a request to bargain the decision, saying only that "[The Association] would like to see this resolved short of taking legal action, but is prepared to move forward if necessary."

The Association filed an unfair practice charge against the District on April 24 (prior to the trustees taking any official action), alleging that the District intended to unilaterally eliminate a certificated librarian position and transfer work out of the bargaining unit[3] in violation of EERA section 3543.5(a), (b) and (c).

In a letter dated April 24, the same day the Association filed its original unfair practice charge, a representative of the District, Everett Taylor (Taylor), responded in writing to the Association's April 13 letter. In the letter, Taylor stated that the he did not understand how the District's conduct violated the law, nor did he understand what was meant by the Association's statement about "resolving this short of taking legal action." The Association did not respond formally to these questions.

[3]The Association also filed amended charges in July and December 1995 containing expanded allegations.

A letter written by Taylor on April 25 refers to a meeting with Association representative Glenice Waters (Waters), at which Taylor attempted to establish whether or not the Association was making a request to bargain:

> I asked you if I should interpret your letter dated April 13, 1995, as a demand on the part of the [Association] to negotiate the issue of the elimination of the librarian position and transfer of some duties, to which you responded 'no that was not the purpose of the letter.'

Also on April 25, Association President Al Dempsey appeared before the trustees to protest the District's proposal. According to minutes of the April 25 trustees meeting, the trustees voted to postpone a decision on the matter to the May 9 meeting. In a letter dated the following day, April 26, Waters stated that "the Association is not waiving any rights to bargain on this issue." At a special meeting of the trustees on May 1, rather than the scheduled May 9 meeting, the trustees approved the staff recommendation to eliminate the position.

In June the District assigned the prior certificated librarian's work to others. The Association objected to the events described above by letter dated June 12, and it filed an amended unfair practice charge in July. At that point, the Board agent conducted an investigation of the Association's allegations.

PROCEDURAL BACKGROUND

Board Agent's Warning Letter

In a warning letter dated November 27, 1995, the Board agent identified the main facts and communications, then stated that although the Association had provided evidence of protest and opposition to the District's intended action, the Association had not stated a prima facie violation of EERA. The Board agent's analysis is summarized below.

Summary

Unilateral changes are considered "per se" violations of EERA if the employer fails to notify the exclusive representative and provide an opportunity to request negotiations (Walnut Valley Unified School District (1981) PERB Decision No. 160; Grant Joint Union High School District (1982) PERB Decision No. 196). The Board agent found that the District had complied with the notice requirement and that there was no "per se" violation of EERA.

PERB also uses a "totality of the conduct" test to analyze whether an unlawful unilateral change occurred. (Id.) Examining the various facts and communications between the two parties, the Board agent found that the Association made no request to bargain as required by Newman-Crows Landing Unified School District (1982) PERB Decision No. 223 (Newman-Crows Landing).

Next, the Board agent analyzed the Association's argument that the zipper clause in the parties' collective bargaining agreement (CBA or contract) relieves the Association of the duty

to request bargaining. The Association relies on Chapter XII, Article 1 of the CBA, which states:

> The District and/or El Centro Elementary-Teachers' Association may not reopen any Chapters of the agreement for negotiations during the 1995-1996 school year.

Citing Los Rios Community College District (1988) PERB Decision No. 684 (Los Rios), the Association argued that the cited language should be read broadly to indicate the parties' desire to preclude all bargaining for the entire 1995-1996 year. The Board agent declined to interpret the language in this case so broadly, however, and found that the conduct in dispute was not covered by any of the chapters in the collective bargaining agreement. Therefore, the Board agent concluded that since the zipper clause does not cover the issues presented by this charge, the clause does not excuse the Association from its failure to request bargaining. The Board agent concluded, "Absent a request to bargain, there is no unilateral change violation."

The Association had also alleged that the District unlawfully revised the Library Technician position job description. The Board agent noted that the District has no duty to provide the Association with notice and opportunity to bargain that decision, since the Library Technician position is not within the bargaining unit exclusively represented by the Association.

Dismissal Letter

In the dismissal letter dated December 29, 1995, the Board agent considered two new explanations offered by the Association

in its second amended complaint. First, the Association argues that its statement in its April 13 letter (that it desired to resolve the matter "short of taking legal action") conveyed its desire to meet and negotiate. Second, the Association argued that its statement in its April 25 letter (that it was "not waiving any rights to bargain on this issue") was intended to express a desire to bargain.

The Board agent disagreed and concluded that the Association had not made a clear request to bargain. One specific reason was that the Association had not rebutted the portion of the District's April 24 letter in which the Association's representative was quoted as saying that the purpose of the Association's April 13 letter was not a demand to bargain.

The Board agent found that the facts indicated that the Association received notice and an opportunity to bargain. Since the Association had not made a request to bargain, the Board agent found no violation and dismissed the charge.

ASSOCIATION'S APPEAL

The Association filed an appeal of the dismissal, elaborating upon its disagreement with the Board agent's conclusion that it had not indicated a desire to bargain. The appeal states that the dismissal is "wrong" because it misreads the plain language of the letters and "places an unprecedented burden on the Association to unilaterally establish negotiations after clearly warning the District it was violating the

collective bargaining law by transferring unit work to another unit."

In support of this position, the Association first argues that it actually did request to bargain, but no one apparently understood that. According to the Association, "Failure to request bargaining in those precise words should not prevent the issuance of a complaint," since the Association "[made] it clear to the District that it wanted it to retain the status quo and that if the District did not do so that it would bargain." As an explanation for Waters' statement that the union was not requesting to bargain, the Association explains that Waters' statement was "taken out of context."

Alternately, the Association argues that it had no opportunity to request bargaining, since the District did not give prior notice that on May 1, 1995 it was going to act to change the status quo.

The Association also continues to rely on the zipper clause argument that was rejected by the Board agent. The Association states that it:

> . . . did not need to bargain prior to a change in the status quo because there were no reopeners in the collective bargaining agreement for that year. . . . The District violated that agreement when it unilaterally changed the pay and hours of the librarian.
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> . . . . . .
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> [Therefore, the Association had] no need to request to bargain, since the right of the District to try to change the bargained situation had been waived.

DISTRICT'S STATEMENT IN OPPOSITION TO APPEAL

Regarding the unilateral change allegation, the District points out that it provided timely written notice of its intentions to the Association on April 6. The District emphasizes that not only did the Association "never express [] a desire to negotiate the proposed changes [;] [r]ather, Charging Party expressly stated that it did not want to bargain." (Emphasis in original.) Therefore, according to the District, the Association waived its right to bargain the changes, and the District's action to implement the changes on May 1 was lawful. The District also notes that the unfair practice charge was filed even before that action occurred, and therefore the charge was premature and facially defective because it lacked an allegation that the District ever took any action.

Regarding the District's amendment of a non-bargaining unit library technician position, the District explains that the amendment merely constituted implementation of the proposed change, of which the Association had already received notice.

The District also points out that the timing of the Association's actions is inconsistent with its assertion that it had a sincere interest in bargaining. For example, it notes that even if the Association's April 13 letter constituted a valid request to bargain, that proposal was "clearly disingenuous," because the letter was received by the District on the same day that the union filed the unfair practice charge. Similarly, the District emphasizes that the Association has never disputed the

accuracy of Taylor's quotation of Waters as saying the union was not requesting to bargain.

In response to the Association's allegation that an "unprecedented" burden has been placed on it to "unilaterally establish negotiations," the District disagrees, stating that it is well established that before an employer can be deemed to have violated the EERA, the exclusive representative must have requested to bargain regarding the proposed action. If the exclusive representative fails to satisfy that requirement, it is deemed to have waived its right to bargain with respect to that action.

Regarding the zipper clause argument, the District argues that it does not apply here, since (1) it bars reopeners regarding "any Chapters of the agreement for negotiations during the 1995-1996 school year," whereas the actions at issue occurred during the 1994-1995 school year (i.e., May-June 1995); and (2) the zipper clause bars reopeners of topics covered by the chapters in the CBA, and the unfair practice charge does not allege that the District made an attempt to reopen any such topics. The District also points out that the union's reliance on the zipper clause contradicts its earlier assertions that it made a request to bargain. In conclusion, the District urges the Board to affirm the Board agent's dismissal, since the Association still has not stated a violation of EERA by the District.

DISCUSSION

A brief discussion of each of the main arguments considered by the Board is provided in this section.

Charging Party's Burden of Proof; Association's Duty to Convey its Request to Bargain

When the employer is charged with a violation of EERA section 3543.5(c), the exclusive representative must show that the public school employer took unilateral action without providing the exclusive representative with notice and an opportunity to negotiate a proposed change in a matter within the scope of representation. (San Mateo County Community College District (1979) PERB Decision No. 94.) Furthermore, the exclusive representative must also establish that it made a timely request to bargain (Newman-Crows Landing). A request to bargain must adequately signify a desire to negotiate, sufficient to put the public employer on notice that the exclusive representative desires to bargain the negotiable subject (Kern Community College District (1983) PERB Decision No. 337).

The record supports the Board agent's conclusion that the Association did not clearly convey its request to negotiate. When the Association learned from the District's April 6 letter that the District was to consider making this change, it protested in various ways. It threatened "legal action" in an April 24 letter. In denied that it was making a request to negotiate in an April 25 meeting, although it now claims that its remarks were "taken out of context." It filed an unfair practice

charge the day before the District's first public meeting to discuss the topic. The Association president appeared at the April 25 meeting of the trustees to protest the proposal. The next day, the Association stated in writing that it was "not waiving" any rights to bargain on this issue, which is not equivalent to an affirmative request to bargain.[4] In other words, the Association did several things, none of which was a clear request to bargain. Under the cases discussed above (e.g., Newman-Crows Landing), a party's words or conduct must clearly convey to the other party that a request to negotiate is being made. It has long been the law that mere protest to an employer's contemplated unilateral action is not enough to constitute a request to bargain (Delano Joint Union High School District (1983) PERB Decision No. 307). In its appeal, the Association expresses disagreement with the Board agent's interpretation of its words and conduct. This disagreement exists, however, because the Association did not clearly convey a

[4]Regarding the legal effect of this statement, the Board agrees with the Association that a request to negotiate need not be in a specific form. However, the real issue is what the Association intended to convey by using these words. The plain meaning of this statement, which is brief and unambiguous, is that the Association does not wish to be perceived to be waiving its right to request negotiations. Preserving a right is distinguishable from affirmatively asserting a right. Just as waiver of a right will not normally be inferred from a party's silence, an affirmative demand to exercise a right is not inferred from a party's statements and actions to the contrary. Since the Board is reluctant to engage in mindreading or speculation after the fact, the charging party in a unilateral change case should be obliged to allege that an unequivocal demand to negotiate was made, as distinguished from a claim that the right has not been waived.

request to negotiate. Board precedent has long held that the party requesting negotiation bears the burden of clearly communicating that request to the other party. The Association has not met that burden. Therefore, the Board finds that based on the record, the Association's communications amounted to a protest but fell short of clearly conveying a desire to negotiate as required by Newman-Crows Landing.

Zipper Clause Argument

In another argument, the Association relies on the contract's zipper clause for its position that it "did not need to bargain" because "the District violated that agreement when it unilaterally changed the pay and hours of the librarian." This argument fails for several reasons.

The Association cites the Los Rios case in support of its position that the zipper clause in the parties' contract removed any obligation the Association had to request negotiations. In Los Rios, however, the Board held that zipper clauses are not, as a general rule, inherently inconsistent with bargaining rights and obligations, and such clauses "will be given the breadth their language warrants." It is important to note that the zipper clause at issue in the Los Rios case was quite different than the one relied upon by the Association in the case at bar. The Los Rios zipper clause was phrased in broad and comprehensive language, as the following excerpt demonstrates:

> . . . the Board and the Union for the life of this Agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated

> to bargain collectively unless mutually agreed upon with respect to any subject or matter . . . . [Los Rios, p. 4, fn. 3.]

By contrast, the zipper clause in this case is much more limited:

> The District and/or El Centro Elementary Teachers' Association may not reopen any Chapters of the agreement for negotiations during the 1995-1996 school year.

Since reopeners were not at issue, this clause is inapplicable and the Los Rios case is not helpful to the Association. The Board hereby finds that the Board agent's rejection of the zipper clause argument is well founded.

Adequacy of Association's Opportunity to Request Bargaining

As an alternative to its arguments discussed above, the Association argues that it had no opportunity to request bargaining, since, according to the Association's appeal, the District gave "no prior notice" before unilaterally changing the status quo on May 1. While this argument is inconsistent with the Association's other claims (e.g., that it did in fact request to bargain, or that the zipper clause relieved it of the obligation to request bargaining), ensuring due process is central to a fair resolution of this dispute. Therefore, the Board finds it appropriate to remand this case to the Board agent to provide the parties with the opportunity to present their explanation of the facts with regard to notice. From the file, it is not clear whether the Association received notice that the meeting of the trustees was to occur on May 1 rather than May 9. For that reason, the Board directs the Board agent to conduct further investigation as to the adequacy of notice given by the

trustees of their intention to meet and vote on May 1 regarding elimination of the position and whether the Association was aware that the decision date was moved from May 9 to May 1. Although the file contains references to numerous events that signaled the District's intention to make this change before May 1, the Board is concerned that the Association may have been precluded from making a timely request to negotiate when the trustees moved their meeting to May 1 from May 9.

ORDER

The Board orders that the Board agent's dismissal and refusal to issue complaint of the unfair practice charge in Case No. LA-CE-3561 is hereby REMANDED to the PERB General Counsel's office for further investigation of the notice issue as directed in this decision.

Members Johnson and Dyer joined in this Decision.

Chairman Caffrey's concurrence begins on page 16.

CAFFREY, Chairman, concurring: I concur in the majority's decision to remand the Public Employment Relations Board (PERB or Board) agent's dismissal in Case No. LA-CE-3561 to the General Counsel's office for further investigation. I write separately to state clearly the reasons for my decision.

The right of the exclusive representative to bargain over changes in terms and conditions of employment is one of the basic principles embodied in the Educational Employment Relations Act (EERA). Under the EERA, the employer must provide notice of the intent to make a change in a negotiable subject adequate to allow the exclusive representative a reasonable opportunity to decide whether to request bargaining. (Compton Community College District (1989) PERB Decision No. 720.) The exclusive representative's request to negotiate must clearly convey the desire to bargain over terms and conditions of employment. (Newman-Crows Landing Unified School District (1982) PERB Decision No. 223.) When it is asserted that the exclusive representative waived its right to negotiate by inaction, it must be clear that the employer provided adequate notice and opportunity to request negotiations, and that the exclusive representative clearly did not do so. (Los Angeles Community College District (1982) PERB Decision No. 252; Beverly Hills Unified School District (1990) PERB Decision No. 789.) It is particularly important that the waiver by inaction be clear and unmistakable if it forms the basis of a dismissal at the outset of PERB's unfair practice charge proceedings of the exclusive

representative's allegation that its right to negotiate has been violated.

In my view, it has not been clearly established at this point of the proceedings that the El Centro School District (District) provided the El Centro Elementary Teachers Association (Association) with adequate notice and opportunity to request negotiations, and that the Association did not do so, thereby waiving by inaction its EERA bargaining rights.

Between April 6, 1995 and April 25, 1995, the District and the Association exchanged written and oral communications in which the Association was notified of the District's intention to take certain action at its April 25, 1995, board meeting. The parties do not dispute that the proposed action falls within the scope of representation under EERA. The Association expressed its opposition to the proposed action, but did not clearly convey a demand to negotiate over the matter.

On April 25, a Tuesday, the District sent a letter to the Association confirming a conversation in which the Association indicated that its prior written objection to the District's proposed action was not intended as a demand to negotiate.

The Association president attended the meeting of the District's board on the evening of April 25 and stated the opposition of the Association to the proposed action. In response, the District board did not take the action, deciding instead "to continue the item to the May 9 board meeting" according to the minutes of the April 25 meeting. On the

following day, Wednesday, April 26, the Association responded to the District's April 25 letter indicating that the Association was "not waiving any rights to bargain on this issue."

On May 1, 1995, a Monday, the District board held a "Special Meeting" at which it acted to approve the proposed action. The District provides no explanation for its decision to act on May 1 after it had indicated at its April 25 meeting that the item would be continued to May 9. There were no other items considered at the May 1 "Special Meeting." The Association asserts that the District did not give the Association prior notice of its intent to take the proposed action on May 1. The District does not respond to this assertion.

These circumstances raise questions which must be addressed before a finding can be made that the Association waived by inaction its EERA right to negotiate resulting in dismissal of the instant unfair practice charge. Specifically, it must be determined if the District, after indicating that it would continue consideration of the proposed action to its May 9 meeting, provided the Association with adequate notice of its intent to act on May 1. It is particularly necessary to make this determination since the Association, after attending the meeting at which the District indicated it would not act until May 9, specifically informed the District on April 26 that it was not waiving its right to bargain.

The warning and dismissal letters issued by the Board agent fail to address these matters. Therefore, Case No. LA-CE-3561

must be remanded to the General Counsel's office for further investigation in accordance with the foregoing discussion.