STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS GAVILAN COLLEGE CHAPTER #270,	)	
Charging Party,	)	Case No. SF-CE-1883
v.	)	PERB Decision No. 1177
GAVILAN JOINT COMMUNITY COLLEGE DISTRICT,	)	November 18, 1996
Respondent.	)	

Appearances: California School Employees Association by Stephen Pearl, Field Director, for California School Employees Association and its Gavilan Chapter #270; Ruiz & Schapiro by David E. Falik, Attorney, for Gavilan Joint Community College District.

Before Caffrey, Chairman; Johnson and Dyer, Members.

DECISION

CAFFREY, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the California School Employees Association and its Gavilan College Chapter #270 (CSEA) of a Board agent's dismissal (attached hereto) of its unfair practice charge. In the charge, CSEA alleged that the Gavilan Joint Community College District (District) violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA)[1] by making false

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. EERA section 3543.5 states, in pertinent part:

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

statements and misrepresentations during negotiations.

The Board has reviewed the entire record in this case, including CSEA's original and amended unfair practice charge, the Board agent's warning and dismissal letters, CSEA's appeal and the District's response thereto. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself in accordance with the following discussion.

DISCUSSION

CSEA agreed to the elimination of a tax-sheltered annuity and cash back benefit plan (TSA/cash back plan) as part of the resolution of its contract negotiations with the District» CSEA alleges that it agreed to the elimination of this plan only because the District represented that the plan would also be eliminated for the other employees of the District. CSEA claims it first learned in January 1996 that the District had not eliminated the plan for other employees. CSEA charges that the District violated its duty to bargain in good faith by making

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(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 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.

false statements and misrepresentations during negotiations. The Board agent dismissed CSEA's charge for failure to demonstrate a violation under PERB's "totality of the conduct" test.[2] CSEA asserts that the District's misrepresentations concerning the TSA/cash back plan must be reviewed in the total context of negotiations, including PERB's findings of other violations by the District. When viewed in this light, CSEA alleges, "the misrepresentation is simply one more example of an employer with a history of bad faith bargaining."

Initially, review of the warning and dismissal letters leaves it unclear as to whether CSEA's charge is timely. The limitation period described in EERA section 3541.5(a)(I)[3] is mandatory and serves as a jurisdictional bar to charges filed outside the prescribed period. (Palm Springs Unified School

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[2]In considering an allegation that there has been a failure to bargain in good faith, PERB may review the totality of the bargaining conduct to determine whether there are sufficient indicators of an intent to frustrate or avoid the bargaining process. (Pajaro Valley Unified School District (1978) PERB Decision No. 51.) The presence of a single indicator of bad faith is generally insufficient to meet the "totality of the conduct" test. (Regents of the University of California (1985) PERB Decision No. 520-H.)

[3]EERA section 3541.5 states, in pertinent part:

> (a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following:
>
> (1) Issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge.

District (1991) PERB Decision No. 888.) The Board agent warned CSEA that its April 8, 1996, charge, which referenced misrepresentations by the District occurring on September 5, 1995, was untimely because no evidence of belated discovery had been provided. In its amended charge, CSEA asserts that it only discovered the District's misrepresentations in January 1996 when the TSA/cash back plan was first eliminated for bargaining unit members, but not eliminated for other employees.

CSEA's assertion that it did not discover the District's alleged misrepresentations until January 1996 is logical. CSEA alleges that the misrepresentations by the District in September 1995 led CSEA to accept the factfinding panel report in November 1995, and subsequently agree to a contract which included elimination of the TSA/cash back plan. The District cites California State Employees' Association (Darzins) (1985) PERB Decision No. 546-S to point out that discovery of the legal significance of conduct of which a party has knowledge does not constitute belated discovery for purposes of EERA's statute of limitations. However, this fails to address CSEA's logical assertion that, since it was misled by the District in September, it did not know that the District had made misrepresentations at that time. The EERA statute of limitations begins to run when the charging party knew or should have known of the alleged unlawful conduct. (Fairfield-Suisun Unified School District (1985) PERB Decision No. 547.) Since CSEA did not know of the alleged unlawful conduct until January 1996, when it discovered

that the TSA/cash back plan had not been eliminated for other employees, its April 8, 1996, unfair practice charge is timely.

On the merits, CSEA's brief appeal argues that the District's misrepresentations, when considered in light of the previous finding by a PERB administrative law judge (ALJ) that the District engaged in bad faith bargaining and anti-union animus, is sufficient to demonstrate that the District has acted unlawfully in this case.

In Gavilan Joint Community College District (1996) PERB Decision No. HO-U-613, a PERB ALJ found that the District engaged in surface bargaining in violation of EERA section 3543.5 in its negotiations with CSEA. In reaching this conclusion the ALJ specifically noted that the case addressed whether the District negotiated in good faith from the submission of CSEA's initial bargaining proposal in September 1993 to the declaration of impasse on July 28, 1994. CSEA asserts that the alleged misrepresentation is "one more example of an employer with a history of bad faith bargaining" and, therefore, meets the Board's "totality of the conduct" test when reviewed in light of the earlier violations.

CSEA's simple reference to the earlier case fails to demonstrate any relationship between the conduct addressed by the ALJ in PERB Decision No. HO-U-613 and the alleged violations in the instant case. The mere statement of the fact that the District was found to have engaged in surface bargaining more than a year prior to the conduct at issue here does not lend

support to the instant unfair practice charge. Therefore, CSEA's appeal is without merit.

ORDER

The unfair practice charge in Case No. SF-CE-1883 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Member Johnson's concurrence begins on page 7.
Member Dyer's concurrence begins on page 9.

JOHNSON, Member, concurring: The California School Employees Association and its Gavilan College Chapter #270 (CSEA) alleged in its unfair practice charge that it agreed to the elimination of the TSA/cash back plan during negotiations for a successor agreement because the Gavilan Joint Community College District (District) represented that the plan would also be eliminated for the District's other employees. However, CSEA later discovered that the District had not eliminated the plan for other employees as it had represented.

The duty to bargain in good faith requires that the parties negotiate with a genuine intent to reach agreement. Under the "totality of the conduct" test, the Public Employment Relations Board (Board) examines the entire course of negotiations to determine whether the parties have negotiated with the required subjective intent to reach agreement. (Regents of the University of California (1985) PERB Decision No. 520-H (Regents).) The Board considers several factors under the totality of the conduct test as indicative of bad faith bargaining, including: (1) frequent turnover in negotiators, (2) negotiator's lack of authority, (3) lack of preparation for bargaining sessions, (4) missing, delaying or cancelling bargaining sessions, (5) insistence on ground rules before negotiating substantive issues, (6) taking an inflexible position, (7) regressive bargaining proposals, (8) predictably unacceptable counterproposals, and (9) repudiation of a tentative agreement. (Oakland Unified School District (1996) PERB Decision No. 1156.) The presence of

a single indicia of bad faith has been found by the Board to be insufficient to establish a violation of the duty to bargain in good faith. (Regents.)

In matters involving public agencies, the public trust creates an obligation for parties to deal openly and fairly with each other. An intentional misrepresentation of a material issue, relied upon by another party to its detriment, may result in damage to both the public trust and the bargaining process. Although a single indicia of bad faith bargaining does not establish a prima facie case under the totality of the bargaining conduct, I am concerned that such conduct could impair the public trust. Parties engaged in labor negotiations should endeavor to protect the public trust by striving honestly and fairly toward an agreement.

DYER, Member, concurring: I write separately to clarify an issue not addressed in the warning and dismissal letters.

As the Public Employment Relations Board (PERB or Board) agent noted, California School Employees Association and its Gavilan College Chapter #270 (CSEA) alleges that the Gavilan Joint Community College District made certain misrepresentations during factfinding. It is well established that during the pendency of the Educational Employment Relations Act's (EERA) statutory impasse procedure, the parties have no formal obligation to meet and confer pursuant to EERA section 3543.5(c). (Moreno Valley Unified School Dist, v. Public Employment Relations Bd. (1983) 142 Cal.App.3d 191, 199-202 [191 Cal.Rptr. 60] (Moreno Valley) (holding that although bargaining is part of EERA's statutory impasse resolution procedures, obligation to bargain exists under EERA section 3543.5(e) rather than section 3543.5(c)).)[1] The parties' duty to meet and confer in good faith under EERA section 3543.5(c) remains dormant until the conclusion of EERA's statutory impasse resolution procedures. (Regents of the University of California (1996) PERB Decision No. 1157-H at p. 3 (noting that post-factfinding changed circumstances may

[1]EERA section 3543.5 provides, in relevant part:

> It shall be unlawful for a public school employer to do any of the following:
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.
>
> (e) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).

revive duty).) CSEA's charge, therefore, raises a potential violation of EERA section 3543.5(e), rather than EERA section 3543.5(c).

Because the Board's analysis of bad faith under EERA section 3543.5(e) is identical to its analysis of bad faith under EERA section 3543.5(c), however, this distinction does not alter the Board agent's conclusion. (See Moreno Valley, pp. 199-202.)

STATE OF CALIFORNIA PETE WILSON, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

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

July 10, 1996

Stephen Pearl, Field Director
CSEA & Chapter 270
P.O. Box 640
San Jose, CA 95106

Re: **DISMISSAL OF UNFAIR PRACTICE CHARGE/REFUSAL TO ISSUE COMPLAINT**
California School Employees Association and its Chapter 270 v. Gavilan Joint Community College District
Unfair Practice Charge No. SF-CE-1883

Dear Mr. Pearl:

The above-referenced unfair practice charge, filed April 8, 1996, alleges the Gavilan Joint Community College District (District) failed and refused to negotiate in good faith by making an inaccurate statement during the course of negotiations and impasse procedures. The California School Employees Association (CSEA or Association) alleges this conduct violates Government Code section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA).

I indicated to you, in my attached letter dated June 26, 1996, 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 which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to July 8, 1996, the charge would be dismissed.

I received an amended charge on July 5, 1996. The amended charge reiterates the original charge and adds the following.

The Association notes that Administrative Law Judge Al Link found evidence of bad faith bargaining and anti-union animus in prior unfair practice charges between the parties.

CSEA also provides a declaration from Denise Jensen, former Payroll Officer and CSEA Chapter President. Ms. Jensen's declaration states in pertinent part:

6. On September 5, 1995, I was present during Factfinding when the district's appointee to the Panel, Celia Ruiz, state that College President, Glenn Mayle, had given instructions to discontinue the TSA/cash back benefit for non-represented college employees.
7. I further understood the benefit would be discontinued for non-represented when the benefit was discontinued for CSEA represented employees.

By action of the Board of Trustees for the District, the TSA/cash back benefit was discontinued for CSEA employees on January 1, 1996.

Between January 2, 1996, and January 8, 1996, Larry Carrier, Dean of Business Services instructed Ms. Jensen not to discontinue the TSA/cash back benefit for non-represented employees. CSEA asserts this was there first indication the benefit would not be discontinued for non-represented employees.

The additional facts fail to assist CSEA in demonstrating a prima facie violation of the duty to bargain. Under the "totality of the conduct" test, the Association must show the District lacked the subjective intent to reach an agreement. Ms. Jensen's "understanding" and the District's failure to discontinue the TSA benefit for non-represented employees does not demonstrate the District lacked the intent to reach agreement. While an alleged misrepresentation may indicate bad faith, a single indicia of bad faith is insufficient to meet the "totality of the conduct" test. (Regents of the University of California (1985) PERB Decision No. 520-H.)

Therefore, I am dismissing the charge based on the facts and reasons contained herein and in my June 26, 1996 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. (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.)

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
Kristin L. Rosi
Regional Attorney

Attachment

cc: Celia Ruiz

PUBLIC EMPLOYMENT RELATIONS BOARD

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

June 26, 1996

Stephen Pearl, Field Director
CSEA & Chapter 270
P.O. Box 640
San Jose, CA 95106

Re: **WARNING LETTER**
California School Employees Association and its Chapter 270 v. Gavilan Joint Community College District
Unfair Practice Charge No. SF-CE-1883

Dear Mr. Pearl:

The above-referenced unfair practice charge, filed April 8, 1996, alleges the Gavilan Joint Community College District (District) failed and refused to negotiate in good faith by making an inaccurate statement during the course of negotiations and impasse procedures. The California School Employees Association (CSEA or Association) alleges this conduct violates Government Code section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA).

Investigation of the charge revealed the following. CSEA is the exclusive representative of a wall-to-wall unit of classified employees of the District. CSEA and the District were parties to a collective bargaining agreement which expired on September 30, 1993. From September 1993 through October 1995, the parties were engaged in negotiations for a successor agreement.

In or about September 1993, CSEA provided the District with its initial contract proposal. In or about February 1994, the District countered with its own contract proposal. The District's proposal included a provision for the reduction of the longevity steps and the elimination of a tax-sheltered annuity (TSA) and cash back benefit plan.

On or about October 7, 1994, the parties submitted a joint request for impasse. Included in the impasse request as an article remaining in dispute, was the elimination of the TSA/cash back benefit option.

In or about July 1995, the mediator recommended factfinding as an appropriate means of resolving all outstanding issues. Factfinding hearings were conducted on August 29, 30, and

September 5, 1995. On or about October 2, 1995, the report and recommendations of the factfinding panel were presented to the parties.

CSEA alleges a primary roadblock in reaching agreement was the TSA/cash back issue. CSEA asserts the District singled out Association employees in order to diminish the Association in the eyes of its members. In order to alleviate such fears, CSEA contends it insisted the District exhibit "leadership" by first eliminating the TSA/cash back option for all faculty and supervisory employees. Negotiations for faculty and supervisory employees were not yet underway.

The Association asserts District representative, Celia Ruiz, stated during several executive sessions that the District included elimination of the TSA/cash back in its initial proposal to the faculty bargaining unit. The District did not make its initial proposal to the faculty bargaining unit until December 1995. It is unclear whether the proposal eliminated the TSA/cash back option.

CSEA also alleges Ms. Ruiz stated on September 5, 1995, that College President, Glenn Mayle, issued a directive to eliminate TSA/cash back from administration, supervisory and confidential employees. To date, the TSA/cash back option is in place for supervisory employees.

In October 1995, the parties reached a tentative agreement, which has since been ratified by both the District and the Association.

Based on the facts stated, the charge, as presently written, fails to state a prima facie violation of the EERA, for the reasons stated below.

CSEA asserts it relied upon the District's representations in agreeing to eliminate the TSA/cash back option for its members. The Association contends the District's misrepresentations amount to a failure to bargain in good faith and requests PERB reinstate the TSA/cash back option for CSEA members.

Pursuant to Government Code section 3541.5(a)(1), in order to be timely filed, a charge must be filed within six months of the conduct alleged to constitute the unfair practice. The statute of limitations period commences to run when the charging party knew or should have known of the conduct giving rise to the alleged unfair practice charge. (Regents of the University of California (1983) PERB Decision No. 359-H.) The Association states the District's misrepresentations took place in September 1995, beyond the six month statute of limitation. As CSEA does

not provide evidence of belated discovery, the charge is untimely.

Even if considered timely filed, the charge fails to state a prima facie violation of refusal to bargain in good faith. In determining whether a party has violated EERA section 3543.5(c), PERB utilizes either the "per se" or "totality of the conduct" test, depending *on* the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Decision No. 143.) An allegation that a party misrepresented facts during the negotiation process has not been determined to be a "per se" violation of the duty to bargain in good faith, and thus is properly analyzed under the "totality of the conduct" test.

While the District represented it had made its initial proposal to the faculty and supervisory units, CSEA was aware that it was merely a proposal and not a commitment to eliminate the TSA/cash back option, as negotiations with those two units had not yet begun. Moreover, a single indicia of bad faith is insufficient to meet the "totality of the conduct" test. (Regents of the University of California (1985) PERB Decision No. 520-H.) The District's conduct viewed cumulatively fails to demonstrate a lack of subjective intent to reach an agreement and hence fails to satisfy the "totality of the conduct" test. (See San Ysidro School District (1980) PERB Decision No. 134.)

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts which would correct the deficiencies explained above, please amend the charge. The 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 not receive an amended charge or withdrawal from you before July 8, 1996. I shall dismiss your charge. If you have any questions, please call me at (213) 736-3127.

Sincerely,

Kristin L. Rosi
Regional Attorney