STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

BELLFLOWER EDUCATION ASSOCIATION, Charging Party,	)	Case No. LA-CE-3746
v.	)	PERB Decision No. 1214
BELLFLOWER UNIFIED SCHOOL DISTRICT, Respondent.	)	June 30, 1997

Appearance; California Teachers Association by Charles R. Gustafson, Attorney, for Bellflower Education Association.

Before Caffrey, Chairman; Johnson and Dyer, Members.

DECISION

JOHNSON, Member: This case is before the Public Employment Relations Board (Board) on appeal by the Bellflower Education Association (BEA) to a Board agent's dismissal (attached) of the unfair practice charge. The BEA alleged that the Bellflower Unified School District violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA)[1] by: (1)

[1]**EERA** is codified at Government Code section 3540 et seq. EERA 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 applicant for employment or reemployment.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

retaliating against psychologists represented by the BEA based on their protected activity; (2) unilaterally changing day off procedures, twice-monthly staff meetings, and increasing the workload, without providing BEA notice and an opportunity to negotiate; and (3) bypassing the BEA by asking the psychologists to join management.

The Board has reviewed the entire record in this case, including the Board agent's warning and dismissal letters, the original and amended unfair practice charge, and BEA's appeal. The Board finds the warning and dismissal letters to be free of prejudicial error and, therefore, adopts them as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. LA-CE-3746 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Caffrey and Member Dyer joined in this Decision.

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

STATE OF CALIFORNIA PETE WILSON. *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415) 439-6940

January 29, 1997

Charles R. Gustafson
California Teachers Association
P.O. Box 2153
Santa Fe Springs, CA 90670

Re: **DISMISSAL LETTER/DEFERRAL TO ARBITRATION**
Bellflower Education Association v. Bellflower Unified School District
Unfair Practice Charge No. LA-CE-3746

Dear Mr. Gustafson:

The above-referenced unfair practice charge, filed December 10, 1996, alleges the Bellflower Unified School District (District) discriminated against District psychologists for their protected activity. The Bellflower Education Association (Association) alleges this conduct violates Government Code sections 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA or Act).

I indicated to you, in my attached letter dated January 8, 1997, that certain allegations contained in the charge did not state a prima facie case. I also indicated to you that certain allegations contained in the charge were subject to deferral to arbitration. 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 January 15, 1997, the allegations would be dismissed. I further extended that deadline until January 17, 1997.

On January 17, 1997, I received a first amended charge. The amended charge restates the facts in the original charge and adds the following information. The Association asserts that in June, 1996, District Director of Student Services, Linda Smedly, met with the psychologists and asked if they were interested in joining management. The psychologists refused.

The amended charge further alleges that since September, 1996 through November 22, 1996, the District retaliated against the psychologists for refusing to leave the bargaining unit. Specifically, the charges states Ms. Smedly changed the day off

for those psychologists who worked a four-day work week and gave only pretextual reasons for doing so. Those pretextual reasons are not stated by Charging Party. Additionally, the Association alleges Ms. Smedly broke from past practice in the assignment of new work days, by not making assignments according to seniority, and thus unilaterally changed the terms of the psychologists employment.

The Association further alleges that Ms. Smedly moved the twice-monthly staff meeting, held during regular work hours, from Wednesdays to Tuesdays. The Association asserts that Wednesdays are shorter student days and that by changing the meetings to Tuesdays, psychologists have less time to complete assigned work. The Association alleges this action also constitutes a unilateral change in working conditions. Additionally, the Association contends the District has announced that psychologists tenured at 80% must work 100% time beginning in the 1997-97 school year. The Charging Party does not further explain this assertion.

The Association also asserts the District has changed the evaluation form from one tailored for psychologists to one similar to the form used to evaluate teachers. The Association contends use of the new form will hinder the psychologists ability to receive fair evaluations. Finally, the Association asserts the workload of psychologists has increased greatly, and that the District is urging psychologists to cut corners to complete their work.

The amended charge fails to state a prima facie case for the reasons that follow.

The Association makes the following allegations: (1) the District retaliated against the psychologists based on their protected activity, as shown by the above assertions; (2) the District unilaterally changed the day off procedures, the twice-monthly staff meetings, and unilaterally increased the workload, without providing the Association notice and an opportunity to negotiate; and (3) the District bypassed the Association in asking the psychologists if they were interested in leaving the bargaining unit. Each allegation will be taken in turn.

Retaliation

The Association and the District were parties to a collective bargaining agreement (Agreement) which expired on June 30, 1996. On August 21, 1996, the Association and the District reached a tentative agreement to extend the Agreement until June 30, 1997. Section 6 of the tentative agreement states in pertinent part:

> This Agreement shall become effective upon BEA ratification and Board of Education approval, and shall remain in full force and effect to and including June 30, 1997.

On September 10, 1996, the Association ratified the extension of the Agreement. On September 19, 1996, the Board of Education approved the extension, thus the Agreement took effect September 19, 1996.

Article V, Section E(5) of the Agreement provides for binding arbitration of grievances. Additionally, Article XX states as follows:

> NON-DISCRIMINATION: The District shall not, in administering the provisions of Articles IV (Association Rights), VII (Hours), IX (Evaluation Procedures), X (Leaves of Absence), XI (Class Size), XII (Safety Conditions), XV (Salaries and Benefits), XVII (Early Retirement/ Reduced Services Programs) and Article XVIII (Summer School Selection Procedures), . . . discriminate against any unit member because of race, color, religion, age, sex, marital status, ethnic origin, or lawful political affiliation; or because of membership, non-membership or participation in lawful activities of an employee organization.

As stated in my January 8, 1997, letter, and unaddressed by the amended charge, Section 3541.5(a)(2) of the Educational Employment Relations Act states, in pertinent part, that PERB shall not:

> Issue a complaint against conduct also prohibited by the provisions of the [collective bargaining] agreement 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 Regulation 32620(b)(5) (Cal. Code of Regs., tit. 8, sec. 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/MOU covers the dispute raised by the unfair practice charge and culminates in binding arbitration. Second, certain conduct complained of in this charge, that the District discriminated against the psychologists based on their protected activity, is arguably prohibited by Article XX of the Agreement.

Accordingly, all allegations of retaliation 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 Reg. 32661 [Cal. Code of Regs., tit. 8, sec. 32661]; Los Angeles Unified School District (1982) PERB Decision No. 218; Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81a.)

Unilateral Change

The Association alleges the District made the following unilateral changes: (1) failed to follow past practice of assigning new work days according to seniority; (2) moved the twice-monthly staff meeting from Wednesdays to Tuesdays; and (3) increased the psychologists workload.

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.) Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Walnut Valley Unified School District (1981) PERB Decision No. 160; Grant Joint Unified High School District (1982) PERB Decision No. 196.)

Article III, Section A of the Agreement addresses the District's retained rights. It states in pertinent part:

> Such retained rights include, but are not limited to, the exclusive right to: . . . (10) determine (subject to Article XI, Class Size) staffing patterns, including

but not limited to the number of employees;

The Association alleges the District has failed to follow past practice in the assignment of new work days, by failing to take into consideration seniority in making these assignments. The Association does not, however, provide any other information regarding this allegation, despite the admonition in my January 8, 1997, letter. Thus, it is unclear whether the alleged change in past practice is covered by the District's rights clause stated above. The Association states the District has changed the staffing levels, so as to have an equal amount of staff on site on each day. As noted above, staffing patterns are within the exclusive right of the District, and the Association fails to demonstrate the District is obligated to bargain over such a decision. As such, the allegation is dismissed.

The Association also alleges the District moved the twice-monthly staff meeting from Wednesdays to Tuesdays, thus decreasing the amount of time psychologists have on Tuesdays to complete their assigned work. As stated in my letter dated January 8, 1997, the Association does not demonstrate the day of the week a staff meeting is held is a mandatory subject of bargaining. While holding the staff meetings on Wednesdays may be more convenient for psychologists, a unilateral change in this instance must concern a subject within the scope of bargaining. The amended charge fails to address this deficiency and thus the allegation must be dismissed.

The Association further contends that the District has unilaterally increased the psychologists workload, although the Association provides no further details on this matter. The Association cites an increase in the number of students needing service and an increase in paperwork due to new statutory obligations. However, the mere legal conclusion that an increase in work time or workload constitutes a unilateral change is insufficient to state a prima facie case. (See, United Teachers of Los Angeles (Ragsdale) (1992) PERB Decision No. 944.) The Association does not contend the change requires psychologists to work more hours, nor is there any evidence that psychologists are "cutting corners" to meet the District's requirements. As such, the charge fails to state a prima facie case and must be dismissed.

Moreover, such an assertion may be deferrable to binding arbitration as noted above. Article VII of the Agreement details the parties understanding with regard to work hours and duties. Section A of this Article states:

The District recognizes the varying nature

> of a unit member's day-to-day professional responsibilities does not lend itself to an instructional day of rigidly established length. Unit members shall spend as much time as necessary to fulfill their instructional and professional responsibilities. Although the minimum school-based assignment of hours may be less than forty (40) hours per week, it is understood that fulfillment of a unit member's total professional responsibilities will generally require a work week well in excess of forty (40) hours.

Should the Association allege the District has increased the amount of hours psychologists must work in order to fulfill their duties, such a contention is arguably covered by the above-quoted provision, and thus subject to deferral. As such, the allegation must be dismissed.

Bypassing

The amended charge adds an allegation of bypassing to the original allegations. The Association alleges that in June 1996, the Ms. Smedly asked if the psychologists were interested in becoming part of management. This inquiry took place at a staff meeting Ms. Smedly attended, as Ms. Smedly is the psychologists' supervisor. The charge does not provide any additional information regarding what Ms. Smedly actually said or how the psychologists responded.

Government Code section 3541(a)(1) prohibits the Board from issuing a complaint in respect to conduct taking place more than six months prior to the filing of the charge. The alleged bypassing took place "in June 1996", while the unfair practice charge was filed on December 10, 1996. It is unclear whether PERB has jurisdiction over this allegation. Indeed, my January 8, 1997, letter, stated that the charge must include the date the District took the alleged action. Failure to remedy this deficiency must result in the dismissal of this allegation

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 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: Eric Bathen

STATE OF CALIFORNIA PETE WILSON, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415) 439-6940

January 8, 1997

Charles R. Gustafson
California Teachers Association
P.O. Box 2153
Santa Fe Springs, CA 90670

Re: **WARNING LETTER/DEFER TO ARBITRATION**
~~Bellflower Education Association v. Bellflower Unified School District~~
Unfair Practice Charge No. LA-CE-3746

Dear Mr. Gustafson:

The above-referenced unfair practice charge, filed December 10, 1996, alleges the Bellflower Unified School District (District) discriminated against District psychologists for their protected activity. The Bellflower Education Association (Association) alleges this conduct violates Government Code sections 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA or Act).

Investigation of the charge revealed the following. The Association is the exclusive bargaining representative for the District's psychologists. The Association and the District are parties to a collective bargaining agreement (Agreement) which expires on June 30, 1996. Article V, Section E(5) of the Agreement provides for binding arbitration of grievances. Additionally, Article XX states as follows:

> NON-DISCRIMINATION: The District shall not, in administering the provisions of Articles IV (Association Rights), VII (Hours), IX (Evaluation Procedures), X (Leaves of Absence), XI (Class Size), XII (Safety Conditions), XV (Salaries and Benefits), XVII (Early Retirement/ Reduced Services Programs) and Article XVIII (Summer School Selection Procedures), . . . discriminate against any unit member because of race, color, religion, age, sex, marital status, ethnic origin, or lawful political affiliation; or because of membership, non-membership or participation in lawful activities of an employee organization.

On May 16, 1996, the District gave the Association its initial bargaining proposal, which included a proposed change to the recognition article. The District proposed adding the psychologists to management, and thus eliminating the psychologists from the bargaining unit.

In June 1996, the District met with psychologists to ask them to join management. The Association alleges the psychologists refused this request.

The charge also alleges, without further specificity, that the District has changed the day off for those psychologists with four-day work weeks and has given only pretextual reasons for doing so. The Association alleges this violates past practice of assigning new work days according to seniority.

The Association asserts the District has moved the twice monthly psychologist staff meeting from Wednesdays to Tuesdays. This change allegedly results in less time to work with students. Additionally, the Association contends the District has announced that psychologists tenured at 80% must work 100% time beginning in the 1997-98 school year.

The Association also alleges the District has changed the evaluation form from one tailored for psychologists to one similar to the form used to evaluate teachers. The Association contends use of the new form will hinder the psychologists ability to receive fair evaluations. Finally, the Association asserts the workload of psychologists has increased greatly, and that the District is urging psychologists to cut corners to complete their work.

On December 20, 1996 and December 24, 1996, I telephoned you to in order to obtain further information regarding this charge. To date, I have not received a response.

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

PERB Regulation 32615 (California Code of Regulations, title 8, section 32615) requires that a charge contain "a clear and concise statement of the facts and conduct alleged to constitute an unfair practice." (emphasis added.) The Charging Party must alleges with specificity who, what, when, where and how the Respondent violated the Act. Mere speculation, conjecture or legal conclusions are insufficient.

The instant charge is not in conformance with PERB Regulation 32615, as the charge fails to allege when District officials took action against the psychologists, or how this action was taken. Government Code section 3541.5(a)(1) prohibits the Board from issuing a complaint in respect to conduct taking place more than six months prior to the filing of the charge. As the charge fails to include any dates when alleged actions occurred, it is unclear whether PERB has jurisdiction in this matter. Moreover, the charge does not specify how, or by whom, any of the above-referenced actions were taken, and as such fails to state a prima facie case.

Assuming the charge is not time barred, PERB also lacks jurisdiction over the charge pursuant to Government Code section 3541.5(a)(2). Section 3541.5(a)(2) of the Educational Employment Relations Act states, in pertinent part, that PERB shall not:

> Issue a complaint against conduct also prohibited by the provisions of the [collective bargaining] agreement 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 Regulation 32620(b)(5) (Cal. Code of Regs., tit. 8, sec. 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/MOU 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 discriminated against the psychologists based on their protected activity, is arguably prohibited by Article XX of the Agreement.

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 Reg. 32661 [Cal. Code of Regs., tit. 8,

sec. 32661]; Los Angeles Unified School District (1982) PERB Decision No. 218; Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81a.)

Assuming the charge is not deferrable, the charge also fails to state a prima facie case of discrimination. To demonstrate a violation of EERA section 3543.5(a), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210; Carlsbad Unified School District (1979) PERB Decision No. 89; Department of Developmental Services (1982) PERB Decision No. 228-S; California State University (Sacramento) (1982) PERB Decision No. 211-H.)

The instant charge assumes employees exercised protected rights by refusing to voluntarily withdraw from the bargaining unit. The District had knowledge of this action as the District presented this request to the psychologists. However, the charge does not demonstrate that some of the actions taken by the District can be considered adverse actions against the psychologists in retaliation for this protected activity.

The Board applies an objective test in determining whether the action taken by the employer actually resulted in harm to the charging party. (Palo Verde Unified School District (1988) PERB Decision No. 689.) The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment. The charge alleges the District changed meeting days and changed evaluation forms. The charge does not present, however, any further information as to why these particular actions are adverse to the psychologists' employment with the District.

The charge also fails to demonstrate the requisite nexus. Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor, it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee; (2) the employer's departure from established procedures and standards

when dealing with the employee; (3) the employer's inconsistent or contradictory justifications for its actions; (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; or (6) any other facts which might demonstrate the employer's unlawful motive. (Novato Unified School District, supra; North Sacramento School District (1982) PERB Decision No. 264.) As noted above, the charge fails to note when any of the alleged adverse actions occurred, thus PERB cannot determine if the employee's protected activity was in close temporal proximity to the adverse action. Moreover, the charge does not demonstrate any other factors connecting the protected activity with the District's action. Therefore, the charge fails to state a prima facie violation of EERA section 3543.5(a).

Although the charge asserts only a discrimination violation, several facts may support a finding of a unilateral change violation. However, a prima facie case of unilateral change based on this theory is not demonstrated. There are insufficient facts to determine whether any policies were changed, whether the policies changed were mandatory subjects of bargaining, or whether these alleged changes are subject to deferral as stated above. As such, the charge fails to demonstrate a violation of Government Code section 3543.5(c).

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 January 15, 1997, I shall dismiss your charge. If you have any questions, please call me at (415) 439-6940.

Sincerely,

Kristin L. Rosi
Regional Attorney