

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



CALIFORNIA SCHOOL EMPLOYEES
ASSOCIATION AND ITS GOLDEN PLAINS
CHAPTER 650,

Charging Party,

v.

GOLDEN PLAINS UNIFIED SCHOOL
DISTRICT,

Respondent.

Case No. SA-CE-1916-E

PERB Decision No. 1414

October 26, 2000

Appearances: California School Employees Association by Madalyn J. Frazzini, Deputy Chief Counsel, for California School Employees Association and its Golden Plains Chapter 650; Stroup & de Goede by Bryan G. Martin, Attorney, for Golden Plains Unified School District.

Before Dyer, Amador and Baker, Members.

DYER, Member: This case comes before the Public Employment Relations Board (Board) on appeal by the California School Employees Association and its Golden Plains Chapter 650 (CSEA) of a PERB administrative law judge's (ALJ) proposed decision (attached) dismissing its unfair practice charge. CSEA alleged that the Golden Plains Unified School District (District) violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA)¹ when it failed to negotiate the adoption of a District board policy pertaining to termination of any bus driver employee who failed to pass a re-certification test.

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:

The Board has reviewed the entire record in this case, including the unfair practice charge, the proposed decision, the briefs of the parties, CSEA's exceptions, and the District's opposition. The Board finds the ALJ's proposed decision to be free from prejudicial error and adopts it as the decision of the Board itself.

ORDER

The unfair practice charge and complaint in Case No. SA-CE-1916-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Amador and Baker joined in this Decision.

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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.
 - (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.



STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES)
ASSOCIATION AND ITS GOLDEN)
PLAINS CHAPTER 650,)
)
Charging Party,)
)
v.)
)
GOLDEN PLAINS UNIFIED SCHOOL)
DISTRICT,)
)
Respondent.)
_____)

Unfair Practice
Case No. SA-CE-1916

PROPOSED DECISION
(6/22/2000)

Appearances: Tim Liermann, Senior Labor Relations Representative, for California School Employees Association and its Golden Plains Chapter 650; Stroup and de Goede, by Brian G. Martin, Attorney, for Golden Plains Unified School District.

Before Allen R. Link, Administrative Law Judge.

PROCEDURAL HISTORY

On August 3, 1999, the California School Employees Association and its Golden Plains Chapter 650 (CSEA) filed an unfair practice charge with the Public Employment Relations Board (PERB or Board) against the Golden Plains Unified School District (District). The charge alleged violations of the Educational Employment Relations Act (EERA or Act).¹

On September 14, 1999, the Office of the General Counsel of PERB, after an investigation of the charge issued a complaint alleging violations of subdivisions (a), (b) and (c) of

¹All section references, unless otherwise noted, are to the Government Code. EERA is codified at section 3540 et seq.

section 3543.5.²

On October 8, 1999, the District answered the complaint denying all material allegations and propounding various affirmative defenses. An informal conference was held on October 27, 1999, in an unsuccessful attempt to reach a voluntary settlement. One day of formal hearing was held before the undersigned on March 8, 2000. With the filing of briefs by each side, the matter was submitted May 10, 2000.

INTRODUCTION

On July 1, 1999, Ted Pumarejo (Pumarejo), a bus driver/maintenance employee was dismissed from District employment due to his failure to pass his bus driver recertification test, thereby losing his license.³ The District cites a recently passed board policy provision as authority for

²Subdivisions (a), (b) and (c) of section 3543.5 state, 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.

(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.

³By statute bus drivers are given three opportunities to pass the written test before their license is revoked. After such revocation, applicants must wait a year before retesting.

its dismissal action. CSEA complains, that prior to the adoption of this provision, the District had a policy of accommodating employees that failed to attain license recertification. This accommodation took the form of providing such employees with a non-bus driving position with the same number of weekly hours the employee worked prior to his/her failed recertification. CSEA also contends that the subject board policy affected "terms and conditions" of employment, i.e., wages, hours of employment, and discipline; therefore, the District's unilateral adoption violated its duty to negotiate such matters.

FINDINGS OF FACT

Jurisdiction

The parties stipulated, and it is therefore found, that CSEA is both an employee organization and an exclusive representative, and the District is a public school employer, within the meaning of the EERA.

Maria Cardenas

In November 1998, Maria Cardenas (Cardenas), a District bus driver/custodian who failed her written recertification, asked CSEA for assistance, as she was concerned her District employment would be terminated. Edna Munguia, CSEA's chapter president, met with the administration to determine if Cardenas could be given a full-time custodial position. In January 1999, the District's response was that she was to be terminated. Shortly thereafter

she received a Skelly⁴ hearing with regard to the charge against her, i.e., her failure to maintain a valid bus driver's license.

CSEA and the District met several times to discuss the possibility of creating an alternative-employment opportunity for her. Mike St. Andre (St. Andre), director of maintenance, stated that he had need for a full-time custodian at one of the high schools and that Cardenas could fill that position. In late January or early February 1999, the District agreed to provide Cardenas a full-time custodian position.

While discussing Cardenas' situation the parties attempted to develop collective bargaining agreement (CBA) language to cover this type of circumstance, should it arise in the future. CSEA was willing to agree to a "termination upon failure to recertify" policy, but wanted all current employees to be "grandfathered" into what it believed to be the current policy of accommodation. The District declined to accept this condition and determined that the matter would be better addressed by a modification of its policy file.

Board Policy 4219.3

On May 11, 1999, the District approved Board Policy (BP) 4219.3, Bus Driver Positions, which stated that any bus driver employee who failed to pass a re-certification test in the future "shall be terminated as no longer qualified to hold the position."

⁴Skelly v. State Personnel Board (1975) 15 Cal.3d 194 [124 Cal.Rptr. 14] (Skelly).

The District's job description for a bus driver position requires the possession of a

Valid unrestricted Type I School Bus Operator's Certificate issued through examination by the California Highway Patrol.

BP 4219.3 went on to state:

Termination under these circumstances is also expressly applicable to any employee holding a bus driver position that is combined with another position.

The stated intent of this policy was:

. . . to establish a "base line" for requiring drivers to possess the proper bus certification. The assumption was that the employee who was reinstated as a result of that February 4th meeting would be the last exception in allowing any flexibility with regard to the continued possession of a valid bus driver certificate for employees in multiple classifications.

Dr. David Vaughn (Vaughn), the District's superintendent, testified that the District's purpose

. . . was to satisfy a difference of opinion between the District and the Union and to clarify from that point forward that what we had stated in job description, what the law required, what our administrative regulations required would be clearly outlined in a new policy so that there would be no misunderstanding among anyone from that point forward.

He went on to state that he did not believe BP 4219.3 changed anything, "it just amplified what our expectations were."

The District, in its Administrative Regulations section 4218.1.q. lists, as grounds for discipline,

[f]ailure to . . . keep in effect any license, . . . specified in the employee's class specification . . . necessary for the

employee to perform the duties of the position.

The District stated that, in accordance with their CBA, CSEA was given an opportunity to consult prior to the passage of BP 4219.3.

On April 13, 1999, Ricardo Ornelas (Ornelas), the CSEA labor relations representative assigned to the District, wrote Vaughn protesting the proposed BP 4219.3, insisting that on February 26, 1999, in a meeting with the District and its attorney Brian G. Martin (Martin), the parties agreed they would jointly develop board policy language with regard to this subject. He closed his letter with a request the District "cease and desist" from its implementation of BP 4219.3. The District did not respond to this letter.

On May 24, Ornelas again wrote Vaughn complaining about the passage of BP 4219.3, "imploring" the District to return to the bargaining table to continue the February 26 negotiations on this matter. Once again, the District failed to respond to Ornelas' letter.

Ted Pumarejo

In January or February 1999, after he failed to pass his first written license examination, Pumarejo was told that it was necessary for him to maintain his license and certification in order to keep his job with the District. On July 1, 1999, after he failed to pass his second test, he was notified that, consistent with BP 4219.3, his third failure to pass his bus driver's recertification would result in his employment

termination. After he lost his license Pumarejo was dismissed from District employment. He appealed this dismissal to the District's governing board. It upheld his dismissal on a 4 to 3 vote.

Prior District Bus Driver Licensing Circumstances

Hope Hernandez

Either during or shortly after the 1991-92 school year, Hope Hernandez (Hernandez), a District bus driver/custodian, let her bus driver's license expire. She wanted to become a full-time custodian and was concerned the District would force her to renew her license. CSEA spoke to the superintendent and determined there was no problem with her becoming a full-time custodian.

Tony Baraias Jr.

Sometime in 1994 Tony Barajas Jr. (T. Barajas Jr.) voluntarily terminated his District bus driving responsibilities. The District permitted him to transfer from a position in a bus driver/groundskeeper classification to one in a groundskeeper classification.

Dale Baraias

In or about 1994 Dale Barajas (D. Barajas) held a combination position with the District as a bus driver/maintenance employee. He lost his bus driver's license and was permitted to expand his maintenance duties to a full-time position.

Gilbert Cantu

1994-95 Incident

Sometime in the 1994-95 school year Gilbert Cantu (Cantu) was concerned about an impending District drug test. He admitted to a degree of substance abuse and asked for and was granted an opportunity to attend a rehabilitation program. For a period of time his bus driving privileges were suspended. The District cites mandatory federal law as one of the reasons it provided this accommodation to Cantu.

1998 Incident

In August 1998, Cantu had his bus driver's license revoked by the State of California, Department of Motor Vehicles (DMV), due to a random drug test results. The District's administration recommended employment termination. He appealed this action to the District's governing board. At its meeting, the board members decided that Cantu should continue his employment as a non-bus driving employee.

There was no other evidence proffered with regard to any other District employees either resigning or losing his/her bus driving license.

CBA Article V - Procedure for Consultation

CBA section 5.1 states, in pertinent part:

The parties agree and acknowledge that a variety of items are or may be outside the scope of representation The parties agree, . . . to utilize the consultation procedure . . . whenever a board policy change or adoption is one that affects the specific employment rights and obligations of bargaining unit members.

ISSUE

Did the District when it failed to negotiate the adoption of BP 4219.3 unilaterally modify a term and condition of employment, in violation of subdivision (c) of section 3543.5?

CONCLUSIONS OF LAW

A unilateral modification of terms and conditions of employment within the scope of negotiations that has a generalized effect or continuing impact is a per se refusal to negotiate. (NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177] (Katz).) PERB has long recognized this principle. (Pajaro Valley Unified School District (1978) PERB Decision No. 51 (Pajaro); San Mateo County Community College District (1979) PERB Decision No. 94; and Grant Joint Union High School District (1982) PERB Decision No. 196.)

Under subdivision (c) of section 3543.5, the public school employer is obligated to meet and negotiate in good faith with an exclusive representative about matters within the scope of representation. This section precludes such employer from making unilateral changes in the status quo, whether such status quo is evidenced by a collective bargaining agreement or past practice. (Anaheim City School District (1983) PERB Decision No. 364; Pittsburg Unified School District (1982) PERB Decision No. 199.)

The EERA's scope of representation is found in subdivision (a) of section 3543.2, which states, in pertinent part:

The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment....

PERB, in Pajaro, citing Katz, with approval, stated:

. . . the NLRB has held that the "status quo" against which an employer's conduct is evaluated must take into account the regular and consistent past patterns of changes in the conditions of employment. The NLRB has held that changes consistent with such a pattern are not violations of the "status quo." [Citations.]

CSEA insists that as BP 4219.3 concerned the discipline of employees, its unilateral implementation was a violation of subdivision (c) of section 3543.5. However, BP 4218, enacted long before BP 4219.3, already made it very clear that failure to maintain a bus license was grounds for discipline. In addition, the District's job specifications for bus drivers state that all employees holding positions in that classification must have a bus driver's license.

Therefore, the crucial question is not whether BP 4219.3 unilaterally imposed a new discipline on District employees, but rather what would happen to those employees' employment status once they no longer were legally able to drive a bus. In order to answer this question it is necessary to determine whether or not a past practice of post-revocation accommodation has been established. The charging party contends six separate instances of post-revocation accommodation provide sufficient evidence such a past practice existed. Each of these instances will be examined below:

Hernandez

Hernandez did not lose her license, she merely wanted to discontinue her bus driving duties. She was concerned the District would force her to continue such duties. The District agreed to permit her to become a full-time custodian and discontinue her bus driving duties. In essence, she asked for a change of duties and the District granted her request.

This instance does not provide any evidence of the existence of a past practice of post-revocation accommodation.

T. Barajas Jr.

Similarly, T. Barajas Jr. voluntarily terminated his bus driving responsibilities and asked for a full-time groundskeeper position. The District merely granted his request.

This instance does not provide any evidence of the existence of a past practice of post-revocation accommodation.

P. Barajas

D. Barajas lost his license and was permitted to expand his maintenance duties to include the time he had previously spent driving a bus.

This instance does provide evidence of the existence of a past practice of post-revocation accommodation.

Cantu

1994-95 Incident

Cantu asked for help with regard to a substance abuse problem. The District agreed to assist him, but conditioned such assistance upon the temporary suspension of his bus driving

privileges and his enrollment in a rehabilitation program. Once both of these conditions were met he returned to his bus driving duties. The District cites federal law as one of its reasons for providing his accommodation to Cantu.

This instance does not provide evidence of the existence of a past practice of post-revocation accommodation.

August 1998 Incident

Cantu's license was revoked due to a second substance abuse incident. The District recommended termination of Cantu's employment status. Cantu appealed to the governing board which overruled the administration's recommendation. Cantu maintained his employment status without bus driving duties.

The original recommendation of the District's administration to terminate him as a result of his license revocation strongly supports a conclusion there was no past practice of post-revocation accommodation. However, as the District's governing board did eventually overrule the administration, this incident provides some evidence of the existence of such a past practice.

Cardenas

Cardenas lost her license and was notified she was going to be terminated. She received a Skelly hearing, but prior to her actual termination the District placed her in a full-time custodial position. Once again the District's original decision to terminate Cardenas strongly supports a conclusion there was no past practice of a post-revocation accommodation. However, as Cardenas was eventually given a full-time non-driving position,

this incident provides some evidence of such a past practice.

Summary

Of the six incidents CSEA relied on to support the existence of a past practice of post-revocation accommodation, three were found not to have supported its position. In two of the other three incidents, the District's initial position was to terminate the employee. It was only after (1) governing board action in one instance, and (2) the maintenance supervisor's acknowledgement of an opening position in the other, that the initial decision to terminate was reversed. This supports a conclusion that over a nine-year period there was only one clear instance of post-revocation accommodation and two somewhat tainted instances.

When the Pajaro requirement of evaluating the "regular and consistent past patterns of changes" in the employer's conduct is applied to this conclusion, it is clear that no past practice of post-revocation accommodation has been established. In the absence of such a past practice, there is no "status quo" for the District to have unilaterally modified when it enacted BP 4219.3.

As the District has been found not to have unilaterally modified the status quo, there is no support to an allegation that subdivision (c) of section 3543.5 was violated.

PROPOSED ORDER

Based on the foregoing findings of fact, conclusions of law and the entire record in this case, it is found that the Golden

Plains Unified School District did not violate subdivision (c)⁵ of Government Code section 3543.5 of the Educational Employment Relations Act, when it enacted Board Policy section 4219.3. Therefore, it is ORDERED that all aspects of the charge and complaint in this case are hereby DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself within twenty days of service of this Proposed Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174

FAX: (916) 327-7960

In accordance with PERB Regulations, the statement of exceptions should identify by page, citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (See Cal. Code of Regs., tit. 8, sec. 32300.)

A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing.

⁵In the absence of evidence to support a violation of subdivision (c) of section 3543.5, the allegations of violations of subdivisions (a) and (b) must also fail. There was no evidence proffered regarding an independent violation of either of these subdivisions.

(See Cal. Code of Regs., tit. 8, sec. 32135 (a); see also Cal. Code Regs., tit. 8, section 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirement of Cal. Code Regs., tit. 8, sec. 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service in the U.S. mail. (Cal. Code Regs., tit. 8, secs. 32125(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

Allen R. Link
Administrative Law Judge