STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SIERRA SANDS UNIFIED SCHOOL DISTRICT OF KERN COUNTY, Charging Party, v. DESERT AREA TEACHERS ASSOCIATION, Respondent.	Case No. LA-CO-841-E PERB Decision No. 1425 March 16, 2001

Appearances: Miller, Brown & Dannis by David G. Miller, Attorney, for Sierra Sands Unified School District of Kern County; California Teachers Association by Rosalind D. Wolf, Attorney, for Desert Area Teachers Association.

Before Amador, Baker, Whitehead, Members.

DECISION

BAKER, Member: This case is before the Public Employment Relations Board (Board) on appeal by the Sierra Sands Unified School District of Kern County (District) of a Board agent's dismissal (attached) of its unfair practice charge.

The charge alleged that the Desert Area Teachers Association (Association) violated section 3543.6(c) of the Educational Employment Relations Act (EERA)[1] when it failed or refused to bargain in good faith.

[1] EERA is codified at Government Code section 3540 et seq. Section 3543.6 provides, in pertinent part:

It shall be unlawful for an employee organization to:

After reviewing the entire record in this case, including the charge, the dismissal and warning letters, the District's appeal and the Association's response, the Board finds the dismissal letter to be free from prejudicial error and adopts it as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. LA-CO-841-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Amador and Whitehead joined in this Decision.

(c) Refuse or fail to meet and negotiate in good faith with a public school employer of any of the employees of which it is the exclusive representative.

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8385
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October 23, 2000

David G. Miller
MILLER BROWN & DANNIS
2550 Via Tejon, Suite 3A
Palos Verdes, CA 90274

Re: Sierra Sands Unified School District of Kern County v. Desert Area Teachers Association
Unfair Practice Charge No. LA-CO-841-E
DISMISSAL LETTER

Dear Mr. Miller:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 13, 2000. The Sierra Sands Unified School District of Kern County alleges that the Desert Area Teachers Association violated the Educational Employment Relations Act (EERA) when it failed or refused to bargain in good faith.

I indicated to you in the attached letter dated September 14, 2000, 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, the charge should be amended. You were further advised that unless the charge was withdrawn or was amended to state a prima facie case prior to September 25, 2000, the charge would be dismissed. Your request for an extension of time was granted. An amended unfair practice charge was timely filed on October 2, 2000.

As amended, the charge alleges that the District and the Association initiated reopener negotiations in June 1999. On March 21, 2000, the parties reached a tentative agreement. In a written agreement, the parties resolved reopener issues such as salaries, health and welfare benefits and other items. The charge alleges that the parties also verbally agreed to conduct separate negotiations over a Peer Assistance and Review program (PAR).[1] The parties scheduled a meeting for April 14, 2000 to negotiate PAR.

On April 14, 2000, District and Association bargaining representatives met. The Association presented a bargaining proposal which sought to reopen the contract to negotiate 12 items, in addition to PAR. Several of the proposed bargaining items had recently been settled during

[1] In 1999, the Legislature adopted PAR, a program which provided funding to school districts to develop peer training and assistance programs.

reopener negotiations, such as salary and fringe benefits. Other items had no obvious relationship to PAR, such as proposals concerning the strike prohibition, past practice, and vacancies.

The charge alleges that the Association refused to negotiate PAR at the April 14 meeting unless the District agreed to reopen the contract to negotiate the items proposed by the Association. The District refused to reopen the contract.

On May 8, 2000, District representative David Miller wrote to Association Field Representative Mike Ford. Mr. Miller reminded Mr. Ford that on March 21, 2000 the parties had agreed to negotiate PAR, but that the agreement was not to be considered a reopening of the contract. Mr. Miller asked Mr. Ford to provide further dates to schedule negotiating sessions over PAR. In the absence of additional negotiating dates, Mr. Miller asked the Association whether the parties were at impasse over the PAR issue.

Mr. Ford responded on May 9, 2000, denying that the Association had agreed to negotiate PAR. Mr. Ford noted that the contract is closed under the zipper clause and that it was the Association's position that the contract must be reopened before the Association would be willing to negotiate PAR. Consequently, Mr. Ford stated that the parties were not at impasse over this issue.

On June 12, 2000, Mr. Miller wrote to Mr. Ford suggesting additional dates to bargain PAR. The Association did not respond to the District's letter.

The charge alleges that the Association engaged in bad faith bargaining when it conditioned bargaining PAR on the District's waiver of its contractual right not to bargain under the zipper clause.

As discussed in the attached letter, the charge fails to demonstrate evidence of bad faith under the totality of conduct test. The Board has concluded that where a party has the authority to undertake the proposed condition, in this case to agree to reopen the contract, the condition does not demonstrate evidence of bad faith. (State of California (Department of Personnel Administration (1998) PERB Decision No. 1249-S.) Therefore, the charge fails to state a prima facie case under this theory.

The Board has also developed a per se test to determine whether certain conditional bargaining conduct violates EERA. The charge alleges that the Association violated its duty to bargain in good faith when it conditioned bargaining PAR on the District's waiver of its contractual right not to bargain under the zipper clause. The District contends that the Association violated its duty to bargain in good faith under a per se theory.

As previously discussed in the attached letter, the Board has determined that certain acts have such potential to frustrate negotiations that they are held to be "per se" unlawful without any finding of subjective bad faith. (Pajaro Valley Unified School District (1978) PERB Decision No. 51.) In cases involving conditional bargaining, the Board has found per se violations in

insisting to impasse on the withdrawal of grievances and unfair practice charges, and on a union waiving its statutory right to represent unit members in the grievance process. (Lake Elsinore School District (1986) PERB Decision No. 603; Modesto City Schools (1983) PERB Decision No. 291.) For purposes of determining whether a party has unlawfully insisted to impasse, PERB must first determine that the parties are at impasse pursuant to PERB Regulation 32793. (State of California (Department of Personnel Administration (1999) PERB Decision No. 1330-S.)

The present charge alleges that the District proposed and the Association agreed to negotiate a PAR program. At the bargaining session, the Association submitted its proposal which required the District to reopen the contract to bargain seemingly unrelated matters as a condition of the Association's agreement that it negotiate PAR. The Association refused to negotiate PAR unless the District agreed to waive its contractual right not to bargain under the zipper clause.

Under the case law above, PERB has found per se violations where a party has insisted to impasse that the other party waive its statutory or contractual rights. However, the present charge fails to demonstrate that PERB has determined that the parties are at impasse over PAR. Absent a showing of a PERB certified impasse, the charge fails to demonstrate that the Association unlawfully conditioned bargaining PAR on the District's waiver of its contractual right not to bargain under the zipper clause.

Finally, the charge alleges that the Association failed to bargain in good faith when it refused to negotiate PAR.

An absolute refusal to bargain is a per se violation of the duty to bargain in good faith. (Stockton Unified School District (1980) PERB Decision No. 143; Sierra Joint Community College District (1981) PERB Decision No. 179.)

The charge alleges that on March 21, 2000, the Association agreed to negotiate PAR in a session scheduled for April 14, 2000. At the April 14 bargaining session, the Association refused to negotiate PAR unless the District agreed to reopen the contract. The District insisted that the parties had agreed to limit negotiations to the subject of PAR.

Following the meeting, the District wrote to the Association seeking further dates to negotiate PAR. In its May 9, 2000 letter, the Association again refused to negotiate PAR unless the District agreed to reopen the contract. The Association did not respond to the District's June 12, 2000 letter which provided further dates to negotiate PAR.

These facts fail to demonstrate an absolute refusal to bargain. As alleged, the parties agreed to meet on April 14 to negotiate PAR. The Association attended the meeting and agreed to negotiate PAR on the condition that the District reopen certain items in the contract. Although, the Association's proposal to reopen the contract was unacceptable to the District, the facts do not demonstrate that the Association absolutely refused to negotiate. Accordingly, the charge

fails to demonstrate that the Association breached its duty to bargain in good faith and the charge must be dismissed.

Right to Appeal

Pursuant to PERB Regulations[2], 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. (Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 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. (Regulations 32135(a) and 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 requirements of Regulation 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. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

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. (Regulation 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 Regulation 32140 for the required contents and a

[2] PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. Copies of the Regulations may be purchased from PERB's Publications Coordinator, 1031 18th Street, Sacramento, CA 95814-4174, and the text is available at www.perb.ca.gov.

sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

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. (Regulation 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 _____
Robin W. Wesley
Regional Attorney

Attachment

cc: Rosalind D. Wolf

STATE OF CALIFORNIA GRAY DAVIS, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

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September 14, 2000

David G. Miller
MILLER BROWN & DANNIS
2550 Via Tejon, Suite 3A
Palos Verdes, CA 90274

Re: Sierra Sands Unified School District of Kern County v. Desert Area Teachers Association
Unfair Practice Charge No. LA-CO-841-E
WARNING LETTER

Dear Mr. Miller:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 13, 2000. The Sierra Sands Unified School District of Kern County alleges that the Desert Area Teachers Association violated the Educational Employment Relations Act (EERA)[1] when it failed or refused to bargain in good faith.

The charge makes the following factual allegations. The District and the Association are parties to a collective bargaining agreement (CBA) which expires on June 30, 2001. Article XIX of the parties' CBA includes a zipper clause. Article XXI provides for reopener negotiations during the term of the agreement. Article XXI states, in pertinent part:

> B. During negotiations for the 1999-2000 and 2000-2001 school years, each party shall be entitled to reopen the following Articles: III (Salary), IV (Differentiated Pay), V (Health and Welfare, pursuant to the terms therein), VI (Work Hours), VII (Class Size), and VIII (Leave Provisions).
>
> C. The Association shall be entitled to reopen two (2) Articles in addition to those provided in Section B, above, each reopener year.
>
> D. The District's exercise of reopeners, if any, pursuant to this Article, shall be based on the interest of preservation of the fiscal health of the District.

[1] EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

In 1999, legislation enacting a Peer Assistance and Review program (PAR) was adopted during a special session of the State Legislature. Thereafter, in 1999, the parties initiated reopener negotiations. On June 15, 1999, the District submitted its reopener proposal. The District made numerous statements and proposals, including the following:

> New Legislation in the area of Peer Assistance and Review. We recognize this subject is not technically within the scope of reopener negotiations but would hope the Association will join us in discussing this subject, since it is designed to improve teacher performance and, therefore, student learning.

On June 17, 1999, the Association submitted its reopener proposal. The Association addressed each of the articles listed in Article XXI(B). In addition, the Association chose to reopen Article XI (Transfers) and Article XIX (Miscellaneous Provisions). Under "Miscellaneous Provisions," the Association stated:

> Provide opportunities for the parties to negotiate changes in the law that might not have been contemplated by the parties when this agreement was reached, and to discuss changes made by the legislature and items related thereto, made by special session.

The parties commenced reopener negotiations on October 4, 1999. On January 25, 2000, PAR was first discussed at the bargaining table. The Association expressed concerns about the interest of its members in the PAR program. The District ultimately proposed that the parties meet in a subcommittee of the bargaining teams to negotiate the matter.

The charge alleges that during the March 21, 2000 negotiating session, the parties agreed to meet on April 14, 2000 for the purpose of negotiating PAR. On March 21, the parties reached tentative agreement on the remaining reopened contract provisions. On March 24, the Association ratified the tentative agreement and, on April 12, the District School Board approved the tentative agreement.

On April 14, 2000, Association and District bargaining representatives met. The charge alleges that the Association bargained in bad faith based on the following conduct:

1. Association representative Mike Ford asserted that the contract had not been opened for the purpose of negotiating PAR.

2. The Association presented a bargaining proposal which included 13 items, including PAR. Several of the proposed bargaining items had recently been settled during reopener negotiations, such as salary and fringe benefits. Other items had no obvious relationship to PAR, such as the strike prohibition provision. The Association indicated to the District that it was unwilling to negotiate PAR unless the other items were also opened for negotiations.

3. The Association's proposal included the following, "Fringe Benefits - SISC rebates to be returned to members of the bargaining unit in a form or for a use determined by the Association." The District contends that this proposal is illegal because Government Code section 53205 provides that any dividends or premium rebates derived from health insurance premiums paid by the District "are the employer's property."

Based on the facts stated above, the charge fails to state a prima facie case.

To establish a prima facie case of a failure to bargain in good faith PERB considers the totality of the bargaining conduct to determine whether the parties have negotiated in good faith with the requisite subjective intention of reaching an agreement. (Pajaro Valley Unified School District (1978) PERB Decision No. 51.) The presence of one indicia alone, however, is insufficient to demonstrate bad faith bargaining under the totality of conduct standard.

The Board has also concluded that certain acts have such potential to frustrate negotiations that they are held to be "per se" unlawful without any finding of subjective bad faith. (Ibid.) In cases involving conditional bargaining, the Board has found per se violations in insisting to impasse on the withdrawal of grievances and unfair practice charges, and on a union waiving its statutory right to represent unit members in the grievance process. (Lake Elsinore School District (1986) PERB Decision No. 603; Modesto City Schools (1983) PERB Decision No. 291.)

Applying the totality of conduct test to other cases, PERB has concluded that conditional bargaining may demonstrate evidence of bad faith. In State of California (Department of Personnel Administration) (1998) PERB Decision No. 1249-S (DPA), the employer linked pay raises with the union's agreement to support civil service reform legislation and the approval of an income tax cut. The Board found evidence of bad faith in the DPA case because the employer's pay raise proposal was conditioned on a matter over which the union had no control, approval of an income tax cut. However, the Board concluded that linking the pay raise to the support of the civil service reform legislation did not demonstrate bad faith because the union could decide whether to support the legislation. (See also State of California (Department of Personnel Administration (1999) PERB Decision No. 1330-S.)

The present charge alleges that the Association conditioned bargaining PAR on reopening the contract to negotiate 12 additional items, including subjects that had been settled less than a month before. Because the parties' contract contained a zipper clause, the District had no obligation to bargain the additional items proposed by the Association. However, the District had the discretion to agree to negotiate all or some of these items.

The parties are not at impasse and the alleged facts do not demonstrate that the conditional bargaining was per se unlawful under the Lake Elsinore and Modesto standard. The charge also fails to demonstrate evidence of bad faith under the totality of conduct test because the District had the discretion to determine whether to bargain over the additional subjects proposed by the Association. Accordingly, this allegation fails to state a prima facie violation.

The charge also alleges that the Association bargained in bad faith when Association representative Mike Ford asserted that the contract had not been opened to negotiate PAR. It is unclear under what theory such a statement represents evidence of bad faith bargaining. Thus, this allegation fails to state a prima facie case.

Finally, the charge alleges that the Association offered an illegal proposal. The Association proposed that any health insurance premium rebates be returned to the Association or its members. Government Code section 53205 provides that these rebates are the property of the employer. There is nothing in the language of the statute which precludes the District from negotiating the allocation of any rebates it receives. Therefore, this allegation fails to demonstrate evidence of bad faith bargaining.

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 have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before September 25, 2000, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Robin W. Wesley
Regional Attorney