STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

BERKELEY FEDERATION OF TEACHERS LOCAL 1078, Charging Party, v. BERKELEY UNIFIED SCHOOL DISTRICT, Respondent.	Case No. SF-CE-2211-E PERB Decision No. 1481 May 15, 2002

Appearances: Van Bourg, Weinberg, Roger & Rosenfeld by Stewart Weinberg, Attorney, for Berkeley Federation of Teachers Local 1078; Schools Legal Counsel by Elizabeth B. Mori, Assistant General Counsel, for Berkeley Unified School District.

Before Baker, Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Berkeley Federation of Teachers Local 1078 (Federation) of a Board agent's dismissal (attached) of its unfair practice charge. The charge alleged that the Berkeley Unified School District (District) violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA)[1] by refusing to allow a union representative to attend a meeting between three teachers and their supervisor.

[1] EERA is codified at Government Code section 3540 et seq. Section 3543.5 provides, 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

The Board has reviewed the entire record in this case, including the unfair practice charge, the warning and dismissal letters, the Federation's appeal and the District's response to the appeal.

The Board finds the Board agent's dismissal to be free of prejudicial error and adopts it as the decision of the Board itself consistent with the following discussion.

DISCUSSION

EERA imposes upon the parties an obligation to meet and negotiate in good faith. To establish a failure to bargain in good faith in violation of EERA section 3543.5(c), PERB considers the totality of the 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.) Certain acts, however, have such potential to frustrate negotiations that they are held unlawful without any determination of subjective bad faith. (Ibid.) An absolute refusal to bargain is a per se violation of the duty to bargain in good faith. Absent an adequate demand to negotiate, however, an employer does not violate its duty to bargain. (Stockton Unified School District (1980) PERB Decision No. 143.)

As the Board agent correctly noted, the Federation did not allege in its charge that it made a request to bargain. Since there was no adequate demand to negotiate, the District did

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> 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.

not violate its duty to bargain when it refused to allow Federation President Barry Fike (Fike) to attend the meeting between three special education teachers and their supervisor. Thus, the charge fails to provide sufficient facts to demonstrate a prima facie case.

On appeal, the Federation attempts to correct the deficiencies in its charge by alleging for the first time that it made a demand to bargain. In its appeal, the Federation stated that Fike made a request to bargain caseloads on behalf of the special education teachers.

PERB Regulation 32635(b)[2] states:

> Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence.

In South San Francisco Unified School District (1990) PERB Decision No. 830, the Board stated, "[t]he purpose of PERB Regulation 32635(b) is to require the charging party to present its allegations and supporting evidence to the Board agent in the first instance, so that the Board agent can fully investigate the charge prior to deciding whether to issue a complaint or dismiss the case." A charging party must amend its charge and provide any additional allegations or evidence to the Board agent investigating the charge. (Regents of the University of California (1998) PERB Decision No. 1271-H.)

The Federation does not provide good cause to consider the new allegation on appeal. The information presented on appeal was known to the Federation prior to the filing of the charge. In addition, the Board agent expressly noted in his warning letter that the charge did not allege that the Federation made a demand to bargain. The Federation fails to explain why it did not respond to the warning letter and provide the information to the Board agent that it now asks the Board to consider. The burden is on the charging party to allege sufficient facts

[2] PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. and maybe found on the Internet at www.perb.ca.gov.

to state a prima facie case. As correctly determined by the Board agent, the Federation's charge did not state facts sufficient to establish a prima facie case.

ORDER

The unfair practice charge in Case No. SF-CE-2211-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Baker and Whitehead joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8386
Fax: (916) 327-6377

October 2, 2001

Stewart Weinberg, Attorney
Van Bourg, Weinberg, Roger & Rosenfeld
180 Grand Avenue
Oakland, CA 94612

Re: Berkeley Federation of Teachers Local 1078 v. Berkeley Unified School District
Unfair Practice Charge No. SF-CE-2211-E
DISMISSAL LETTER

Dear Mr. Weinberg:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 15, 2001. The Berkeley Federation of Teachers Local 1078 alleges that the Berkeley Unified School District violated the Educational Employment Relations Act (EERA)[1] by refusing to allow a union representative to attend a meeting that three bargaining unit members held with their supervisor.

I indicated to you in my attached letter dated September 21, 2001, 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 September 8, 2001, the charge would be dismissed.

I have not received either an amended charge or a request for withdrawal. Therefore, I am dismissing the charge based on the facts and reasons contained in my September 21 letter.

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

[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.

[2] PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

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 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 _____
Bernard McMonigle
Regional Attorney

Attachment

cc: Ralph Stern

BMC

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8386
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September 21, 2001

Stewart Weinberg, Attorney
Van Bourg, Weinberg, Roger & Rosenfeld
180 Grand Avenue
Oakland, CA 94612

Re: Berkeley Federation of Teachers Local 1078 v. Berkeley Unified School District
Unfair Practice Charge No. SF-CE-2211-E
WARNING LETTER

Dear Mr. Weinberg:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 15, 2001. The Berkeley Federation of Teachers Local 1078 alleges that the Berkeley Unified School District violated the Educational Employment Relations Act (EERA)[1] by refusing to allow a union representative to attend a meeting that three bargaining unit members held with their supervisor.

On or about July 3, you and I discussed this matter and you recommended that I speak directly with union representative Barry Fike to obtain more information.

Mr. Fike related the following facts. Three special education teachers requested a meeting with Joann Biondi, the District's director of special education. They believed they had a problem getting their work done and wanted to discuss caseload. The teachers requested that Mr. Fike, the Union's president, attend the meeting. Ms. Biondi refused to permit Mr. Fike to attend. At the meeting, on June 14, 2001, the teachers presented Ms. Biondi with two options which they thought would address the problem, designate one teacher to handle only hearing impaired or hiring a new teacher for the visually impaired. Ms. Biondi listened and rejected at least one of the options.

There are no facts which demonstrate that Ms. Biondi made any proposals to the employees on a matter within the scope of bargaining. Nor are there any facts which show that the Union made a request to negotiate a matter within the scope of bargaining and that request was rejected.

The Union has alleged that it was entitled to be present at the meeting. PERB has recognized that employees have a right to representation at disciplinary meetings. Additionally, it is well

[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.

established that an employer may not bypass the union and engage in direct dealing with employees on matters within the scope of bargaining. However, the facts set forth for the June 14 meeting demonstrate no violation of the EERA for the following reasons.

An employee required to attend an investigatory interview with the employer is entitled to union representation where the employee has a reasonable basis to believe discipline may result from the meeting. PERB adopted the Weingarten[2] rule in Rio Hondo Community College District (1982) PERB Decision No. 260. In order to establish a violation of this right, the charging party must demonstrate: (a) the employee requested representation, (b) for an investigatory meeting, (c) which the employee reasonably believed might result in disciplinary action; and (d) the employer denied the request. (See Redwoods Community College District v. Public Employment Relations Board (1984) 159 Cal.App.3d 617.)

In approving the Weingarten rule, the U.S. Supreme Court noted with approval that the National Labor Relations Board would not apply it to "such run-of-the-mill shop-floor conversations as, for example, the giving of instructions or training or needed corrections of work techniques." (Weingarten, quoting Quality Manufacturing Co. (1972) 195 NLRB 197, 199 [79 LRRM 1269, 1271].)

A right to union representation may be held to exist, in the absence of an objectively reasonable fear of discipline, only under "highly unusual circumstances." (Redwoods Community College District v. PERB (1984) 159 Cal.App.3d 617 [205 Cal.Rptr. 523].) The finding of "highly unusual circumstances" in the Redwoods case was based on the requirement that the employee attend a meeting which she no longer sought over her appeal of a negative performance rating; the fact that the interview was investigatory and formal; the interview was held by a high-ranking official of the employer; and the hostile attitude of the official toward the employee.

It does not appear that there was a violation of employee Weingarten rights at the June 14 meeting.

An employer may not communicate directly with employees to undermine or derogate the representative's exclusive authority to represent unit members. (Muroc Unified School District (1978) PERB Decision No. 80.) Similarly, the employer violates the duty to bargain in good faith when it bypasses the exclusive representative to negotiate directly with employees over matters within the scope of representation. (Walnut Valley Unified School District (1981) PERB Decision No. 160.) However, once a policy has been established by lawful means, an employer has the right to take necessary actions, including consulting with employees, to implement the policy. (Ibid.) To establish that an employer has unlawfully bypassed the union, the charging party must demonstrate that the employer dealt directly with its employees (1) to create a new policy of general application, or (2) to obtain a waiver or modification of

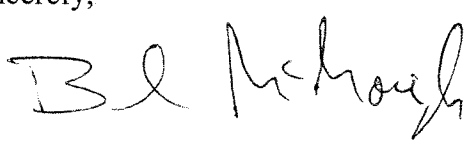
[2]In National Labor Relations Board v. Weingarten (1975) 420 U.S. 251 (Weingarten), the Court granted employees the right to representation during disciplinary interviews.

existing policies applicable to those employees. (Ibid.) There are no facts which establish either of these elements of a prima facie case.

Accordingly, it appears that Ms. Biondi did not engage in unlawful bypassing of the Union. Her meeting with the three teachers appears to fall far short of the direct dealing which is prohibited by the EERA.

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 that 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 28,2001, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,



Bernard McMonigle
Regional Attorney

BMC