

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



UNITED FACULTY CONTRA COSTA,

Charging Party,

v.

CONTRA COSTA COMMUNITY COLLEGE
DISTRICT,

Respondent.

Case No. SF-CE-2421-E

PERB Decision No. 1756

March 8, 2005

Appearance: Weinberg, Roger & Rosenfeld by Stewart Weinberg, Attorney, for United Faculty Contra Costa.

Before Duncan, Chairman; Whitehead and Shek, Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on appeal by United Faculty Contra Costa (UFCC) of a Board agent's dismissal (attached) of its unfair practice charge. The charge alleged that the Contra Costa Community College District (District) violated the Educational Employment Relations Act (EERA)¹ by bargaining in bad faith. UFCC alleged that this conduct constituted a violation of Section 3543.5(a), (b) and (c) by regressive bargaining during negotiations for a successor agreement to the collective bargaining agreement that expired on June 30, 2003.

The Board has reviewed the entire record in this matter, including the unfair practice charge, the first amended charge, the warning and dismissal letters, and UFCC's appeal. The Board finds the Board agent's warning and dismissal letters to be without prejudicial error and adopts them as the decision of the Board itself, subject to the discussion below.

¹EERA is codified at Government Code section 3540, et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

DISCUSSION

The Board agent dismissed the charges for failure to state a prima facie violation of EERA because of a lack of specific information necessary to determine what proposals were made by each party and whether or not under the proper test, the District was in violation as alleged.

UFCC has appealed this dismissal. The appeal states:

The basis of this appeal is that while it might be interesting to provide information regarding every proposal that was made by both sides during the course of negotiations, given the thrust of the charge, the only relevant information has to do with the size of the pay cut demanded by the Employer and the fact that that demand increased from the first day of negotiations in February when it was 5%, to 7% in the last, best and final offer in May of 2004. Furthermore, the cost of Health Benefits to be passed on to the employees increased as well. Thus, it is irrelevant as to what else was included in the last, best and final offer since there is no allegation that any other part of that offer was regressive.

This position by UFCC ignores the legal test for a determination of regressive bargaining. The Board agent correctly noted in both the warning and dismissal letters that not enough information was provided to sustain a prima facie case.

In County of Riverside (2004) PERB Decision No. 1715-M (Riverside), this Board noted that bad faith on the part of the employer is established by reviewing the “totality of conduct.”

In that case, the union alleged that the county engaged in regressive bargaining by withdrawal of salary proposals, canceling five bargaining sessions and renegeing on a tentative agreement regarding 3/50 safety retirement.

“The Board weighs the facts to determine whether the conduct at issue ‘indicates an intent to subvert the negotiating process or is merely a legitimate position adamantly

maintained.” (Riverside, quoting Oakland Unified School District (1982) PERB Decision No. 275.)

In Chino Valley Unified School District (1999) PERB Decision No. 1326, the Board stated that “In general, the Board has held that one indicator of bad-faith bargaining is insufficient to demonstrate a prima facie case of unlawful conduct. (Regents of the University of California (1985) PERB Decision No. 520-H.)”

The Board also noted,

In cases of an alleged failure or refusal to bargain in good faith, PERB typically looks to the entire course of negotiations, examining a party’s outward conduct to determine whether its subjective intent was to attempt to resolve differences and reach a common ground. (Charter Oak Unified School District (1991) PERB Decision No. 873 at p. 7 (Charter Oak), citing Pajaro Valley Unified School District (1978) PERB Decision No. 51 (Pajaro Valley)). A few actions are so egregious as to be per se violations of the duty to bargain in good faith. Some unilateral changes and an outright refusal to bargain constitute examples of per se violations of this duty. In most case, the Board examines the totality of the circumstances to determine whether a party demonstrated the subjective intent to bargain in good faith. (Id. at p. 4.)

Here, the Board agent dismissed the charges for failure to state a prima facie violation of EERA because of a lack of specific information necessary to determine what proposals were made by each party and whether or not under the proper test, the District was in violation as alleged.

There is no refusal to bargain or egregious unilateral activity. We are left to wonder what happened in the totality of circumstances because UFCC has refused to provide that information. In fact, in its appeal UFCC states that it does not have to provide the information of the entire circumstances. This position ignores case law requiring a look at the total negotiations. UFCC has not met its burden and the charge must be dismissed.

ORDER

The unfair practice charge in Case No. SF-CE-2421-E is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Members Whitehead and Shek joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
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December 1, 2004

Stewart Weinberg, Attorney
Weinberg, Roger & Rosenfeld
180 Grand Avenue, Suite 1400
Oakland, CA 94612

Re: United Faculty Contra Costa v. Contra Costa Community College District
Unfair Practice Charge No. SF-CE-2421-E; First Amended Charge
DISMISSAL LETTER

Dear Mr. Weinberg:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 10, 2004. The United Faculty Contra Costa alleges that the Contra Costa Community College District violated the Educational Employment Relations Act (EERA)¹ by bargaining in bad faith.

I indicated to you in my attached letter dated September 27, 2004, 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 October 4, 2004, the charge would be dismissed.

On October 1, 2004, I received a first amended charge. The amended charge adds new facts which will be summarized below.

The District and United Faculty are parties to a collective bargaining agreement that expired on June 30, 2003. With regard to successor negotiations, the Agreement provides as follows:

25.3. Negotiations for a Successor Agreement will begin not later than sixty (60) calendar days from receipt of written demands and contract changes from the other party.

25.3.1. Should agreement not be reached during a period of forty-five (45) calendar days from the date of beginning of

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.

negotiations, either party may submit an unresolved dispute to the impasse procedures of the Public Employment Relations Board.

On February 18, 2004, the District presented its first comprehensive bargaining proposal. A copy of only the District's salary proposal was provided with the amended charge. The salary proposal indicates that the District proposed a 5% salary reduction to be implemented on July 1, 2004. If the proposal was implemented after July 1, 2004, the salary reduction would be increased so that the net impact on an annualized basis would be 5%. The District also proposed changes in salary schedule placement and eliminated the required office hours for faculty. The District's rationale for the proposed 5% salary cut was a projected District deficit of 7.1 million dollars. The District further indicated that if the Faculty did not accept the 5% cut, layoffs could be expected.

Charging Party also contends the District's first proposal called for a participation fee of 3% of an employee's gross monthly salary for Health and Welfare Benefits, effective July 1, 2004. A copy of this proposal was not provided with either the original or amended charge. As such, it is unclear what other proposals were made regarding health benefits.

During the next several months, the parties apparently met on several occasions and exchanged various proposals. However, Charging Party does not provide any specifics about these meetings and does not provide any of the proposals presented.

On April 23, 2004, Faculty Chief Negotiator Irene Menegas sent a letter to District Chief Negotiator Greg Marvel requesting 13 separate pieces of information regarding the District's proposals. A sample of the requested is as follows:

1. Postpone faculty hires: Please clarify what 15 positions are referred to, and indicate how this item provides a \$525,000 savings to the district.
2. Eliminate emeritus teaching: Please provide a detailed assessment of how this item provides a \$150,000 savings to the district.
3. Outside Contracting: What outside contracting is being eliminated and how does it save \$45,000?
4. Freeze sabbatical leaves: Please explain how freezing sabbatical leaves will save the district \$400,000.
5. Cut District Office: Please itemize the cuts planned for the District Office for 2004-2005.

7. Please provide the costs for salary and benefits for each of the following categories of district employees: classified managers, supervisors, and confidentials.

12. What is the number of faculty at each placement on the salary schedule?

On May 14, 2004, Mr. Marvel responded to Ms. Menegas' letter by providing a response to each and every one of her questions. Additionally, Mr. Marvel attached spreadsheets detailing the District's budget expenditures.

On May 28, 2004, the District presented its last, best and final offer. In my warning letter, I noted that the Charging Party did not provide a copy of this proposal. The amended charge also fails to provide this information. As such, it is impossible for PERB to determine what other subject were included in the last, best and final offer. Charging Party states the last, best and final offer calls for a 7% salary cut and an increase in health benefit costs. The charge does not present any other information about the offer. Additionally, Charging Party contends the District "threatened" to declare impasse if the union did not accept its offer.

On June 4, 2004, the District filed a request for impasse determination with PERB.

Based on the facts provided in the original and amended charge, the charge as presently written, fails to state a prima facie violation of the EERA, for the reasons provided below.

The charge alleges that the employer violated EERA section 3543.5(c) by engaging in bad faith or "surface" bargaining. It is the essence of surface bargaining that a party goes through the motions of negotiations, but in fact is weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent agreement. (Muroc Unified School District (1978) PERB Decision No. 80.) Where there is an accusation of surface bargaining, PERB will resolve the question of good faith by analyzing the totality of the accused party's conduct. The Board weighs the facts to determine whether the conduct at issue "indicates an intent to subvert the negotiating process or is merely a legitimate position adamantly maintained." (Oakland Unified School District (1982) PERB Decision No. 275.)

The indicia of surface bargaining are many. Entering negotiations with a "take-it-or-leave-it" attitude evidences a failure of the duty to bargain because it amounts to merely going through the motions of negotiations. (General Electric Co. (1964) 150 NLRB 192, 194 [57 LRRM 1491], enf. 418 F.2d 736 [72 LRRM 2530].) Recalcitrance in the scheduling of meetings is evidence of manipulation to delay and obstruct a timely agreement. (Oakland Unified School District (1983) PERB Decision No. 326.) Dilatory and evasive tactics including canceling meetings or failing to prepare for meetings is evidence of bad faith. (Oakland Unified School District, supra, PERB Decision No. 326.) Conditioning agreement on economic matters upon prior agreement on non-economic subjects is evidence of an unwillingness to engage in a give-and-take. (State of California (Department of Personnel Administration) (1998) PERB Decision No. 1249-S.)

Other factors that have been held to be indicia of surface bargaining include: negotiator's lack of authority which delays and thwarts the bargaining process (Stockton Unified School District (1980) PERB Decision No. 143); insistence on ground rules before negotiating substantive issues (San Ysidro School District (1980) PERB Decision No. 134); and reneging on tentative agreements the parties already have made (Charter Oak Unified School District (1991) PERB Decision No. 873; Stockton Unified School District, *supra*, PERB Decision No. 143; Placerville Union School District (1978) PERB Decision No. 69).

It is clear, however, that while a party may not merely go through the motions, it may lawfully maintain an adamant position on any issue. Adamant insistence on a bargaining position is not necessarily refusal to bargain in good faith. (Oakland Unified School District, *supra*, PERB Decision No. 275.) "The obligation of the employer to bargain in good faith does not require the yielding of positions fairly maintained." (NLRB v. Herman Sausage Co. (5th Cir. 1960) 275 F.2d 229 [45 LRRM 2829, 2830].)

Herein, Charging Party fails to provide facts sufficient to demonstrate the District bargained in bad faith. Charging Party asserts the District failed to provide requested information. However, facts provided by the Charging Party demonstrate the District provided all of the requested information within three weeks of the request. Additionally, while the charge contends the District engaged in regressive bargaining, the charge fails to provide copies of both parties proposals. As such, it is impossible for PERB to determine if the proposals were in fact regressive. Lastly, the union contends the District engaged in bad faith bargaining by requesting an impasse determination when the parties were still bargaining. However, Article 25 of the parties Agreement appears to allow either party to request an impasse determination forty-five days after the inception of bargaining. Lastly, the union contends the District acted in bad faith by requesting the parties bargain on weekends, holidays and in the evenings. However, Charging Party does not provide any PERB case law indicating that requesting to bargain at inconvenient times is an indicia of bad faith. As such, this 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. (Regulations 32135(a) and 32130.) A document is also considered "filed" when received by facsimile transmission before the close of business on the

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

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.

SF-CE-2421-E
December 1, 2004
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Sincerely,

ROBERT THOMPSON
General Counsel

By _____
Kristin L. Rosi
Regional Attorney

Attachment

cc: Greg Marvel

PUBLIC EMPLOYMENT RELATIONS BOARD

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September 27, 2004

Stewart Weinberg, Attorney
Weinberg, Roger & Rosenfeld
180 Grand Avenue, Suite 1400
Oakland, CA 94612

Re: United Faculty Contra Costa v. Contra Costa Community College District
Unfair Practice Charge No. SF-CE-2421-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 10, 2004. The United Faculty Contra Costa alleges that the Contra Costa Community College District violated the Educational Employment Relations Act (EERA)¹ by bargaining in bad faith.

Investigation of the charge revealed the following. United Faculty is the exclusive bargaining representative for the District certificated personnel. The District and United Faculty are parties to a collective bargaining agreement that expired on June 30, 2003. With regard to successor negotiations, the Agreement provides as follows:

25.3. Negotiations for a Successor Agreement will begin not later than sixty (60) calendar days from receipt of written demands and contract changes from the other party.

25.3.1. Should agreement not be reached during a period of forty-five (45) calendar days from the date of beginning of negotiations, either party may submit an unresolved dispute to the impasse procedures of the Public Employment Relations Board.

On February 13, 2004, the parties held their first bargaining session. Charging Party does not specify what proposals were made by either party and does not present copies of the proposals. Charging Party does state, however, that the District threatened to layoff employees if the union did not move quickly to accept a 5% salary cut.

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.

During the next several months, the parties apparently met on several occasions and exchanged various proposals. However, Charging Party does not provide any specifics about these meetings and does not provide any of the proposals presented.

On May 28, 2004, the District presented its last, best and final offer. Charging Party states the last, best and final offer calls for a 7% salary cut and an increase in health benefit costs. The charge does not present any other information about the offer.

On June 3, 2004, the District filed an impasse determination with PERB. On June 7, 2004, the District cancelled a scheduled bargaining session.

Charging Party also states that on some unspecified date it requested "financial information" regarding the budget deficit. Charging Party contends it received some, but not all, of the information requested. The charge does not specify what information was not received. Additionally, Charging Party contends the District made unreasonable requests to meet in the evenings and on weekends. It is unclear when these requests were made and why Charging Party believes them to be unreasonable.

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

The charge alleges that the employer violated EERA section 3543.5(c) by engaging in bad faith or "surface" bargaining. It is the essence of surface bargaining that a party goes through the motions of negotiations, but in fact is weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent agreement. (Muroc Unified School District (1978) PERB Decision No. 80.) Where there is an accusation of surface bargaining, PERB will resolve the question of good faith by analyzing the totality of the accused party's conduct. The Board weighs the facts to determine whether the conduct at issue "indicates an intent to subvert the negotiating process or is merely a legitimate position adamantly maintained." (Oakland Unified School District (1982) PERB Decision No. 275.)

The indicia of surface bargaining are many. Entering negotiations with a "take-it-or-leave-it" attitude evidences a failure of the duty to bargain because it amounts to merely going through the motions of negotiations. (General Electric Co. (1964) 150 NLRB 192, 194 [57 LRRM 1491], enf. 418 F.2d 736 [72 LRRM 2530].) Recalcitrance in the scheduling of meetings is evidence of manipulation to delay and obstruct a timely agreement. (Oakland Unified School District (1983) PERB Decision No. 326.) Dilatory and evasive tactics including canceling meetings or failing to prepare for meetings is evidence of bad faith. (Oakland Unified School District, supra, PERB Decision No. 326.) Conditioning agreement on economic matters upon prior agreement on non-economic subjects is evidence of an unwillingness to engage in a give-and-take. (State of California (Department of Personnel Administration) (1998) PERB Decision No. 1249-S.)

Other factors that have been held to be indicia of surface bargaining include: negotiator's lack of authority which delays and thwarts the bargaining process (Stockton Unified School District

(1980) PERB Decision No. 143); insistence on ground rules before negotiating substantive issues (San Ysidro School District (1980) PERB Decision No. 134); and renegeing on tentative agreements the parties already have made (Charter Oak Unified School District (1991) PERB Decision No. 873; Stockton Unified School District, *supra*, PERB Decision No. 143; Placerville Union School District (1978) PERB Decision No. 69).

It is clear, however, that while a party may not merely go through the motions, it may lawfully maintain an adamant position on any issue. Adamant insistence on a bargaining position is not necessarily refusal to bargain in good faith. (Oakland Unified School District, *supra*, PERB Decision No. 275.) "The obligation of the employer to bargain in good faith does not require the yielding of positions fairly maintained." (NLRB v. Herman Sausage Co. (5th Cir. 1960) 275 F.2d 229 [45 LRRM 2829, 2830].)

Herein, Charging Party fails to provide facts sufficient to demonstrate the District bargained in bad faith. Although the union requested financial information, the charge fails to specify when the request was made and what information was not received. Additionally, while the charge contends the District engaged in regressive bargaining, the charge fails to provide copies of both parties proposals. Lastly, the union contends the District engaged in bad faith bargaining by requesting an impasse determination when the parties were still bargaining. However, Article 25 of the parties Agreement appears to allow either party to request an impasse determination after forty-five days from the inception of bargaining. As the charge fails to provide relevant factual information, it is impossible to determine whether the District's conduct violates 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 October 4, 2004, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Kristin L. Rosi
Regional Attorney

KLR