

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



BERKELEY COUNCIL OF CLASSIFIED  
EMPLOYEES,

Charging Party,

v.

BERKELEY UNIFIED SCHOOL DISTRICT,

Respondent.

Case No. SF-CE-2600-E

PERB Decision No. 1954

April 21, 2008

Appearance: Weinberg, Roger & Rosenfeld by Stewart Weinberg, Attorney, for Berkeley Council of Classified Employees.

Before Neuwald, Chair; McKeag and Wesley, Members.

DECISION

NEUWALD, Chair: This case is before the Public Employment Relations Board (Board) on appeal by the Berkeley Council of Classified Employees (BCCE) of a Board agent's dismissal of its unfair practice charge. The charge alleged that the Berkeley Unified School District (District) violated the Educational Employment Relations Act (EERA)<sup>1</sup> by unilaterally changing the release time policy. BCCE alleged that this conduct constituted a violation of EERA section 3543.5(a), (b) and (c).

The Board has reviewed the entire record, including the unfair practice charge, the amended unfair practice charge, the District's position statement, the Board agent's warning and dismissal letters, and BCCE's appeal. The Board affirms the dismissal of the charge based on the discussion below.

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<sup>1</sup>EERA is codified at Government Code section 3540, et seq. Unless otherwise noted, all statutory references are to the Government Code.

## BACKGROUND

The District and BCCE are parties to a collective bargaining agreement that expired on June 30, 2007. Article 4 of the Agreement covers the release time policy.<sup>2</sup>

Tim Donnelly (Donnelly) currently serves as the president of BCCE. As BCCE president, Donnelly has been on a full-time leave of absence to work on union business, pursuant to Education Code section 45210.<sup>3</sup>

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<sup>2</sup>Article 4 of the Agreement provides:

A reasonable number of representatives of BCCE shall have a reasonable amount of release time for negotiations.

All employees in the bargaining units shall be given release time to attend one (1) meeting per school year for the purpose of contract ratification and review.

Employees shall be allowed reasonable release time after 6 P.M. to attend general union meetings once per quarter of the academic year.

BCCE unit leadership may request and may be granted release time to attend conferences or training sessions of mutual benefit to the Union and the District. These requests must be approved by the Superintendent or designee.

<sup>3</sup>Education Code section 45210 provides, in pertinent part:

(a) The governing board of a school district shall grant to any classified employee, upon request, a leave of absence without loss of compensation for the purpose of enabling the employee to serve as an elected officer of any local school district public employee organization, or any statewide or national public employee organization with which the local organization is affiliated.

The leave shall include, but is not limited to, absence for purposes of attendance by the employee at periodic, stated, special, or regular meetings of the body of the organization on which the employee serves as an officer. Compensation during the leave shall include retirement fund contributions required of the school district as employer. . . .

For many years, the BCCE president has been on full-time leave of absence and BCCE has reimbursed the District for the full amount of salary and benefits provided to the president. During negotiations for a successor collective bargaining agreement, the issue of Donnelly's leave of absence compensation for the 2006-2007 school year was on the table.

On October 13, 2006, the District proposed maintaining the terms and conditions of the leave granted pursuant to Education Code section 45210; i.e., that Donnelly be granted the leave with full salary and benefits with BCCE reimbursing the District for the costs. BCCE disagreed with the proposal believing that under the release time provisions of EERA section 3543.1(c)<sup>4</sup> it was not required to reimburse the District for the time Donnelly spent meeting and negotiating.

On November 2, 2006, BCCE made a counterproposal adding the following language to the District's proposal:

Wages paid to Mr. Donnelly for time spent meeting and negotiating and for processing grievances, pursuant to Government Code section 3543.1(c) shall not be subject to said

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Following the school district's payment of the employee for the leave of absence, the school district shall be reimbursed by the employee organization of which the employee is an elected officer for all compensation paid the employee on account of the leave. Reimbursement by the employee organization shall be made within 10 days after its receipt of the school district's certification of payment of compensation to the employee.

The leave of absence without loss of compensation provided for by this section is in addition to the released time without loss of compensation granted to representatives of an exclusive representative by subdivision (c) of Section 3543.1 of the Government Code.

<sup>4</sup>Section 3543.1(c) states:

A reasonable number of representatives of an exclusive representative shall have the right to receive reasonable periods of released time without loss of compensation when meeting and negotiating and for the processing of grievances.

reimbursement. BCCE will provided [sic] documentation for time spent on these activities.

The parties discussed this subject at bargaining sessions held on November 2, 21 and 30, 2006. BCCE offered to negotiate over a cap on the amount of time the District would have to compensate Donnelly for the time he spent in negotiations and processing grievances. The District maintained its position that it would not agree to cover a portion of Donnelly's compensation to participate in these activities.

In early December 2006, BCCE declared impasse over this issue and the parties met with a mediator.

The matter was not resolved in mediation and on February 6, 2007, BCCE filed an unfair practice charge with PERB alleging that the District unilaterally changed the release time policy. In its amended charge filed on June 14, 2007, BCCE changed its underlying theory from a unilateral change to surface bargaining. Specifically, BCCE alleged that the District engaged in bad faith bargaining by refusing to modify its position regarding leave of absence compensation. The charge alleges that the District violated EERA by engaging in bad faith or "surface bargaining".

#### BOARD AGENT'S FINDINGS

On May 24, 2007, the Board agent issued a warning letter finding that BCCE failed to state a prima facie case. The warning stated that it was unclear how the District violated EERA by requiring reimbursement from BCCE for Donnelly's leave of absence. The warning letter concluded that BCCE had confused "leave of absence" under the Education Code with release time under EERA. The letter further stated that the provisions of EERA cannot be used by BCCE to circumvent their obligation to reimburse the District.

BCCE filed an amended charge changing their underlying theory to surface bargaining. On August 13, 2007, the Board agent issued a dismissal. The Board agent found the amended charge devoid of any facts demonstrating the District bargained in bad faith over the issue of union leave and compensation for Donnelly. The Board agent noted that while the District held firm to its position that it would not agree to modify the leave provisions, such an adamant position did not constitute bad faith bargaining. In reaching this conclusion, the Board agent relied on (Oakland Unified School District (1982) PERB Decision No. 275 (Oakland I)). "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] (Herman Sausage Co.)).

#### CHARGING PARTY'S APPEAL

On appeal, BCCE argues that the Board agent erred in dismissing the case. BCCE contends the District engaged in bad faith bargaining because it took a position inconsistent with its obligations under EERA. Donnelly is entitled to the leave provisions of the Education Code for the purpose of serving as an elected officer of BCCE. He is also entitled to reasonable periods of release time without loss of compensation to represent BCCE on grievances and in negotiations. BCCE attempted to negotiate over what constitutes "reasonable time off" for negotiations and processing of grievances. The District refused to negotiate this issue. BCCE argues, it is a mandatory duty that the release time under EERA be given to Donnelly and, therefore, the District must bargain about the issue.<sup>5</sup>

#### DECISION

The Board assesses the allegation that the District engaged in bad faith bargaining by refusing to modify its position regarding leave of absence compensation. The charge alleges

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<sup>5</sup>The District did not file a response to the appeal.

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 I.)

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 (Oakland II.)) Dilatory and evasive tactics including canceling meetings or failing to prepare for meetings is evidence of bad faith. (Oakland II.) 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.)

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 I.) "The obligation of the employer to bargain in good faith does not require the yielding of positions fairly maintained." (Herman Sausage Co.)

Education Code section 45210 mandates that classified school district employees be granted leaves of absence to serve as elected officers of local school district employee organizations or statewide or national employee organizations with which a local organization is affiliated. Under this provision, a school district continues to compensate its employee and is reimbursed by the employee organization for the time the employee is on leave. The California Court of Appeal has determined that such leaves are allowed for “any period of time for which the organization is willing to reimburse the school district,” including both part-time and full-time leaves. (Tracy Educators Assn. v. Superior Court (2002) 96 Cal.App.4<sup>th</sup> 530, 535 [116 Cal.Rptr.2d 916] (Tracy Educators Assn.))<sup>6</sup> The court also held that employee organizations are allowed to determine the purposes for which such leaves are required. (Ibid.)

Section 3543.1(c) governs released time under EERA and provides:

A reasonable number of representatives of an exclusive representative shall have the right to receive reasonable periods of released time without loss of compensation when meeting and negotiating and for the processing of grievances.

The Board has found release time to be a mandatory subject of bargaining. (Anaheim Union High School District (1981) PERB Decision No. 177 (Anaheim UHSD)). In Anaheim UHSD, the Board stated:

Released time, though not specifically defined in EERA, refers to time during an employee's workday during which the employee is excused from work. In the context of section 3543.1 (c), it is time during the workday during which an employee is excused from work to participate in negotiations and grievance processing.

Under the requirements of EERA “the employee is to continue to receive full compensation during reasonable periods of time excused from work for these purposes.” (Id.) When an

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<sup>6</sup>Although Tracy Educators Assn. interprets Education Code section 44987(a) which applies to certificated employees, the language is nearly identical to that contained in Education Code section 45210, which applies to classified employees.

employee receives released time under EERA, the employee is compensated by his or her employer.

BCCE argues that Donnelly is entitled to both a leave of absence under the Education Code and released time under EERA and that the District's refusal to agree to the application of both provisions to Donnelly is bad faith bargaining. We disagree.

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As outlined above, the leave of absence allowed by the Education Code and the released time required under EERA have different purposes. The Education Code's provision allows an employee to carry out his or her duties as a union officer, while on leave from their normal work duties. In essence, during the time that the employee is on leave, it is the union that directs their duties.

In contrast, released time under EERA is for employees who continue to carry out their normal work duties for the school district, but who are afforded reasonable paid time off to participate in negotiations and grievance processing. While it is not inconceivable that the duties performed by a union officer while on a leave of absence would include negotiations and grievance processing (as they apparently do with Donnelly), the possible overlap does not change the fact that an employee who is on leave under Education Code section 45210 is on leave from their normal work duties to serve as a union officer. Because such an employee is already on leave from their normal duties, it stands to reason that released time (which is afforded to allow an employee time away from their normal duties) is not possible, as the employee is already on leave.

Therefore, the District's decision to maintain a firm position regarding its released time proposal does not demonstrate bad faith bargaining and we uphold the Board agent's dismissal.



ORDER

The unfair practice charge in Case No. SF-CE-2600-E is hereby DISMISSED  
WITHOUT LEAVE TO AMEND.

Members McKeag and Wesley joined in this Decision.