* * * Clarified by *East Bay Regional Park District* (2025) PERB Decision No. 2969-M * * *

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

COUNCIL OF CLASSIFIED EMPLOYEES/AFT, LOCAL 4522, Charging Party, v. PALOMAR COMMUNITY COLLEGE DISTRICT, Respondent.	Case No. LA-CE-5226-E PERB Decision No. 2213 October 27, 2011

Appearances: Gattey and Baranic by Jason L. Alrich, Attorney, for Council of Classified Employees/AFT, Local 4522; Rutan & Tucker by David C. Larsen, Attorney, for Palomar Community College District.

Before McKeag, Dowdin Calvillo and Huguenin, Members.

DECISION

McKEAG, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by the Council of Classified Employees/AFT, Local 4522 (CCE) of a dismissal of an unfair practice charge by an administrative law judge (ALJ). The charge alleged that the Palomar Community College District (District) violated the Educational Employment Relations Act (EERA)[1] when it unilaterally changed its discipline policy without providing CCE with prior notice or opportunity to bargain. CCE alleged this conduct constituted a violation of EERA section 3543.5(c).

The issue in this case is whether the District committed an unlawful unilateral change when it issued a letter of reprimand in May 2008 pursuant to a side letter of agreement

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

negotiated between the parties on November 18, 2005 (2005 Side Letter). According to CCE, the 2005 Side Letter expired in February 2006 when the parties' collective bargaining agreement (2006 Agreement) was last modified and, therefore, was not in effect when the reprimand was issued. The ALJ found, however, that the 2005 Side Letter was in effect when the letter of reprimand was issued. Accordingly, the ALJ dismissed the complaint, finding the District did not make any change in policy when it processed the letter of reprimand under the terms of the 2005 Side Letter.

The Board has reviewed the proposed decision and the record in light of CCE's exceptions, the responses thereto, and the relevant law. Based on this review, the Board affirms the dismissal of the complaint and the underlying unfair practice charge for the reasons set forth below.

FINDINGS OF FACT

There are virtually no factual disputes. The District is a public school employer within the meaning of EERA section 3540.1(k). CCE, a recognized employee organization within the meaning of EERA section 3540.1(l), represents a bargaining unit of the District's classified employees. Over the years, the parties have maintained a series of agreements. The original agreement was reached in July 1988, and was modified in January 1989, December 1989, January 1991, November 1991, January 1995, and lastly in February 2006.[2]

[2] The District contends that the 2006 Agreement is not a traditional collective bargaining agreement, because it does not contain salary or health benefit provisions, an integration clause, a zipper clause, an effective date, or the parties' signatures. Rather, it is a "handbook" or series of agreements on various District policies. Nevertheless, the District does not contend that the terms contained therein are not binding.

Several articles of the 2006 Agreement have remained unchanged over the years, including Article 10, "Discipline," which states in relevant part:

> B. A permanent classified employee may be disciplined by the District for cause. The term 'discipline' refers to disciplinary actions, penalties, and/or settlements including dismissal, suspension, or demotion without the classified employee's voluntary consent. All discipline must be reasonable, timely, and related in severity to the seriousness of the offense.
>
> The term 'discipline' for the purpose of this Board Policy does not include adverse or negative evaluations, warnings, directives and the denial of any leave. These actions may be used in attempts to resolve problems informally prior to imposing formal disciplinary action. [Emphasis added.]

Article 10 also provides that: (1) the employee will be given written notice of the discipline; (2) the notice must include a statement that the employee may respond orally or in writing prior to the end of ten days following service of the notice and is entitled to an evidentiary hearing before any discipline is final; (3) the employee must make a written request for such a hearing within 10 days of receipt of the notice; (4) the hearing will be held within forty-five days of the request; and (5) the decision of the governing board or its designee is final and binding.

Recognizing that the 2006 Agreement did not address rights granted peace officers under the California Public Safety Officers Procedural Bill of Rights Act[3] (POBR), the parties executed the Side Letter in November 2005 to modify the minor discipline procedures for the District's police officers. Relevant to this discussion, these new procedures included the issuance of written reprimands. The 2005 Side Letter states in part:

> 1. Campus peace officers who have successfully completed the probationary period shall be provided with the opportunity for administrative appeal for any punitive action. 'Punitive action' is

[3] This Act is codified at California Government Code sections 3300-3312.

> defined as any personnel action which may lead to dismissal, demotion, suspension, reduction in salary (other than that related to a demotion), a written reprimand, if a transfer is claimed to be for the purposes of punishment, or the termination of a probationary peace officer for misconduct. The term 'punitive action' shall be construed to mean any personnel action defined as punitive action pursuant to Section 3303 of the Government Code and as further defined by the controlling state judicial precedent. . . .
>
> 2. Administrative appeals of reductions in salary (other than those resulting from demotion), written reprimands, or transfers for purposes of punishment, shall be conducted in conformance with the procedures set forth in . . . this Agreement. [Emphasis added.]

There is no language in the 2005 Side Letter regarding how long it would remain in effect, and the parties did not discuss its duration during their negotiations.

On June 27, 2007, the District's chief of campus police issued a Notice of Intent to Dismiss pursuant to Article 10 of the 2006 Agreement to Police Officer Gerard Perez (Perez). After an appeals hearing, Perez and the District reached a written agreement under which Perez would be suspended but not dismissed.

On May 14, 2008,[4] the police chief issued an official letter of reprimand under the 2005 Side Letter to Perez. The letter stated that an appeal would be heard by the vice president of student services. On May 21, CCE filed an appeal objecting, inter alia, to the appointment of Joseph Madrigal (Madrigal), then vice president of student services, as hearing officer because Madrigal had previously called Perez a "bad employee." In its appeal, however, CCE did not object to the application of the 2005 Side Letter.

On May 23, the District sent CCE a copy of the 2005 Side Letter and explained that Madrigal is the proper person to hear the appeal. CCE responded on May 28, claiming that

[4] All dates hereafter refer to the year 2008 unless otherwise specified.

Madrigal would not be "a fair and impartial arbiter for this particular situation." CCE also argued that the 2005 Side Letter was inapplicable because it was not incorporated into the new 2006 Agreement, as CCE had unsuccessfully proposed during negotiations.

On May 30, CCE wrote directly to Madrigal, seeking his recusal, objecting again to the application of the 2005 Side Letter, and asking that no appeal be scheduled until these matters were resolved.

By memo dated June 6, the District detailed its position supporting the 2005 Side Letter. The District also stated that it found no reason to remove Madrigal, but that he was willing to recuse himself voluntarily. By memo dated June 11, CCE detailed its position against the use of the 2005 Side Letter. In response, on June 24, the District reiterated its position regarding the applicability of the 2005 Side Letter and stated that, if CCE "desires to modify this process set forth in the Side Letter Agreement, we continue to be open to those discussions." The parties did not discuss the matter further.

An evidentiary hearing was conducted on Perez's appeal on September 16, before a hearing officer other than Madrigal. In her decision dated November 3, the hearing officer reduced Perez's letter of reprimand to a letter of warning.

The only prior written reprimand issued by the District to a police officer was in 2005, prior to the creation of the 2005 Side Letter. In that case, the parties followed the resolution procedure in Article 10.B. of the 2006 Agreement. The subject employee challenged the action, claiming the procedures did not comply with the rights afforded peace officers by POBR. This challenge eventually lead to the creation of the 2005 Side Letter. There is no other history of written reprimands, nor is there any history of other punitive actions handled under the 2005 Side Letter.

ISSUE

Did the District commit an unlawful unilateral change when it issued Perez' letter of reprimand pursuant to the provision contained in the 2005 Side Letter?

DISCUSSION

In determining whether a party violated EERA section 3543.5(c), PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (*Stockton Unified School District* (1980) PERB Decision No. 143.) An employer's unilateral change in terms and conditions of employment constitutes a "per se" violation of its duty to bargain in good faith when: (1) the employer breached or altered the parties' written agreement or its own established past practice; (2) such action was taken without giving the other party notice or an opportunity to bargain over the change; (3) the change was not merely an isolated breach of the contract, but amounts to a change in policy (i.e., it has a generalized effect or continuing impact upon bargaining unit members' terms and conditions of employment); and (4) the change in policy concerns a matter within the scope of representation. (*Sonoma County Office of Education* (2011) PERB Decision No. 2160; *Grant Joint Union High School District* (1982) PERB Decision No. 196; *Walnut Valley Unified School District* (1981) PERB Decision No. 160.)

There is no question in this case that a written reprimand is a matter of discipline and, therefore, within the scope of representation. Nor is there a dispute that the District issued the letter of reprimand pursuant to the procedures set forth in the 2005 Side Letter. Thus, the issue in this case is whether the District's reliance on the procedures set forth in the 2005 Side Letter constituted a change of policy.

Both the 2005 Side Letter and the 2006 Agreement contain discipline policies, and the parties do not dispute that written reprimands are covered by the 2005 Side Letter. CCE, however, contends that the 2005 Side Letter expired in February 2006, when the 2006 Agreement was last modified and, therefore, the 2005 Side Letter was not in effect when the reprimand was issued. Consequently, CCE concludes the District's reliance on the procedures set forth in the 2005 Side Letter constituted a change of policy. For the reasons set forth below, we disagree.

A. *Lodi Unified School District* (2001) PERB Decision No. 1452 (*Lodi*)

In *Lodi,* the parties negotiated a written salary schedule agreement for certain food service employees not covered by their CBA. The parties later negotiated a new agreement that did not include the salary schedule. The school district, however, continued to pay the covered classifications pursuant to the previously negotiated salary schedule. The union alleged that the school district committed an unlawful unilateral change from the collective bargaining agreement, claiming that the salary schedule agreement had expired. (*Ibid.*)

The ALJ's proposed decision contained the following statement:

> A side letter is an agreement of the parties that occurs during a CBA term. It usually modifies or interprets an existing CBA provision and remains in effect until that particular CBA term ends. When that CBA term expires, the side letter expires unless, by its own terms, it continues.

The Board subsequently adopted the proposed decision as a decision of the Board itself, subject to some clarification. However, notwithstanding the above statement, the Board specifically ordered the following language be struck from the proposed decision:

> [The salary schedule agreement] merely remains in effect until such time as one side or the other asks to negotiate a modification and/or to insert it into the CBA.

Ultimately, the Board found the salary schedule agreement still in effect even though it did not, by its own terms, continue, and a new collective bargaining agreement was subsequently reached by the parties. In light of this conclusion, we do not find the ALJ's statement regarding the duration of side letters to be dispositive in this case.

B. *City of Riverside* (2009) PERB Decision No. 2027-M (*Riverside*)

The Board later considered the duration of side letters in *Riverside*. In that case, the parties negotiated an agreement (Promotion Agreement) to resolve a grievance that established seniority-based criteria for the promotion of mini-bus drivers. Although this agreement was not incorporated into a memorandum of understanding, the city's mini-bus drivers were promoted in accordance with the Promotion Agreement from July 1999 through the end of 2005. In 2006, the parties executed a memorandum of understanding (2006 MOU) that, among other things, established merit-based promotional criteria for all employees in the mini-bus drivers' bargaining unit. (*Ibid.*) In addition, Article 30, Subsection E of the 2006 MOU provided:

> This Memorandum of Understanding will supercede all Side Letters. Both parties recognize that this excludes grievance resolutions documents.

Beginning in October of 2006, the city began promoting mini-bus drivers in accordance with the 2006 MOU. The union filed an unfair practice charge alleging the city committed an unlawful unilateral change when it began applying the promotional criteria set forth in the 2006 MOU.

The city argued that the Promotion Agreement was a side letter and was superseded by the 2006 MOU. Consequently, the city was merely following the MOU when it ceased to promote mini-bus drivers pursuant to the Promotion Agreement. The union, on the other hand,

argued that the Promotion Agreement was a grievance resolution document and was not superseded by the 2006 MOU.

The Board found that the Promotion Agreement was not a side letter and, therefore, was not superseded by operation of Article 30 of the 2006 MOU. Implied in *Riverside*, however, is the fact that the supersession language of Article 30, and not the mere passage of the 2006 MOU, was the determining factor in whether the Promotion Agreement remained in full force. Said another way, absent a provision in an MOU or an agreement between the parties, the side letter did not automatically expire upon the ratification of a subsequently negotiated MOU.

C. The Term of a Side Letter is Controlled by the Parties

Harmonizing these two cases, we find a side letter is an agreement between an employer and union that typically: (1) modifies, clarifies or interprets an existing provision in an MOU; or (2) addresses issues of interest to the parties that are not otherwise covered by the MOU. At its most basic, a side letter is a contract between the parties. As such, the duration of such an agreement is dictated by the provisions of the side letter itself (either express or implied) or by the subsequent conduct of the parties. (See *Riverside*.) Consequently, absent a provision in an MOU, an agreement between the parties or other evidence demonstrating the parties intended it to expire, a side letter does not automatically expire upon the ratification of a subsequently negotiated MOU.

D. The 2005 Side Letter Did Not Expire

In the instant case, the 2005 Side Letter does not contain an express provision regarding its duration. To the contrary, the introductory paragraph of the 2005 Side Letter provides:

> The Palomar Community College District (District) and the representative of its classified bargaining unit; CCE/AFT, enter into this Side Letter of Agreement (Agreement) for the purpose of establishing an administrative appeal process with respect to only

> those bargaining unit members represented by CCE/AFT who are designated campus peace officers within the meaning of the applicable provisions of the California Penal Code.

According to CCE President Becky McClusky, the 2005 Side Letter was negotiated to address a gap in the MOU regarding lesser discipline for the District's police officers.

We find that both this testimony and the plain language of the introductory language of the 2005 Side Letter support a finding that the parties likely intended the procedures set forth in the 2005 Side Letter to remain in effect at least as long as the discipline policies of the 2006 Agreement excluded warnings and reprimands. The 2006 Agreement, however, was last modified in 2006, and the discipline provisions were not changed. Thus, there is no provision in the 2005 Side Letter that would have terminated it prior to the issuance of the letter of reprimand. Similarly, there is nothing in the 2006 Agreement that would operate to terminate the 2005 Side Letter. Indeed, the 2006 Agreement lacks a merger clause, an integration clause, a supersession clause, an entire agreement clause, a zipper clause or any other provision that would terminate, modify or extinguish the 2005 Side Letter. Last, there is no evidence in the record that the parties mutually agreed to terminate the 2005 Side Letter.

Based on the foregoing, we find the 2005 Side Letter was still in effect when the District issued the letter of reprimand to Perez. Accordingly, we find the District did not make a change in policy when it processed Perez's letter of reprimand under the terms of the 2005 Side Letter. We, therefore, conclude the District did not commit an unlawful unilateral change.

ORDER

The complaint and underlying unfair practice charge in Case No. LA-CE-5226-E are hereby DISMISSED.

Members Dowdin Calvillo and Huguenin joined in this Decision.