STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

NORWALK-LA MIRADA UNIFIED SCHOOL DISTRICT, Employer, APPELLANT, and TEACHERS ASSOCIATION OF NORWALK-LA MIRADA, Employee Organization.	Case No. LA-CE-165 PERB Order No. Ad-38 Administrative Appeal June 19, 1978

Appearances: Eric Bathen, Jr., Attorney for Norwalk-La Mirada Unified School District; Charles R. Gustafson, Attorney (Galiano, Hanson and Gustafson) for Teachers Association of Norwalk-La Mirada.

Before: Gluck, Chairperson; Cossack Twohey and Gonzales, Members

OPINION

Norwalk-La Mirada Unified School District (hereafter District) appeals the withdrawal with prejudice of an unfair practice charge filed on August 17, 1977, by Teachers Association of Norwalk-La Mirada (hereafter Association).

The facts concerning the underlying charge are as follows. Essentially the unfair practice charge alleged that the District had reassigned a counselor to a teaching position because of his organizational activities. The District claimed that the reassignment was due to a decline in average daily attendance. Subsequent to a Public Employment Relations Board (hereafter Board) hearing held on November 28 through December 9, 1977, the District returned the employee to his counseling position. The Association thereupon requested withdrawal of the charge without prejudice pursuant

to Board rule 35015.[1] The District objected to the withdrawal and requested the issuance of a written decision. It asserted that a decision in this case would establish useful precedent in the matter of reassignment of members of a negotiating unit. On February 16, 1978, the PERB hearing officer accepted the withdrawal with prejudice.

On March 6, 1978, the District appealed the withdrawal to the Board itself. The Association opposes this appeal on the ground that the case is now moot. By way of its charge, the Association sought to have the employee reinstated to his counseling position. That remedy was effectuated voluntarily on the part of the District prior to a ruling by the hearing officer.

We sustain the hearing officer's decision to allow the withdrawal. We note here that the charge alleges a specific set of facts regarding discrimination against an individual employee. Whenever such discrimination is alleged, each case is supported by its own unique facts as to the employee, his organizational

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[1]Cal. Admin. Code, tit. 8, sec. 35015 provides:

> The charging party may file a withdrawal of the charge which shall be in writing, signed by the party or its agent, and state whether the party desires the withdrawal to be with or without prejudice. If the formal hearing has commenced, the withdrawal shall be with or without prejudice according to the discretion of the Board. The withdrawal shall be allowed; except if the formal hearing has commenced, the respondent may file objections to the withdrawal on the basis of which the Board may refuse to allow the withdrawal.

activities, and his employment situation. Contrary to the District's argument, the circumstances presented in this case do not provide us with a broad legal principle applicable in future cases before the Board. Rendering a decision to obtain useful precedent is not imperative here.

ORDER

The hearing officer's allowance of the withdrawal with prejudice of the unfair practice charge filed by Teachers Association of Norwalk-La Mirada against Norwalk-La Mirada Unified School District is sustained.

Jerilou Cossack Twohey
By: Jerilou Cossack Twohey, Member

Harry Gluck
Harry Gluck, Chairperson

Raymond J. Gonzales
Raymond J. Gonzales, Member

STATE OF CALIFORNIA

PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of:	)	
	)	
TEACHERS ASSOCIATION OF NORWALK-LA MIRADA	)	
	)	
Charging Party,	)	Case No. LA-CE-165
	)	
vs.	)	Ruling on Charging Party's
	)	
NORWALK-LA MIRADA UNIFIED SCHOOL DISTRICT,	)	Withdrawal and Respondent'
	)	
Respondent.	)	Objections to Withdrawal
	)	

BACKGROUND

The formal hearing in the above-entitled matter concluded on December 9, 1977.

On February 10, 1978, Charging Party filed with the PERB a withdrawal of the unfair practice charge, which stated as follows:

> Charging party, Teachers Association of Norwalk-La Mirada, hereby withdraws its unfair practice charge herein without prejudice pursuant to Regulations 35015.

Also on February 10, 1978, Respondent filed a letter objecting to the withdrawal and requesting a decision following the submission of briefs. The letter, in part, stated:

> The District, as well as the Charging Party and yourself, have already spent a tremendous amount of time and energy on this case and we would not like to see all of that time and energy wasted and receive no decision. A decision would set considerable precedent and serve as an invaluable guide when districts reassign counselors or others who are part of the bargaining unit.

RULING

PERB Regulation 35015 states as follows:

> The charging party may file a withdrawal of the charge which shall be in writing, signed by the party or its agent, and state whether the party desires the withdrawal to be with or without prejudice. If the formal hearing has commenced, the withdrawal shall be with or without prejudice according to the discretion of the Board. The withdrawal shall be allowed; except if the formal hearing has commenced, the respondent may file objections to the withdrawal on the basis of which the Board may refuse to allow the withdrawal.

Since the formal hearing has concluded, it is the Board's discretion (1) to accept or reject the withdrawal; and (2) if the withdrawal is accepted, to designate whether the withdrawal is with or without prejudice.

It is found that the reasons set out in Respondent's letter objecting to the withdrawal are not sufficient to warrant the issuance of a Recommended Decision. It is also concluded that since Charging Party has not set forth any basis why the withdrawal should be without prejudice, the withdrawal will therefore be accepted with prejudice.

An appeal from this ruling may be made within ten (10) calendar days of receipt of this communication, stating the facts upon which the appeal is based, and filed with the Executive Assistant to the Board, Mr. Stephen Barber, at 923 12th Street, Suite 201, Sacramento, CA 95814. Copies of any appeal must be served upon the other party to this action, with an additional copy to the Los Angeles Regional Office.

DATED: February 16, 1978

WILLIAM P. SMITH
General Counsel

By _____
David Schlossberg
Hearing Officer

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DATED: February 16, 1978

WILLIAM P. SMITH
General Counsel

By David Schlossberg
David Schlossberg
Hearing Officer

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

REDDING ELEMENTARY SCHOOL DISTRICT, Employer, APPELLANT, and REDDING TEACHERS ASSOCIATION, CTA/NEA, Employee Organization.	Case Nos. S-R-437 S-UC-5 PERB Order No. Ad-39 Administrative Appeal June 21, 1978

Appearances: Robert G. Walters, Attorney (Biddle, Walters and Bukey) for Redding Elementary School District; John Minoletti and Jack Polance, Attorneys (Barr and Minoletti) for Redding Teachers Association, CTA/NEA.

Before Gluck, Chairperson; Gonzales and Cossack Twohey, Members.

OPINION

This is an appeal by the Redding Elementary School District (hereafter District) from the executive assistant to the Board's rejection of the District's exceptions to the hearing officer's proposed decision dated January 3, 1978, in the above-captioned case.

FACTS

The hearing officer's proposed decision found that certain employees were not management employees within the meaning of the Educational Employment Relations Act.[1] The executive

[1]Gov. Code sec. 3540 et seq.

assistant to the Board's rejection of exceptions was on the ground that they were not timely filed.

On January 5, 1978, the proposed decision of the hearing officer was received by the District. This proposed decision contained notice of the District's right to file exceptions. It stated:

> The parties have seven (7) calendar days from receipt of this proposed decision in which to file exceptions in accordance with section 33380 of the Board's rules and regulations. If no party files timely exceptions, this proposed decision will become final on January 16, 1978, and a Notice of Decision will issue from the Board.

In addition, the Sacramento regional director's cover letter of January 3, 1978, to the hearing officer's proposed decision indicated that any party to the proceeding could file a statement of exceptions and stated:

> An original and four copies of the statement of exceptions must be filed with the Board within seven (7) calendar days after receipt of the proposed decision as provided in section 33380 of the EERB's rules and regulations (Part III, title 8, Cal. Admin. Code).

As noted, the hearing officer's proposed decision was received by the District on January 5, 1978. Therefore, the last day for exceptions to be filed with the Public Employment Relations Board (hereafter Board) was January 12, 1978.[2] The District's statement of exceptions

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[2]Cal. Admin. Code, tit. 8, sec. 33020 states that:

> File with Board. "File with the Board" or "File with the regional office" means personal delivery or actual delivery by certified mail to the Board.

was actually received at the Board headquarters in Sacramento on January 13, 1978. On January 16, 1978, the executive assistant to the Board, pursuant to rules 33380 and 33390,[3] issued the Board order declaring the proposed decision of the hearing officer to be the final decision.

DISCUSSION

In its appeal, the District contends that, read together, rules 32130[4] and 33380[5] result in a one-day "grace period" in the total time in which an appellant may file a timely statement of exceptions. Specifically, the District argues that reading these two sections together results in starting the appeal period "the day after the day after receipt."

By commencing the seven-day period for filing its statement of exceptions on January 7, 1978, the District argues, its filing on January 13, 1978, would have been within the noticed seven-day period for filing a statement of exceptions and was therefore timely.

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[3]Cal. Admin. Code, tit. 8, sec. 33380 and 33390.

[4]Cal. Admin. Code, tit. 8, sec. 32130 states that:

> Computation of Time. In computing any period of time under these rules and regulations, the period of time begins to run the day after the act or occurrence referred to.

[5]Cal. Admin. Code, tit. 8, sec. 33380(a) states that:

> (a) A party may file with the Board an original and four copies of a statement of exceptions to the proposed decision, and supporting brief, within seven calendar days after receipt of the propose decision....

The District concedes that under the Board's present interpretation of these rules the period in which the District could file a timely statement of exceptions ended on January 12, 1978, but argues that this interpretation is incorrect. We disagree. The application of rule 32130 and rule 33380 caused the appeal period in this case to commence January 6, 1978; the "act of occurrence" to which rule 32130 refers is receipt by the District of the proposed decision on January 5, 1978.

The Board has previously counted the seven-day time period referred to in rule 33380 as beginning the day after the receipt by the parties of the proposed decision.[6]

In its statement of exceptions, the District also contends that the seven-day filing period for filing a statement of exceptions in rule 33380 was too short and created hardships for the parties. That rule was adopted by the Board as a part of title 8, California Administrative Code, following duly noticed public hearings and in accordance with the Administrative Procedure Act.[7] It was determined that the specified time allowed for parties to file a statement of exceptions was adequate. The vast majority of parties who have filed statements of exceptions to a Board agent's proposed

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[6]See, for example, Los Angeles Unified School District (11/8/77) EERB Order No. Ad-19.

[7]Gov. Code, tit. 2, div. 3, part 1, ch. 4.5, sec. 11371 et seq.

decision have, in fact, complied with the seven-day time requirement.

The District also argues that the Board's rules regarding deadlines and the definitions of such things as "service," "filing," and "receipt" are confusing and urges "a more relaxed view toward deadlines and the like." Experience with the rule fails to support that argument. The overwhelming number of filings have been in strict accordance with the rule's requirements.[8]

Finally, we note that the District did not avail itself of the opportunity to request an extension of time in which to file a statement of exceptions.

ORDER

The decision issued by the executive assistant to the Board, PERB Decision No. HO-R-49, declaring the hearing officer's proposed decision to be final, is affirmed.

Harry Gluck, Chairperson

Raymond J. Gonzales, Member

Jerilou Cossack Twohey, Member, dissenting:

I disagree with the majority's conclusion that the executive assistant properly rejected the District's exceptions to the hearing officer's proposed decision.

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[8] In her dissent, Member Cossack Twohey refers to the seven-day appeal period provided by rule 33380 and indicated that the Board "tacitly determined" that seven days was an inadequate period when it modified this rule effective March 20, 1978. This is not correct. A majority of the Board modified rules 33380 and 35030 in order to consolidate and provide uniformity between the appeal procedures and timelines from hearing officer decisions on representation and unfair practice cases. In addition, the timelines were originally devised in order to expedite the establishment of negotiating units at the inception of the EERA. However, rapid processing of cases became impractical when the Board docket grew longer. There was then no need to continue the shorter appeal timelines.

On January 5, 1978, the District received the hearing officer's proposed decision. The District's exceptions were actually received by the Board on January 13, 1978, one day late under the then-existing rules governing filing of exceptions.

This is yet another case, of which there have been many,[1] in which a majority of the Board has mechanically applied an unreasonable rule so as to deny a party appellate review.

I agree with the District's counsel that the seven days provided in the rule itself did not afford sufficient time within which to review the facts and issues of the case, confer with the school district, hold a meeting of the school board, and write the exceptions themselves. In fact on March 8, 1978 the Board considered this deficiency among others, and modified the rule so that the parties now have twenty days within which to file exceptions. Thus, contrary to the majority's assertion in this case, the Board has tacitly determined that the time specified in this now-repealed rule was not adequate.

I do not advocate permitting parties to ignore the time requirements established by the Board's rules and regulations. However, neither should the basic purposes of the EERA be undermined by slavish adherence to rules which have shown themselves to be unreasonable and unrealistic. Rather, the long-established legal principle of not permitting minor procedural defects to preclude the examination of an actual controversy by an appellate body should prevail.[2]

[1] Manteca Unified School District (8/5/77) EERB Decision No. 21; San Francisco Unified School District (9/8/77) EERB Decision No. 23; Santa Ana Unified School District (10/28/77) EERB Decision No. 36; Anaheim Union High School District (3/16/78) PERB Order No. Ad-27; and Lincoln Unified School District (5/30/78) PERB Order No. Ad-35.

[2] Pesce v. Department of Alcoholic Beverage Control (1958) 51 Cal.2d 310, 313; See also Gibson v. Unemployment Insurance Appeals Board (1973) 9 Cal.3d 494 and Flores v. Unemployment Insurance Appeals Board (1973) 30 Cal.App.3d 681.

This principle is especially applicable to controversies arising under the EERA. Unlike most other arenas of litigation, the parties in a disputed case under the EERA enjoy an ongoing relationship which does not terminate with the completion of the litigation. Continuing relationships conducive to successful and harmonious problem solving--the essence of collective negotiations--demand that the parameters of the relationship have been fairly defined. When a dispute has been unfairly denied a full hearing by the Board entrusted with its resolution, the future harmonious relationship of the parties is jeopardized.

The problem in the instant case, the composition of the negotiating unit, is one at the very heart of this harmonious relationship. It is the cornerstone of the obligation to negotiate and further determines the parameters of this obligation.[3] Permitting a minor procedural defect to forestall the

[3]Section 3540 of the Act declares it to be the purpose of this Act "...to promote the improvement of personnel management and employer-employee relations...by providing a uniform basis for recognizing the right of public school employees...to select one employee organization as the exclusive representative of the employees in an appropriate unit,...." To effectuate this policy Sections 3543.5(c) and 3543.6(c) of the Act impose a mutual obligation on an employer and an employee organization respectively to meet and negotiate in good faith. Section 3540.1(h) of the Act in turn defines meeting and negotiating as "...meeting, conferring, negotiating, and discussing by the exclusive representative and the public school employer in a good faith effort to reach agreement on matters within the scope of representation...." Section 3540.1(e) defines exclusive representative as "...the employee organization recognized or certified as the exclusive negotiating representative of...employees in an appropriate unit...." Finally, Section 3543.2 of the Act defines those matters within the scope of representation.

Board's consideration of the District's position on this fundamental disagreement raises the genuine possibility that the disagreement will fester and perhaps distort and poison the entire negotiating relationship. Accordingly, I dissent.

Jerilou Cossack Twohey

By: Jerilou Cossack Twohey, Member