STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

VICTOR VALLEY TEACHERS ASSOCIATION, Charging Party, v. VICTOR VALLEY JOINT UNION HIGH SCHOOL DISTRICT, Respondent.	)	Case NO. LA-CE-1083 PERB Decision No. 192 December 31, 1981

Appearances: Charles R. Gustafson, Attorney for Victor Valley Teachers Association; Steven J. Andelson, Attorney (Atkinson, Andelson, Ruud & Romo) for Victor Valley Joint Union High School District.

Before Gluck, Chairperson; Jaeger and Tovar, Members.

DECISION

The Victor Valley Teachers Association (hereafter VVTA) excepts to the dismissal without leave to amend of its charge against the Victor Valley Joint Union High School District (hereafter District) which alleges that the District violated sections 3543.5(a), (b), (c) and (e) of the Educational Employment Relations Act (hereafter EERA or the Act)[1] by unilaterally breaching its negotiated agreement on employees

[1]The EERA is codified as section 3540, et seq. All statutory references are to the California Government Code unless otherwise stated.

salaries, refusing to entertain VVTA's grievance concerning that alleged breach, unilaterally changing employee wages without negotiating with VVTA and by effecting reprisals against members of the bargaining unit by failing to provide to said employees the full amount of their negotiated wage increase.

The source of these charges is a disagreement over a negotiated wage provision. The agreement, concluded immediately prior to this charge, called for the District to provide a 7 percent retroactive wage increase to unit employees. The agreement itself is silent as to the method of computing the increase. VVTA attempted to demonstrate that it had been the District's past practice to calculate wages on a monthly basis and that it was the intention of the agreement that this practice continue, but that the District had actually calculated the retroactive increase on a per diem basis, resulting in financial loss to the employees. The District, in turn, denies such an intention and points to the contract's silence as evidence that it could unilaterally decide the method of computation. The District further argues that absent any contractual grievance procedure, it is not obligated to entertain VVTA's complaint on the subject.

At the outset, the hearing officer indicated his belief that VVTA's charge alleged only a breach of contract, that the Public Employment Relations Board (hereafter PERB) lacks

jurisdiction to enforce collective agreements, and that he therefore proposed to dismiss the charge. In a hearing held to take argument on his intended dismissal the following occurred:[2]

> HEARING OFFICER: . . . I'm going to ask if there are any other facts you would allege if you were given an opportunity to amend this charge so that it more clearly stated an unfair practice, other than a contract violation. . .
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> GUSTAFSON: (VVTA representative): . . . The Association came here today prepared to put on evidence to prove that the negotiator for the District, who negotiated the agreement in question, agrees with the interpretation of that agreement put forth by the Association in this unfair practice charge. . . .
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> HEARING OFFICER: . . . It's my judgment . . . that that is more a question of proving whether your contentions as to what the contract said are correct. . . . It is my judgment that it would not be productive to take in evidence because, indeed, it seems to me to be an attempt to enforce an agreement between the parties. . .

The charge was then dismissed without leave to amend.

DISCUSSION

Section 3541.5(b) provides that this

> . . . board shall not have authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of such an agreement that would not also consitute an unfair practice under this chapter. (Emphasis added.)

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[2]Transcript, page 2, of a hearing held in San Bernardino, California, Thursday, April 16, 1980, at 10:00 a.m.

Thus, the fact that a party's actions breach an existing contract does not, in and of itself, defeat PERB's jurisdiction. If the action complained of violates the statute as well as the contract, the underscored phrase of section 3541.5(b) is satisfied.

Though this provision seems clear enough, the potential for PERB jurisdiction where there is a concurrent contract breach is further demonstrated by subsection (a) of section 3541.5. This requires PERB to defer its unfair practice proceedings to contractual grievance procedures culminating in binding arbitration provided, however, that PERB may nevertheless proceed where resort to the contracted procedure is demonstrably futile or where PERB finds that the arbitration award is repugnant to the Act's purposes.

The question, then, is whether the District's action, if as alleged by VVTA,[3] violated one or more of the sections of EERA cited in the charge. There is no doubt that the District unilaterally decided to compute the retroactive wages on a per diem basis. Generally, the unilateral adoption of a wage policy, once an exclusive representative has been recognized or

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[3]For purposes of determining whether a charge states a prima facie violation, the facts alleged are deemed to be true. San Juan Unified School District (3/10/77) EERB Decision No. 12. Prior to January 1, 1978, PERB was called the Educational Employment Relations Board (EERB).

certified, would violate the employer's duty to negotiate in good faith.[4] A charge to that effect, however, would fail where the employer's action is not demonstrated to be an alteration of existing policy or where the exclusive representative has waived its right to negotiate concerning that change.[5]

Here, VVTA makes two relevant accusations: (1) it had been the practice of the District to compute wages on a monthly basis, this being the first instance where a different method of computation was employed; and (2) the negotiated agreement included the mutual understanding that that practice be continued. If either assertion were proven to be true, the District would have unlawfully unilaterally altered a wage policy which had been established either by past practice or negotiated agreement. The District's reliance on the absence of a specific provision in the agreement is unavailing. Failure to incorporate such a provision constitutes neither a waiver on the part of VVTA or refutation of VVTA's claim that

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[4]Pajaro Valley Unified School District (5/22/78) PERB Decision No. 51; San Mateo Community College District (6/8/79) PERB Decision No. 94; San Francisco Community College District (10/12/79) PERB Decision No. 105.

[5]Walnut Valley Unified School District (3/30/81) PERB Decision No. 160.

the existing practice was to be continued.[6]

PERB's lack of authority to enforce a collective agreement does not detract from its ability to determine the contents of such an agreement for the purpose of determining whether a violation of the Act has occurred.[7] Here, VVTA, in response to the hearing officer's question, made an offer of proof as to the meaning of the contract. That the proof was to come from the District's own negotiator makes it particularly difficult to understand the hearing officer's ultimate rejection of the offer as insufficient to establish a prima facie violation of the District's obligation to negotiate in good faith. For example, if the District did agree to maintain the established computation policy, its subsequent action to the contrary is evidence that either it never gave its negotiator the authority to reach the agreement or that it simply reneged on the agreement that he did reach. Either of these facts would also constitute a prima facie case of refusal to negotiate in good

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[6]Amador Valley Joint Union High School District (10/2/78) PERB Decision No. 74, p. 8:

> . . . generally, waiver must be established by clear and unmistakable language, particularly where waiver of a statutory right is asserted.

[7]C & C Plywood Corp. (1967) 385 U.S. 421 [64 LRRM 2065].

faith. The hearing officer's dismissal of this portion of the charge without leave to amend was in error.

The District asserts that because there is no contractual grievance procedure, it is not obligated to consider VVTA's complaint that the retroactive increase of wages was calculated on a per diem rather than monthly basis.[8]

Section 3543 extends to employees the right to be represented in their employment relations by an organization of their choosing. Section 3543.1(a) provides, inter alia, that:

> Employee organizations shall have the right to represent their members in their employment relations with public school employers, . . .

These rights are not limited by any requirement that the representational procedure be defined and provided by contract.[9]

Section 3543.5(a) makes it unlawful to interfere with rights guaranteed to employees by the Act and section 3543.5(b) makes it unlawful to deny to employee organizations their statutory rights. A refusal by the District to discuss the

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[8]The hearing officer, it should be noted, fails to discuss this aspect of VVTA's complaint. Nor, for that matter, is the dismissal for this charge explained.

[9]Indeed, section 3543.1 extends such rights to nonexclusive representatives until such time as an exclusive representative has been recognized or certified.

VVTA grievance over the computation of wages would violate both sections of the Act. The hearing officer's dismissal of this aspect of the charge was also erroneous.

Finally, so much of VVTA's charge which alleges that the District's actions were in reprisal against unit employees is unsupported by any factual allegations. Nor did VVTA offer to amend its charge to cure this defect. This portion of the charge is therefore dismissed.

Based on the foregoing this case is hereby remanded to the chief administrative law judge with the provision that VVTA be permitted to amend its charge in accordance with its offer of proof made to the hearing officer. The chief administrative law judge, upon determining that the amended charge, if submitted, states a prima facie violation of any cited section of the EERA, shall then issue a complaint and process this case in accordance with Board procedures.

ORDER

Upon the foregoing decision and the entire record in this case, the Public Employment Relations Board ORDERS that the hearing officer's order of dismissal is reversed and that the matter is remanded to the chief adminstrative law judge for the purpose of permitting the Victor Valley Teachers Association to amend its charges in accordance with this decision provided,

however, that that portion of the Victor Valley Teachers Association's charge which alleges that the Victor Valley Joint Union High School District acted to take reprisals against employees in the unit is dismissed with prejudice.

By: Harry Gluck, Chairperson

Irene Tovar, Member

John W. Jaeger, Member