STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS FREMONT CHAPTER No. 237,	)	
Charging Party,	)	Case No. SF-CE-577
v.	)	PERB Decision No. 301
FREMONT UNION HIGH SCHOOL DISTRICT,	)	April 6, 1983
Respondent.	)	

Appearances; Janae Novotny, Field Representative for the California School Employees Association and its Fremont Chapter No. 237; Patricia P. White, Attorney (Littler, Mendelson, Fastiff & Tichy) for the Fremont Union High School District.

Before Gluck, Chairperson; Morgenstern and Burt, Members.

DECISION

BURT, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions to the proposed decision of the administrative law judge (ALJ) filed by the Fremont Union High School District (District). The ALJ found that the District violated subsections 3543.5(a) and (b) of the Educational Employment Relations Act (EERA) by denying California School Employees Association and its Fremont Chapter No. 237 (CSEA), the exclusive representative of the District's classified employees, the right to represent a member in grievance processing and by denying to employee

Kathleen Liccardo the right to such representation by a labor organization of her choosing.[1]

CSEA filed no exceptions. For the reasons set forth below, we affirm the findings of fact and the result reached by the ALJ. His proposed decision is incorporated by reference herein.

FACTS

We find the ALJ's statement of facts to be free of prejudicial error, and adopt that portion of his decision as the decision of the Board itself. The relevant facts may be briefly summarized as follows:

At all times material herein, Kathleen Liccardo was employed by the District as senior secretary in the Adult Education Center. Her position is in the classified employee unit represented exclusively by CSEA.

In early 1981, Liccardo noted what she felt was a discrepancy in the amount of sick leave she had accrued, as

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[1]EERA is codified at Government Code sections 3540 et seq. All statutory references are to the Government Code. Subsections 3543.5(a) and (b) provide as follows:

> It shall be unlawful for a public school employer to:
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> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

recorded in the sick leave status report compiled by the District. She felt that she had accrued 76 days of sick leave, whereas the report indicated that she had accrued only 66 days. She therefore marked the space on the form which indicated that she did not agree with it, and turned it in. She subsequently discussed the matter with the District payroll clerk, but was unable to satisfactorily resolve the dispute. She then contacted a CSEA grievance representative who advised her to attempt to resolve the matter informally with her immediate supervisor. Liccardo sent a memo to her supervisor, Jan Barkett, on March 5, 1981. That memo outlined the discrepancy in sick leave and made reference to the language of the collective negotiating agreement between CSEA and the District which supported Liccardo's computations. Liccardo also indicated that she understood that if she was unable to resolve the problem with Barkett she could file a grievance within five to ten days.

On March 17, 1981, Barkett wrote a memo to Bob Crank, chief of the District business office, informing him of Liccardo's claim and requesting answers to several questions regarding it. Barkett concluded her memo as follows:

> A response as quickly as possible will be appreciated so that I will respond within timelines stated in collective bargaining agreement.

The import of this memo is that Barkett was referring to the timelines in the contract governing grievances, and that she

understood that a grievance had been initiated by Liccardo. In addition to sending the above-referenced memo to Crank, Barkett contacted Deputy Superintendent Thomas Hodges, her supervisor, for advice as to how to handle Liccardo's sick leave problem. Hodges suggested that Liccardo be allowed to examine the District's sick leave records. Barkett told Liccardo of Hodges' suggestion, and gave her the option of examining the records with Mr. Crank. On March 25, 1981, Liccardo was advised that a meeting would be held that day at which Liccardo could discuss the matter with Barkett and Crank. On receiving this information, Liccardo called CSEA Grievance Chairperson Barbara Dodsworth and asked her to be present at the meeting on her behalf. Dodsworth then called Hodges and informed him that Liccardo had requested that Dodsworth represent her at the meeting. Hodges included Crank in the conversation as he was present in Hodges' office when the call came in, and a three-way telephone conversation ensued. Hodges declined the CSEA representative permission to attend the meeting, and stated that if Liccardo did not want to meet without representation she could cancel the meeting.

Dodsworth informed Liccardo that her request for representation at the meeting had been denied by the District. Liccardo met with Crank as scheduled, without representation. She testified that she understood the meeting to be part of the informal level of the contractual grievance procedure.

DISCUSSION

The District excepted on three grounds: 1) That the meeting at issue herein was not a part of the contractual grievance procedure; 2) that the right to union representation does not extend beyond grievance handling and pre-disciplinary investigatory interviews; and 3) that, even if Liccardo had a right to union representation under these circumstances, she waived that right by failing to personally transmit her request for union representation to the District.

As to the District's first exception, we note the following:

Among the purposes of EERA, as stated in section 3540, is

> . . . to promote the improvement of personnel management and employer-employee relations within the public school systems . . . by providing a uniform basis for recognizing the right of public school employees to join organizations of their own choice, to be represented by such organizations in their professional and employment relationships with public school employers . . . . [Emphasis added.]

With respect to employee rights, section 3543 provides that:

> Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. . . . [Emphasis added.]

And, regarding employee organizations' rights, subsection 3543.1(a) provides that:

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

We affirm the ALJ's finding that the meeting at issue herein was prefatory to the formal stages of the contractual grievance procedure and was hence part of an attempt by employee Liccardo to avail herself of contractual grievance rights.

This Board has expressly held that ". . . section 3543.1(a) confers on an employee organization the right to represent its member in a grievance proceeding . . . ." Mount Diablo Unified School District, et al. (12/30/77) EERB Decision No. 44,[2] at p. 9. See also Rio Hondo Community College District (12/28/82) PERB Decision No. 272. PERB has further held, subsequent to the ALJ's decision in the instant case, that section 3543's guarantee to employees of the right to ". . . participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations" grants to employees the right to be represented by their employee organization in grievance proceedings. Rio Hondo, supra.

For the reasons set forth above, we affirm the conclusion of the ALJ that CSEA had a right to represent its member and that Liccardo had a right to be represented by CSEA in the grievance procedure at issue herein. Because we find that the

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[2]Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board (EERB).

instant case involved grievance handling, we need not decide the full scope of the right to representation under EERA, and thus need not address the District's second exception.

The District's only remaining relevant exception is that even if CSEA and Liccardo had such representational rights, they were waived by Liccardo's failure to personally request CSEA representation and by her participation in the grievance meeting without such representation. The District bases its argument in this regard on two National Labor Relations Board (NLRB) cases, Appalachian Power Company (1980) 253 NLRB 931, and Lennox Industries, Inc. (1979) 244 NLR 607.

In Lennox Industries, Inc., supra, the NLRB held that an employee request for union representation was not effective to trigger a right to union representation under Weingarten v. U.S. (1975) 420 U.S. 251 [88 LRRM 2689], because the request was directed to a manager other than the one who called the pre-disciplinary meeting and was not received by the manager involved. Because no effective request for representation was made, the NLRB held that no denial of employee rights occurred.

In Appalachian Power Company, supra, an employee was directed to report to a supervisor's office for a pre-disciplinary interview. The employee did not direct a request for representation to management. Rather, he called the union representative on the shop paging system and asked him to come to the meeting and represent him. The employee met

the supervisor in the hallway on the way to the supervisor's office, and the pre-disciplinary discussion began. Several minutes later, the steward arrived in the area. Another supervisor, who was not at that time directly involved in the discussion, intercepted the steward and asked him why he was there. Upon learning that the steward was there to represent the employee, he told the steward to return to his work station. The supervisor who called and was involved in the meeting never knew of the employee's desire for representation. The administrative law judge held, with NLRB approval, that no effective request for representation was made by the employee and, therefore, that no representational right was denied.

Both cases are clearly distinguishable from the instant case on their facts. In both Lennox Industries and Appalachian Power, the aggrieved employee failed to direct the request for representation to the supervisor who called and was conducting the meeting. Because no request was directed to the appropriate supervisor by the employee or his union representative, the NLRB held that no effective request for union representation was made and thus that no denial took place. In the instant case, Liccardo's request was clearly transmitted directly to the supervisors who called and met with Liccardo. Therefore, an effective request for representation was made by her.

In dicta, the administrative law judge in Appalachian Power also indicated that the request for union representation must be initiated by the employee, and not raised by the union representative. This is so, stated the administrative law judge, because under Weingarten, supra, the employee involved has the right to determine whether he/she wants to continue the interview without representation or to refuse to participate. The administrative law judge reasoned that, when the employee therein did not protest the continuation of the interview after he saw his representative being ejected from the hallway, he may have simply been indicating that he no longer saw the need for representation.

The implication of such dicta is that because the Weingarten right to union representation may be waived by the employee, a request initiated solely by the union representative might serve to deprive the employee of his right to choose. In the instant case, unlike the situation contemplated by the dicta in Appalachian Power, the request for union representation was initiated by Liccardo and conveyed by her CSEA representative to the appropriate District supervisor, who was informed by the CSEA representative that Liccardo had requested her presence at the meeting. Where, as here, the employee organization representative makes the request on behalf of the employee and makes it clear that the employee initiated the request being conveyed, the Appalachian Power

dicta does not conflict with a finding that an effective employee request for representation has been made.

Because we find that an employee request for representation, directed to the appropriate supervisory personnel of the District, was made herein, and because that request was denied, we find the situation distinguishable from Appalachian Power and Lennox Industries.

Because the employee in Appalachian Power was never told that an earlier request for representation had been denied, the NLRB opined that he had no basis for a belief that a renewed request would have been denied, and thus found that it was reasonable to infer that the employee's acquiescence in the meeting constituted a deliberate waiver of the right to representation.

Unlike the employee in Appalachian Power, Liccardo made an effective request for representation and was told that it was denied. Under such circumstances we find that her failure to renew her request for representation was reasonable. She had no reason to believe that a second request would be granted after the first one had been denied. Rather, she reasonably believed that it would have been futile to renew the request for representation. Further, she had a reasonable interest in moving toward an expeditious and effective resolution of her grievance at the earliest possible time. It would thus be neither fair nor sensible to regard her failure to renew this request as a waiver of her right to representation.

For the reasons set forth above, we find that the District denied CSEA its right to represent its members, thus violating subsection 3543.5(b), and denied to employee Liccardo her right to representation in violation of subsection 3543.5(a).

REMEDY

The District did not except to the remedy recommended by the ALJ. Finding that proposed remedy to be an appropriate application of the Board's remedial authority under subsection 3541.5(c),[3] we shall adopt it as the remedy of the Board.

ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record of this case, and pursuant to Government Code subsection 3541.5(c), it is hereby ORDERED that the Fremont Union High School District, board of trustees, superintendent and their respective agents shall:

A. CEASE AND DESIST FROM:

1. Denying employee Kathleen Liccardo her right to be represented by her exclusive representative at a grievance meeting.

3subsection 3541.5(c) provides as follows:

> The board shall have the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

2. Denying California School Employees Association and its Fremont Chapter No. 237 the right to represent its member at a grievance meeting

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EERA:

1. Within thirty (30) workdays after the date of service of this Decision, post at all work locations where notices to employees customarily are posted, copies of the Notice attached as an appendix hereto signed by an authorized agent of the employer. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notices are not altered, reduced in size, defaced or covered with any other material.

2. Within forty-five (45) consecutive workdays from the service of this Decision, notify the San Francisco regional director of the Public Employment Relations Board in writing of what steps the employer has taken to comply with the terms of this Order. Continue to report in writing to the regional director periodically thereafter as directed. All reports to the regional director shall be served concurrently on the charging party herein.

Chairperson Gluck and Member Morgenstern join in this Decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. SF-CE-577 California School Employees Association and its Fremont Chapter No. 237 v. Fremont Union High School District, in which all parties had the right to participate, it has been found that the Fremont High School District violated the Educational Employment Relations Act, Government Code subsections 3543.5(a) and (b) by denying to employee Kathleen Liccardo and employee organization CSEA their representational rights under EERA.

As a result of this conduct, we have been ordered to post this Notice and we will abide by the following:

A. CEASE AND DESIST FROM:

1. Denying employee Kathleen Liccardo her right to be represented by her exclusive representative at a grievance meeting.

2. Denying California School Employees Association and its Fremont Chapter No. 237 the right to represent its member at a grievance meeting.

FREMONT UNION HIGH SCHOOL DISTRICT

Dated: _____ By _____
Authorized Representative

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, REDUCED IN SIZE, DEFACED OR COVERED WITH ANY OTHER MATERIAL.