STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SOUTHERN ALAMEDA COUNTY TEACHERS ASSOCIATION, CTA/NEA,	)	
Charging Party,	)	Case No. SF-CE-521
V.	)	
	)	PERB Decision No. 323
ALAMEDA COUNTY BOARD OF EDUCATION AND COUNTY SUPERINTENDENT OF SCHOOLS OF ALAMEDA COUNTY,	)	June 30, 1983
Respondents.	)	

Appearances: Diane Ross, Attorney for Southern Alameda County Teachers Association, CTA/NEA; Margaret E. O'Donnell and Mark W. Goodson, Attorneys (Breon, Galgani, Godino and O'Donnell) for Alameda County Board of Education and County Superintendent of Schools of Alameda County.

Before Gluck, Chairperson; Morgenstern and Burt, Members.

DECISION

GLUCK, Chairperson: Respondents, Alameda County Board of Education (BOE) and County Superintendent of Schools of Alameda County (Superintendent), sometimes jointly referred to herein as the District, except to a Public Employment Relations Board (PERB) hearing officer's findings that the BOE is an employer under the Educational Employment Relations Act (EERA) and that both respondents violated subsections 3543.5(a), (b), and (c)l by the BOE'S refusal, in concert with the

[1]EERA is codified at Government Code section 3540 et seq. All statutory references are to the Government Code unless otherwise specified.

Superintendent, to participate in negotiations or be a party to the negotiations agreement with the exclusive representative, the Southern Alameda County Teachers Association, CTA/NEA (Association).

STATEMENT OF FACTS

On January 3, 1977, the BOE and Superintendent recognized the Association as the exclusive representative of approximately 81 certificated employees, some of whom work at the District's juvenile court schools and other special education programs.[2] Superintendent Robert Coney testified that the joint recognition occurred because of uncertainty as to which governmental agency employed certificated personnel in the county juvenile court schools. This confusion existed because of former section 857 of the Welfare and Institute Code which provided, in part:

> The board of supervisors may . . . provide that [juvenile court] schools established and maintained pursuant to section 856 shall be maintained by the county superintendent of schools in which case the county board of education shall have the same powers and duties to such schools as the governing board of a school district would have were said schools maintained by the school district under the provisions of this article. . . . (Emphasis added.)

Between 1975 and 1979, the BOE and the Superintendent separately offered individual employment contracts to

[2]The record does not provide any further information on the composition of the unit or to which programs the employees are assigned.

certificated employees depending upon whether they worked in the juvenile court schools or in another county special education program.

In 1977, the BOE and the Superintendent negotiated and were signatories to their first agreement with the Association, covering 1977-1978. Article I of the agreement stipulated:

> The Articles and provisions contained herein constitute a bilateral and binding agreement . . . by and between the Alameda County Board of Education and the County Superintendent, Schools (Board) and the [Association].

During negotiations for the 1978-1979 agreement, the parties agreed to modify the above provision to read the "Alameda County Board of Education and/or County Superintendent of Schools. . . ." (Emphasis added.) According to Raul Jaramillo, chief negotiator for the District, the change was stimulated by a decision of an administrative law judge (ALJ) in the Office of Administrative Law involving the propriety of a decision to layoff certificated employees in the juvenile court school facilities. In the matter of the Association against Vicki Ann Rozendal Henry et al. (4/26/77) N 9537, the ALJ held that the BOE was the employer of certificated employees of the juvenile court school program and the only agency authorized to dismiss them from service, but that the Superintendent employed the certificated employees in the other special education programs and had sole authority to dismiss these employees.

In early 1979, the BOE sought an opinion from the Alameda county counsel as to whether it could retain an attorney to negotiate with employees of the Alameda County Office of Education. The county counsel rendered an opinion that legislative enactments repealing section 857 of the Welfare and Institutions Code and adding section 889 of the Welfare and Institutions Code and section 48645 of the Education Code created "grave doubts as to whether the [BOE] any longer has employees." Section 889 requires that the BOE provide for the administration and operation of juvenile court schools while section 48645.2 states that the BOE shall provide for such administration and operation by using the county superintendent of schools or the "respective governing boards of the elementary, high school, or unified school district in which the juvenile court school is located." The county counsel stated:

> . . . the thrust of the legislation is that the County Board of Education provides for the administration and operation, not that it administers and operates the juvenile court schools. If it elects to do so by the County Superintendent it appears to us that the employees are employed by the County Superintendent just as where the schools are administered and operated by contract with a school district, the employees are employees of the school district.

Superintendent Coney testified that because negotiations for the 1979-1980 agreement were already in progress when the county counsel's opinion was received, the District did not

propose any changes to the "and/or" language of Article I or to Article II, the recognition clause, which continued to state that both the BOE and the Superintendent recognized the Association as the exclusive representative.

However, on November 26, 1979, Jaramillo sent to the Association a memorandum which reported that:

> Due to recent Education Code changes, the staff assigned to Juvenile Court School are now considered employees of the Superintendent and not the Board of Education.

There is no record of any response from the Association to this memo. During the 1979-1980 school year, the District also changed its former practice of providing separate employment contracts by the BOE and Superintendent. Instead contracts were signed only by the Superintendent.

1980 Negotiations

On March 21, 1980, the Association presented its initial proposal for the 1980-1981 agreement. It did not propose a change in employer identification. Later, after developing counterproposals which deleted mention of the BOE from Articles I and II, Coney and Jaramillo met with the BOE in executive session. The BOE agreed with the proposals and subsequently adopted them in open session. On May 28, Jaramillo presented the proposals at the negotiating table and explained that the Superintendent and the BOE were of the opinion that the Superintendent was now the only employer. He testified that

the BOE'S role was to be limited to giving final approval to the negotiated agreement and to continuing its participation in the grievance procedure at an intermediate step between the Superintendent and arbitration.

Jerrel Cooper, the Association's president, testified that the Association wanted to receive further proof of the BOE'S intentions to withdraw as an employer, but agreed to continue with negotiations in the interim.

On June 5, the District contacted the San Francisco regional office of PERB to notify it that the designated employer was to be changed from the BOE and the Superintendent to the Superintendent only. A District witness testified that she was informed by a PERB agent that there were no formal procedures that needed to be followed and that the District should forward a memo to PERB if it wanted the change noted in its files.[3] Accordingly, the District sent a letter explaining that future agreements with employee organizations will specify the Superintendent as the employer, but that the BOE will continue to approve all such agreements.

At the June 18 negotiating session, Jaramillo distributed to the Association a copy of a June 11 memorandum from Coney to Jaramillo confirming the District's position that in the future

[3]The determination of changes in employer status should be made pursuant to a Board hearing or investigation and not by unilateral employer action. Nevertheless, the fact that the Board agent offered this advice has no bearing on the issues raised in this case.

the BOE will no longer be designated as an employer and contracting party. It stated that the BOE's role would be limited to granting final approval to the negotiated agreement.

In response to further inquiries from the Association, the BOE responded that all employees of the District were employed by the Superintendent and that any further requests for information relating to negotiations should be directed to the Superintendent or its chief negotiator.

The Association provided somewhat inconsistent testimony as to whether it perceived the District's position to be a negotiable subject for bargaining or a statement of fact. At one point, Cooper testified that, even after receipt of the June 11 memo, the Association continued to negotiate with the BOE on this and other matters as if it were the employer. However, on direct examination, he characterized the District's position as being offered as a nonnegotiable statement of fact. On the other hand, Charley Hinton, Chapter Consultant for the California Teachers Association, testified that he considered the District's position always to be "just a bargaining chip."

Both Cooper and Hinton testified that the District's position affected the Association's negotiations because, had it known of the change, it would have submitted different initial proposals on such subjects as the grievance procedure and the management-rights and no-strike clauses.

The Association, however, did not modify its proposals upon learning of the District's position. Hinton said that this was because he believed that the BOE was still an employer, and that the District was willing to bargain on the issue.

In November 1980, the parties reached impasse and entered mediation on several issues including the BOE'S employer status. The parties were unable to resolve that issue and, on November 19, they entered into a written agreement deferring the question. It stated:

> [P]arties do herein agree that the issue of Employer Identification shall at a future date be determined by the appropriate legal authority.
>
> Said decision shall determine final language used in the Employer/Employee contract.

In January 1981, the parties reached agreement on a contract and continued, pending final resolution of the employer issue, to use the standard language of Articles I and II, which identified the BOE as an employer.

Relationship Between the Board and Superintendent; Among the duties and powers of the Superintendent is the authority to enter into contracts of employment with certificated employees (Education Code section 1293); to administer, in accordance with the powers and duties imposed upon or granted to the governing boards of school or community college districts, leaves of absence, sick leave, bereavement leave, layoffs, dismissals, and industrial accidents and illness leave

(Education Code section 1294); to grant, upon the approval of the county board of education, leaves of absence for study and travel (Education Code section 1294); to employ persons possessing appropriate credentials as certificated employees (Education Code section 1294.5); and to employ, with the approval of the county board of education and in accordance with regulations of the superintendent of public instruction, qualified personnel to provide for the coordination of courses of study, guidance services, health services, school library services, special education, and attendance activities among the school districts under his jurisdiction (Education Code section 1703).

The powers and duties of the BOE include approving the annual budget of the county superintendent of schools prior to its submission to the county board of supervisors (Education Code section 1040(c)); approving the annual school service fund budget of the county superintendent of schools prior to its submission to the superintendent of public instruction (Education Code section 1040(d)); adopting rules and regulations governing the administration of the office of the county superintendent of schools (Education Code section 1042(a)); reviewing and making revisions, reductions, or additions to, and approving prior to approval of the board of supervisors the county superintendent of schools' annual itemized estimate of anticipated revenue and expenditures

(Education Code section 1042(b)); approving the annual estimate (Education Code section 1042(b); with the approval of the board of supervisors, filing with the superintendent of public instruction a single-fund tentative budget which may contain (1) a general reserve which the board believes will meet the cash requirements for the next fiscal year and (2) an undistributed reserve which would be available for appropriation by a two-third vote of the board to meet unprovided-for expenditures (Education Code section 1621); approving leaves of absence for study and travel for certificated employees (Education Code section 1294); and approving the employment of certain certificated employees (Education Code section 1703).

In view of its authority under section 1042(a), the BOE developed, in consultation with the superintendent, Board policy 9600 which defines the relationship and respective responsibilities and powers between the two governmental agencies. Coney conceded that the BOE has authority to unilaterally amend the policy, but believed that it is prohibited from modifying the duties and responsibilities of the Superintendent which have been granted by the Legislature.

The BOE has also established Policy 4600 which outlines District guidelines for equal employment opportunity. Superintendent Coney gave the only testimony as to this policy, explaining that the BOE has authority to adopt standards that

the Superintendent must meet when administering pertinent programs. He described such standards as "I will not discriminate in . . . I won't use sexist materials in the classroom."

Coney testified that BOE presently does not have any employment relations responsibilities and that it takes no independent action in the following areas: hiring, salary setting, disciplining, promoting, laying off, scheduling, assigning, contracting with insurance carriers, determining class size or evaluating. He claims that such functions are the sole responsibility of the Superintendent. Nonetheless, he acknowledged under cross-examination that by its participation in the third step of the grievance procedure, the BOE could affect employees' wages and other working conditions.

Coney stated that in the past the Superintendent's office has usually developed the negotiating proposals which were then reviewed by the BOE. The BOE conducted public hearings required by EERA.[4] Although Coney testified that he believes he possesses the authority to conduct such a meeting, he never has done so. At the public meeting, the superintendent discusses the proposals with the BOE members who, in turn, adopt them.

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[4]EERA section 3547.

At one point, Coney testified that he does not seek a formal vote from the members, but rather solicits their ideas in an effort to reach a consensus. However, he also testified that the BOE is not obligated to approve the counterproposals that his staff has developed, but actually does so.

The BOE also approves the final agreement. Coney testified that he has always tried to keep the board members informed of the progress of negotiations to help ensure the agreement's final approval. However, he emphasized that such approval is not legally required, claiming that he seeks it as a matter of "good politics" and "[t]hey do set my salary and I'm very interested in what they have to say."

A similar relationship between the superintendent and the BOE exists as to creation and approval of the District budgets. The superintendent develops the budget, but throughout the process he keeps the BOE informed, presenting to it financial forecasts and tentative and preliminary budgets. As with the collective bargaining agreement, he considers the input of the BOE important, and concedes that the BOE does have some responsibility for approval of the final budget. However, he believes that this authority is purely ministerial and that the BOE must adopt his proposals.

Further, he claims that if the BOE failed to adopt the budget and final collective bargaining agreements, he would

nevertheless proceed as if they had, although he is not sure whether he has statutory authority to so act regarding the budget.

DISCUSSION

In support of his finding that the BOE is an employer, the hearing officer relied upon the "plain meaning" of section 3540.1(k) which he interpreted as indicative of a legislative intent to include all boards of education as employers; Education Code sections 1980 et seq, and 52310.5(c) which permit boards of education to establish and maintain community schools and regional occupation center programs; and evidence indicating that the BOE exercises joint control over District employees' conditions of work. As to the last point, he specifically found that BOE has authority to adopt guidelines on such matters as the relationship between the BOE and the Superintendent (Policy 9600) and on equal employment and educational opportunities (Policy 4600); to approve sabbatical leaves granted by the Superintendent; to set school holidays and in-service training days in the juvenile court schools; to establish the District budget; to resolve grievances; and to participate in the negotiating process.

The District disputes each of the above findings and the overall conclusion that the BOE is an employer. We find merit in many of the District's contentions and agree that the BOE does not possess sufficient control over employment conditions

of certificated employees within the District to be deemed an employer.

EERA subsection 3540.l(k) states:

> "Public school employer" or "employer" means the governing board of a school district, a school district, a county board of education, or a county superintendent of schools.

This subsection, like section 2(2) of the National Labor Relations Act (NLRA), is a jurisdictional definition identifying the types of agencies subject to PERB jurisdiction. To determine whether an agency so listed is an employer in a given instance, it is appropriate to consider whether the alleged employer has such "sufficient control over the employment conditions of its employees to enable it to bargain with a labor organization as their representative." See National Transportation Service, Inc. (1979) 240 NLRB 565 [100 LRRM 1263]. (Emphasis added.) See also North American Soccer League v. NLRB (1980 613 F.2d 1379 [103 LRRM 2976]; den. cert. ___ U.S. _____ [105 LRRM 2737], ("existence of joint employer relationship depends on the control which an employer exercises, or potentially exercises, over the labor relations policy of the other").[5]

[5]PERB may rely upon federal precedent when interpreting provisions of EERA which are identical or similar to the NLRA. See Sweetwater Union High School District (11/23/76) EERB Decision No. 4. (Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board.) See also Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608.

The Superintendent's authority over such fundamental employment matters as entering into employment contracts, hiring, promoting, granting permanent employment status, assigning work, transferring, evaluating, disciplining, and laying-off all certificated employees in the District is not disputed.

The record indicates that the BOE has never exercised comparable authority over District employees, except that prior to 1979, it did contract to employ certificated employees in the juvenile court schools and, according to the Office of Administrative Law, had authority to dismiss such employees. This authority was grounded in former section 857 of the Welfare and Institutions Code. The uncontroverted testimony of Superintendent Coney is that after the repeal of the section, the BOE ceased to exercise any authority in these areas.

Education Code section 48645.3 which provides that boards of education have the authority to adopt school holidays and to set aside days for in-service purposes does not, on its face, demonstrate that the BOE has the degree of control over employment conditions that would allow for meaningful negotiations. The Board has held that establishment of the student school calendar is not a negotiable subject. See Palos Verdes Peninsula Unified School District/Pleasant Valley School District (7/16/79) PERB Decision No. 96; San Jose Community College District (9/30/82) PERB Decision No. 240. The

provision concerning in-service days neither specifies what is meant by "in-service purposes" nor what impact such authority might have on the employment of certificated employees. The parties presented no evidence clarifying these issues. For example, we do not know whether employee attendance at days set aside for in-service purposes is compulsory or whether the BOE merely establishes times when such activities are available. In the absence of such evidence, we cannot find that the provision indicates the necessary BOE control over negotiable conditions.

While we acknowledge that control over budgets, "the wherewithal to give and withhold," (Parking West Area Vocational Technical School Board (5/19/71) Pennsylvania Labor Relations Board Decision Nos. PERA-R-358-W and PERA-R-399-W [1 PPER 25]), is strong evidence of employer control over employee conditions of work, the record fails to demonstrate that the BOE has sufficient control over the Superintendent's budget to meet such a test. Its authority is neither exclusive nor final. It is limited to approving the Superintendent's annual budget and school service fund's budget prior to submission to the county board of supervisors and superintendent of public instruction, respectively (Education Code sections 1040 (c) and (d)) and to reviewing and approving the Superintendent's annual itemized estimate of anticipated revenue and expenditures prior to approval by the county board of supervisors (Education Code section 1042(b)). Further, BOE

authority to create a single-fund tentative budget with a general and undistributed reserve (Education Code section 1621) is qualified by the requirements that the county board of supervisors adopt a resolution bestowing such authority (Education Code section 1620) and that the budget be prepared in the form prescribed and furnished by the Superintendent of Public Instruction (Education Code section 1622).

The county board of supervisors may transfer to the BOE its authority to approve the Superintendent's estimate of anticipated revenue and expenditures (Education Code section 1080) and may authorize the BOE to establish a single-fund tentative budget. Neither action creates exclusive plenary authority in the BOE since such delegation is revocable. This diffusion of authority over the budget, considered together with the exclusion of boards of supervisors and the superintendent of public instruction from section 3540.l(k), convinces us that shared participation in the budgetary process is not sufficient to warrant a finding of employer status.

We do not find BOE'S role in the negotiated grievance process determinative. The grievance and arbitration provision provides that the BOE will hear and resolve grievances at the third step of a four step procedure. Its role in effect is like that of the arbitrator who has been delegated by the parties to hear and resolve grievances. The fact that the

District and Association had, in the past, agreed to use the BOE as the third level review because they had believed it to be an employer, may bear on their decision to continue such practice in the future. It does not preclude the conclusion we reach as to the BOE'S status as the employer.

The District's assertion that, in the future, the BOE will have authority to approve agreements negotiated by the Superintendent and the Association, is unauthorized by statute and inconsistent with its contention that the BOE is not an employer. In the absence of statutory authorization or other proof of employer status, we cannot find the BOE to be so empowered, and the mere assertion of future intent need not influence the Board in this case.

Section 1294 of the Education Code provides that the BOE must approve leaves of absence for study and travel granted by the Superintendent. Such authority does not preclude the Superintendent and the Association from negotiating a leave of absence policy pursuant to which the superintendent would grant leaves.[6]

Section 1042(a) of the Education Code authorizes the BOE to develop rules and regulations governing the administration of

[6]It is not necessary to decide the extent of BOE'S authority to withhold approval of leaves granted by the Superintendent. Assuming, without finding, that it is unlimited, the parties could negotiate an agreement to make joint recommendations for approval.

the county superintendent of schools. Pursuant to this authority, it developed Policy 4600 which establishes guidelines for equal employment opportunity. We find that such a policy could influence negotiations but would not prevent the Superintendent and Association from negotiating within the policy guidelines.

Finally, the BOE'S authority with respect to leaves of absence and equal employment opportunity, construed most liberally, when considered in light of the total range of negotiable matters, does not constitute such control over the employment conditions of the District's certificated employees that the BOE would be able to conduct meaningful negotiations with the Association. National Transportation Services, Inc., supra.

ORDER

Based on the entire record before the Public Employment Relations Board, the charges filed by the Southern Alameda County Teachers Association, CTA/NEA against the Alameda County Board of Education and County Superintendent of Schools of Alameda County in Case No. SF-CE-521 are hereby DISMISSED.

Members Morgenstern and Burt joined in this Decision.