STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

BEAUMONT TEACHERS ASSOCIATION, CTA/NEA, Charging Party,	)	Case No. LA-CE-1751
v.	)	PERB Decision No. 429
BEAUMONT UNIFIED SCHOOL DISTRICT, Respondent.	)	November 9, 1984

Appearances; Charles R. Gustafson, Attorney for Beaumont Teachers Association, CTA/NEA; Atkinson, Andelson, Loya, Ruud and Romo by Ronald C. Ruud for Beaumont Unified School District.

Before Hesse, Chairperson; Morgenstern and Burt, Members.

DECISION

BURT, Member: This case is before the Public Employment Relations Board (PERB or Board) on two appeals filed by the Beaumont Teachers Association, CTA/NEA (Association). One appeal concerns the partial dismissal of charges by the regional attorney. The other appeals the denial of a motion to amend the complaint by the administrative law judge (ALJ).

After the initial filing of charges, the regional attorney issued a complaint on the Association's charge that the Beaumont Unified School District (District) violated sections 3543.5(b) and (c) of the Educational Employment

Relations Act (EERA)[1] by dealing directly with bargaining unit members and bypassing the exclusive representative.[2] He dismissed accompanying charges alleging that the District violated EERA sections 3543.5(a), (b), (c) and (e) by engaging in a course of conduct amounting to bad-faith bargaining by making regressive salary offers and statements of disdain for the factfinding process, and by consistently arriving late for bargaining sessions. The Association claims on appeal that the alleged regressive bargaining constituted a violation in itself and that, in any event, because the totality of the District's conduct evidenced a lack of good faith in bargaining, the dismissed charges should be reinstated.

After the original complaint was set for hearing, the Association moved to amend the complaint to include the dismissed charges, and to add another alleged violation of EERA section 3543.5(a) by the discriminatory termination of three District employees. The motion to amend was denied by the ALJ because the majority of the charges had already been dismissed by the regional attorney and, with regard to the new charge, the ALJ found that it failed to state a prima facie case. The

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

[2]A hearing on the original complaint was held on January 3, 1984. The decision has not yet issued.

Association appeals the dismissal of the new charge, claiming a prima facie case was established.

For the reasons set forth below, we affirm in part and reverse in part the decisions of the regional attorney and the ALJ.

FACTS

The facts as found by the regional attorney and the ALJ are summarized below.[3]

The collective bargaining agreement between the District and the Association expired on June 30, 1982, and negotiations for a successor agreement began. On September 1, 1982, the certificated employees represented by the Association returned to work without a new agreement.

In October 1982, the District offered a two-percent salary increase to the Association for the 1982-83 school year. The proposed increase was not to be retroactive and was to take effect upon ratification of the entire agreement.

The District reiterated its proposal of a two-percent pay increase in December, still to take effect upon ratification of the total agreement. On December 16, 1982, the District

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[3]To decide whether a charge which was dismissed contained facts sufficient to establish a prima facie case, 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 known as the Educational Employment Relations Board.)

declared impasse and, on March 4, 1983, the Association moved the dispute to factfinding with proper certification from the mediator and notice to the District and to PERB.

On March 14, 1983, the District revised its wage offer to four percent, to be retroactive to February 1, 1983, provided the Association would accept the District's position on all outstanding issues and ratify the total agreement by March 28, 1983.

On March 15, 1983, the District sent each member of the bargaining unit an offer of employment for the 1983-84 school year which included a salary figure, presumably representing a four-percent increase. These contracts stated that they would serve as notification of employment in compliance with Education Code section 13261 (now section 44843)[4] and the District asked that they be signed and returned to signify acceptance.

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[4]Education Code section 44843 and others deal with offers of employment by school districts. Section 44841 gives non-tenured certificated employees 45 days in which to accept district offers of employment or be deemed to have declined the offer. Section 44842 says that, if permanent or probationary employees do not notify their districts by July 1 of any year of their intention to return to work for the upcoming school year when the District has sent a request for such an indication by the preceding May 30, the district may terminate the employee. Section 44843 requires that school district governing boards give notice of their employment of certificated employees to county superintendents of schools.

On March 18, 1983, three days after the District sent its offers of employment to individual bargaining unit members, the Association wrote to each member telling him or her not to sign the contracts sent out by the District because they were improper offers which bypassed the exclusive representative. The Association's letter advised that each bargaining unit member should sign and return to the District an attached Association form indicating an intention to return to work for the 1983-84 school year in order to comply with Education Code sections 44841 and 44842.

Three employees failed to return either the District's contract or the Association's form to the District. On July 6, 1983, the District informed these employees that they were deemed to have declined employment for the following year, but that they could appear at a July 12, 1983 governing board meeting to give reasons why they should be reinstated. Two of the employees met with the board in executive session and were reinstated. The third, allegedly acting on the Association's advice, refused to meet in executive session and requested to meet in public. That request was denied, and the employee was not reinstated at that time. However, she was later reinstated prior to the start of the 1983-84 school year.

The Association contends that on May 3, 1983, Ms. Megan Cassette, chairperson of the Association's bargaining

team, was approached by District Superintendent Dr. Edward Ikard and told:

> You know you're not going to get anything out of factfinding. If we gave you any more than our last offer then it would only encourage you to hold out for factfinding every year.

The Association also contends that on April 26, 1983, Superintendent Ikard made a similar statement to Mr. Marshall Waller, president of the Association. Similarly on May 12, 1982, Mr. Ronald Ruud, the District's legal counsel and bargaining representative, allegedly said he believed that if school boards ever changed their bargaining positions because of a factfinder's recommendation, it would only encourage employees to hold out for factfinding in the future.

The Association also alleges that the District's negotiators were consistently 15 minutes to one-half hour late for each scheduled bargaining session held from August 19, 1982 to October 19, 1982 (the record does not indicate how many sessions were held). The Association alleges that after October 19, 1982, when the Association reported the District's tardiness to its members, the District negotiators then showed up for sessions on time but went immediately into caucuses lasting approximately the same length of time as the original periods of tardiness.

The original charges were filed on March 22, 1983, and the motion to amend was made on December 15, 1983, approximately two weeks before the hearing began.

DISCUSSION

I. The Partial Dismissal of Charges by the Regional Attorney

PERB, following the National Labor Relations Board, has previously determined that certain conduct by the employer, such as unilateral changes in matters within the scope of representation and bypassing the exclusive representative, may be a per se violation of EERA section 3543.5(c). San Mateo County Community College District (6/8/79) PERB Decision No. 94; Davis Unified School District, et al. (2/22/80) PERB Decision No. 116; North Sacramento School District (12/31/81) PERB Decision No. 193; Modesto City Schools (3/8/83) PERB Decision No. 291; and Oakland Unified School District (12/16/83) PERB Decision No. 367. However, in Pajaro Valley Unified School District (5/22/78) PERB Decision No. 51, PERB adopted a "totality of conduct" test for determining whether a party's entire course of conduct evidences a failure to bargain with the requisite good faith or subjective intent to reach agreement. The Board's "totality" test was further refined in Muroc Unified School District (12/15/78) PERB Decision No. 80, p. 13:

> It is the essence of surface bargaining that a party goes through the motions of negotiations, but in fact is weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent agreement. [Citations omitted.] Specific conduct of the charged party, which when viewed in isolation may be wholly proper, may, when placed in the narrative history of

> the negotiations, support a conclusion that the charged party was not negotiating with the requisite subjective intent to reach agreement. [Citations omitted.]

The regional attorney found that the District's wage proposal here was not regressive, and that the alleged consistent tardiness to meetings and statements of disdain for factfinding were only minimal circumstantial evidence of bad faith. He therefore found that the totality of conduct on the part of the District was insufficient to support a charge of bad-faith bargaining.

In so concluding, the regional attorney did not consider the allegation of bypassing the representative as part of the totality of conduct, but treated that issue as a separate charge and issued a complaint as to that conduct.

We agree with the regional attorney that the evidence offered by the Association is insufficient to establish a prima facie case of regressive bargaining. The Association argues that the District's nonretroactive two-percent wage hike offer was regressive because as time passed without an agreement being reached, the total monetary benefit to the employees over the term of the contract would decrease. To suggest that merely holding firm to a two-percent wage hike proposal is regressive, however, would be to conclude that any economic proposal made during negotiations must be adjusted on a daily basis. Such a holding would defy logic. We therefore find

that these allegations are insufficient to state a prima facie violation of EERA.

Regarding the District's alleged tardiness for bargaining sessions and statements of disdain for factfinding, the situation is somewhat different. Here the Association did allege facts sufficient to conclude that the conduct did occur; the question is whether that conduct is sufficiently serious to warrant a finding of a violation of the District's duty to negotiate or participate in the factfinding process in good faith.

It may be that each alleged incident is unobjectionable viewed in isolation. Certainly, being slightly late for bargaining sessions, for example, may be merely inadvertence or a legitimate element of bargaining strategy. However, the essence of an evaluation of the totality of circumstances is that incidents are not viewed in isolation, and that conduct which may be "de minimus" standing alone may be part of a pattern of conduct which indicates a lack of good faith.

Therefore, we remand the charges of tardiness and statements of disdain for factfinding to the administrative law judge for consolidation with the complaint previously issued on the bypassing charge.

II. The Denial by the ALJ of the Motion to Amend the Complaint

After the complaint was issued on the bypassing charge, the Association made a pre-hearing motion to amend the complaint in

compliance with PERB regulation, section 32647.[5] The amendment, in pertinent part, would have added a violation of EERA section 3543.5(a), alleging reprisals against three bargaining unit members.

The Association alleged that the District acted in reprisal by terminating three bargaining unit members who failed to return to the District by July 1, 1983, either its contract proposal or the form provided by the Association indicating an intention to return to employment for the 1983-84 school year. All three were notified on or about July 6, 1983 that their employment was viewed as having terminated, although all were later reinstated.

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[5]PERB regulations are codified at California Administrative Code, title 8, section 31001 et seq.

Section 32647 states:

> (a) The charging party may move to amend the complaint. Before hearing, the charging party may move to amend the complaint by filing an amended charge and request to amend complaint with the Board agent in compliance with Section 32615. If the Board agent determines that amendment of the complaint is appropriate, the Board agent shall issue an amended complaint in accordance with Section 32640.
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> (b) If the Board agent finds that the pre-hearing amendment to the charge does not result in the establishment of a prima facie case, the Board agent shall refuse to amend the complaint. The charging party may appeal a refusal to amend the complaint in accordance with Section 32635.

The ALJ dismissed this charge, finding that the Association failed to establish a prima facie case because it did not allege any protected activity in which the three bargaining unit members had been engaged.

The Association argues that the three employees engaged in protected activity in that they (a) followed the Association's advice and (b) refused to participate in the direct dealing by the District.

We note, however, that the Association's advice was that bargaining unit members not return the individual contracts sent out by the District, but rather return forms provided by the Association indicating to the District an intention to work the following year in compliance with the Education Code. The three employees failed to return either the District's contract or the form provided by the Association. Thus, those three individuals did not actually follow the Association's advice and did not participate in a protected activity. The fact that other employees refused to participate in the alleged direct dealing and uneventfully returned the Association's form indicating their desire to work further suggests that the District's action was not taken in retaliation for failure to return the contract.

We reach a similar conclusion with regard to the one employee who refused to go into a closed meeting with the school board. She, like the others, was terminated because

she did not indicate that she wished to return the next year. She was not reinstated because she failed to appear to explain her failure to do so. She was reinstated before the commencement of the next school year. We cannot find that these facts describe retaliation for the exercise of protected rights, and we uphold the ALJ's denial of the Association's amendment to so allege.

ORDER

Upon the foregoing Decision and the record as a whole, the Public Employment Relations Board ORDERS that the administrative law judge's Denial of the Association's Motion to Amend Complaint is upheld. The Board further ORDERS that the regional attorney's Partial Refusal to Issue Complaint and Dismissal of Unfair Practice Charge is reversed in part. The case is therefore REMANDED to the administrative law judge in order that the complaint may be amended and the record in this case may be reopened for further proceedings consistent with this Decision.

Chairperson Hesse and Member Morgenstern joined in this Decision.