

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



EL DORADO UNION HIGH SCHOOL)
DISTRICT,)
)
Charging Party,) Case No. S-CO-116
)
v.) PERB Decision No. 495
)
CALIFORNIA SCHOOL EMPLOYEES) March 14, 1985
ASSOCIATION AND ITS PONDERADO)
CHAPTER NO. 267,)
)
Respondent.)
)

Appearance: Girard and Griffin, by Thomas M. Griffin, for El Dorado Union High School District.

Before Hesse, Chairperson; Jaeger, Morgenstern and Burt, Members.

DECISION

This case is before the Public Employment Relations Board on appeal by charging party of the Board agent's dismissal, attached hereto, of its charge alleging that the California School Employees Association and its Ponderado Chapter No. 267 violated section 3543.6(c) of the Educational Employment Relations Act (Gov. Code sec. 3540 et seq.).

We have reviewed the dismissal and, finding it free from error, adopt it as the Decision of the Board itself.

ORDER

The unfair practice charge in Case No. SF-CO-116 is DISMISSED WITHOUT LEAVE TO AMEND.

By the BOARD

PUBLIC EMPLOYMENT RELATIONS BOARD

HEADQUARTERS OFFICE
1031 18TH STREET
SACRAMENTO, CALIFORNIA 95814
(916) 322-3088



November 30, 1984

Thomas M. Griffin
Girard & Griffin
511 O Street Suite 20

Re: El Dorado Union High School District v. California School Employees Association and its Ponderado Chapter No. 267 Unfair Labor Practice Charge No. S-CO-116.

Dear Mr. Griffin:

The above-referenced charge alleges that the California School Employees Association and its Ponderado Chapter No. 267 (Association) threatened to file a grievance against the El Dorado Union High School District (District) and filed an unfair practice charge against the District. This conduct is alleged to violate section 3543.6(c) of the Educational Employment Relations Act (EERA).

I indicated to you in my letter dated November 8, 1984 that the above-referenced charge did not state a prima facie case, and that unless you amended the charge to state a prima facie case, or withdrew it prior to November 15, 1984, it would be dismissed. More specifically, I informed you that if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge accordingly.

On November 16 you requested and received a one week extension to file an argument concerning the case. In it you correctly state that the November 8 letter omitted the following facts. During October 1983 a dispute arose between the Association and the District concerning bus driver pay on field trips. That dispute was resolved by payment to the grieving employee. Subsequently, the collective bargaining agreement between the Association and the District was modified by the addition of the following:

- 6e. Notwithstanding any other provisions of this Agreement, if a special trip requires an overnight stay, the District shall be relieved of the obligation of payment for any hours between the time a bus driver is relieved of duties for the

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evening and the time duties resume the following morning.

The District argues that by threatening a grievance and then filing an unfair practice charge over the dispute in May 1984 the Association repudiated the contract and that such a repudiation is an unfair practice. For the reasons stated in the November 8 letter (Exhibit 1) as elaborated below, this allegation does not state a prima facie violation of the EERA and is dismissed.

First, the threat to file a grievance or the filing of an unfair practice charge with PERB is not a repudiation of the collective bargaining agreement. In this case the Association had no power to make the disputed payment to the driver in question. Its recourse is to file a grievance or unfair practice charge. On the other hand, an employer does have the power to immediately impose its will or decision to repudiate an agreement with an employee organization. For this reason among others unilateral action by employers is viewed with disfavor and is a violation of the EERA. San Mateo County Community College District (6/8/79) PERB Decision No. 94.

Second, the unfair practice charge filed by the Association, Case No. S-CE-775 did not focus on the dispute over bus driver's pay on field trips. It concerned whether the District had unilaterally contracted out bus driving work and whether such contracting out was an act of reprisal against the employees and the Association. Section 6e of the contract has little or nothing to do with the merits of the unfair practice. Again, if the employer feels that that case was frivolous or an abuse of process, the proper remedy is to seek attorney's fees in that case.

Pursuant to Public Employment Relations Board regulation section 32635 (California Administrative Code, title 8, part III), you may appeal the refusal to issue a complaint (dismissal) to the Board itself.

Right to Appeal

You may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal (section 32635(a)). To be timely filed, the original and five

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(5) copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) on December 20, 1984, or sent by telegraph or certified United States mail postmarked not later than December 20, 1984 (section 32135). The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five (5) copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal (section 32635(b)).

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany the document filed with the Board itself (see section 32140 for the required contents and a sample form). The document will be considered properly "served" when personally delivered or deposited in the first-class mail postage paid and properly addressed.

Extension of Time

A request for an extension of time in which to file a document with the Board itself must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party (section 32132).

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Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Very truly yours,

DENNIS M. SULLIVAN
General Counsel

By

ROBERT THOMPSON
Regional Attorney

PUBLIC EMPLOYMENT RELATIONS BOARD

SACRAMENTO REGIONAL OFFICE
1001 18TH STREET, SUITE 102
SACRAMENTO, CALIFORNIA 95814
(916) 327-3198



November 8, 1984

Thomas M. Griffin
Girard & Griffin
511 Q Street, Suite 29

Re: El Dorado Union High School District v. California School
Employeess Association and its Ponderado Chapter No. 267
Unfair Practice Charge No. S-CO-116

Dear Mr. Griffin:

The above-referenced charge alleges that the California School Employees Association and its Ponderado Chapter No. 267 (Association) threatened to file a grievance against the El Dorado Union High School District (District) and filed an unfair practice charge against the District. This conduct is alleged to violate section 3543.6(c) of the Educational Employment Relations Act (EERA).

My investigation revealed the following undisputed facts. During May 1984 a dispute arose between the Association and the District concerning the proper level of pay for bus drivers who drive an overnight field trip. On May 11 Ms. Ybright, a shop steward for the Association in the transportation department, told Mr. Hunter, the transportation department supervisor, that unless the District paid the bus driver according to the Association's interpretation of the collective bargaining agreement that the Association would file a grievance against the District. Shortly thereafter the trip was reassigned to a private carrier and a grievance was never filed. On June 1, however, the Association filed Unfair Practice Charge No. S-CE-775 alleging in part that the District had transferred bargaining unit work out of the unit by contracting with the private carrier. A formal hearing was held on this case on October 9, 1984. No decision has been issued.

Based on the facts described above this charge does not state a prima facie violation of EERA for the reasons which follow.

In determining whether a party has violated section 3543.6(c) of the EERA, the Public Employment Relations Board (PERB or Board) utilizes either the "per se" or the "totality of conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process.

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Stockton Unified School District (11/3/80) PERB Decision No. 143, Fremont Unified School District (6/19/80) PERB Decision No. 136. The conduct alleged in this case to violate this section is the Association's threatening to file a grievance under the collective bargaining agreement and the filing of an unfair practice against the District. Charging Party has not provided any case law which indicates this conduct to be evidence of a failure to bargain in good faith or a "per se" violation of the EERA. An independent review of cases also failed to uncover such legal authority. In addition, such a theory appears to run contrary to the present case law of PERB. In North Sacramento School District (12/20/82) PERB Decision No. 264, the Board found the filing of a grievance is protected activity. If the District feels that the Association's filing of Case No. S-CE-775 is frivolous it should request the hearing officer in that case to order the Association to pay the District's attorney's fees as part of that litigation. King City Joint Union High School District (3/3/82) PERB Decision No. 197, review pending.

For these reasons, charge number S-CO-116, as presently written, does not state a prima facie case. If you feel that there are any factual inaccuracies in this letter or any additional facts which would correct the deficiencies explained above, please amend the charge accordingly. The amended charge should be prepared on a standard PERB unfair practice charge form clearly labeled **First Amended Charge**, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must be served on the respondent and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before November 15, 1984, I shall dismiss your charge. If you have any questions on how to proceed, please call me at (916) 322-3198.

Sincerely yours,

ROBERT THOMPSON
Regional Attorney