STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

TUSTIN UNIFIED SCHOOL DISTRICT, Charging Party,	)	Case No. LA-CO-377
v.	)	PERB Decision No. 626
TUSTIN EDUCATORS ASSOCIATION, CTA/NEA, Respondent.	)	June 23, 1987

Appearances; Parker and Covert by Margaret A. Chidester for Tustin Unified School District; Rosalind D. Wolf, Attorney, for Tustin Educators Association, CTA/NEA.

Before Hesse, Chairperson; Porter, Craib, and Shank, Members.

DECISION

This case is before the Public Employment Relations Board (Board) on appeal by charging party of the Board agent's dismissal, attached hereto, of its charge alleging that the Tustin Educators Association violated section 3543.6(a) and (b) of the Educational Employment Relations Act (EERA).

We have reviewed the dismissal and, finding it free from prejudicial error, adopt it as the Decision of the Board itself, insofar as the Board agent concludes that the allegations in the instant charge fail to state a prima facie violation of EERA.

Finally, we deny charging party's request for oral argument.

ORDER

The dismissal of the unfair practice charge in Case No. LA-CO-377 is hereby AFFIRMED.

By the BOARD

STATE Of CALIFORNIA GEORGE DEUKMEJIAN, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

LOS ANGELES REGIONAL OFFICE
3470 WILSHIRE BLVD., SUITE 1001
LOS ANGELES, CALIFORNIA 90010
(213) 736-3127

January 26, 1987

Margaret A. Chidester
Parker and Covert
1901 E. Fourth Street, Suite 312
Santa Ana, California 9 2705

Re: Tustin Unified School District v. Tustin Educator's Association/CTA/NEA, Case No. LA-CO-0377

Dear Ms. Chidester:

In the above-referenced charge filed on September 23, 1986, the Tustin Unified School District alleges that the Tustin Educator's Association/CTA/NEA committed an unfair practice by utilizing the school mailboxes and mail system on several occasions to circulate flyers and other communications soliciting support for a recall campaign of three members of the District's Board of Education. This conduct is alleged to violate section 3543.6(a) and (b) of the Educational Employment Relations Act.

I indicated to you in my attached letter dated January 16, 1987 that the above-referenced charge did not state a prima facie case. You were advised 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. You were further advised that unless you amended the charge to state a prima facie case, or withdrew it prior to January 23, 1987, it would be dismissed.

On January 23, 1987, you stated to me in our telephone conversation that you had no additional facts to add to the charge and you had no additional legal arguments to offer as to why a complaint should issue based on the facts presently alleged. You also stated that the Charging Party had no intention of withdrawing the charge. Therefore I am dismissing the charge based on the facts and reasons contained in my January 16, 1987 letter.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, 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 (California Administrative Code, title 8, section 32635(a)). To be timely filed, the original and five copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.), or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing. Code of Civil Procedure section 1013 shall apply. (See 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 copies of a statement in opposition within twenty 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 each copy of a document served upon a party or 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 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).

Final Date

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

Sincerely,

JEFFREY SLOAN
General Counsel

By
DONN GINOZA
Regional Attorney

Attachment

cc: Rosalind Wolf

PUBLIC EMPLOYMENT RELATIONS BOARD
LOS ANGELES REGIONAL OFFICE
3470 WILSHIRE BLVD., SUITE 1001
LOS ANGELES, CALIFORNIA 90010
(213) 736-3)27

January 16, 1987

Margaret A. Chidester
Parker and Covert
1901 E. Fourth Street, Suite 312
Santa Ana, California 92705

Re: Tustin Unified School District v. Tustin Educators Association /CTA/NEA, Case No. LA-CO-0377

Dear Ms. Chidester:

In the above-referenced charge filed on September 23, 1986, the Tustin Unified School District ("District") alleges that the Tustin Educator's Association/CTA/NEA ("TEA" or Association) committed an unfair practice by utilizing the school mailboxes and mail system on several occasions to circulate flyers and other communications soliciting support for a recall campaign of three members of the District's Board of Education. This conduct is alleged to violate section 3543.6 (a) and (b) of the Educational Employment Relations Act ("EERA").

My investigation revealed the following facts. Beginning in the spring of 1985 TEA, through its "Crisis Committee," distributed flyers to certificated employees soliciting release time funds for its negotiators and designating that some of the proceeds would support a campaign to elect new Board of Education members more "sympathetic" to TEA. This distribution utilized the District's internal mail system. The practice of utilizing the internal mail system to solicit funds continued on several occasions through the spring and summer of 1986, at which time flyers indicated that monies contributed would be used to support the recall of three members of the District's Board.

TEA's "Crisis Committee" has chosen to call this campaign "Adopt A Negotiator." In July 1985 the Crisis Committee, after formally organizing a separate committee called "Committee to Adopt a Negotiator," filed a "Statement of Organization" with the Orange County Registrar of Voters. In July 1986 the "Committee to Adopt a Negotiator" filed a "Recipient Committee Campaign Statement" with the Registrar. TEA appears on these documents as an affiliated organization through the listing of its own name or that of the "Committee to Adopt a Negotiator."

The mail system for the District consists of mailboxes for the individual teachers located at each of the schools. There is also a central mail drop in the District office where mail addressed to teachers at the schools is sorted for delivery. After the mail is sorted and delivered to the designated schools, a clerk at each school distributes the mail to the individual teacher mailboxes. In some cases the campaign flyers were deposited at the central mail drop and in at least one instance the flyers were placed directly into the individual mailboxes.

TEA and the District are parties to a collective bargaining agreement which currently extends to June 30, 1988. The agreement grants access rights to the Association to use the internal mail system of the District. Article 14, section F states:

> The Association shall have reasonable use of the local site mailboxes to distribute . organizational material which conforms to the content restrictions in Section G.

Article 14, section G provides:

> Any literature to be distributed or posted must be dated and must identify the person and organization responsible for its promulgation. The Association mad/or its representative may use the District mailboxes to communicate with bargaining unit members. The District shall allow reasonable use of the delivery system of the District for Association business.

Article 12 of the contract provides a procedure for the resolution of grievances which ends in binding arbitration. A "grievant" must be a member of the bargaining unit. (Article 12, section B(l).)

According to the Charging Party, Respondent's "Crisis Committee" utilized the school mail system on April 16, April 21, May 14, and June 17, 1986 to solicit support for the recall of three members of the District's Board of Education. Charginq Party alleges that these mailings violated Education Code section 7054, which reads as follows:

> Use of District Property. Except as provided in Sections 7056, 35174, and 72632, no school district or community college district funds, services, supplies, or equipment shall be used for the purpose of urging the passage or defeat of any school measure of the district, including, but not limited to, the candidacy of any person for election to the governing board of the district.

Government Code section 3543.6 provides, in pertinent part, as follows:

> It shall be unlawful for an employee organization to:
>
> (a) Cause or attempt to cause a public school employer to violate Section 3543.5.
>
> (b) 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.

In our telephone conversation on November 14, 1986 you explained how the use of the District's mail system to distribute recall campaign literature violated the above-mentioned subsections of the statute. In regard to the (a) charge, you stated that TEA'S use of the mail system to circulate political literature placed the District in a position of potential liability for violating Education Code section 7054. In turn, you asserted that the District has only one option for preventing the unlawful use, namely, to employ censorship. Such action, you argued, would interfere with TEA'S access rights as mandated by Regents of the University of California v. PERB (1986) 139 Cal.App.3d 1037.

As to the (b) charge, you argued that TEA was abusing its right to communicate with members. Citing the Regents case, you asserted that PERB has jurisdiction to determine if the type of communication involved here was a lawful exercise of its rights under EERA.

For the following reasons, the charge as filed fails to state a prima facie case for violations of either subsection 3543.6(a) or -3543.6(b) .

Alleged Violation of Section 3543.6(a)

In order for the charge to state a violation of section 3543.6(a) it must be clear how and in what manner the Respondent has caused or attempted to cause the District to violate section 3543.5. The investigation indicates that TEA'S only action to date has been use of the mail system to circulate political literature. The District has not censored or otherwise attempted to stop the circulation of the flyers. Nor has it demanded that TEA cease using the mail system for the flyers. Since the District has taken no action against the flyers as yet, it cannot have been "caused" to commit any act violating section 3543.5. Thus, at best, the charge presents the theory that TEA "attempted to cause" the District to violate section 3543.5.

To succeed under this theory, the District must 6how that distribution of the flyers was an attempt by the TEA to cause it to violate section 3543.5 of the EERA. The District has failed to identify which specific subsections of section 3543.5 TEA attempted to cause the District to violate. However, the charge conceivably contends that TEA attempted to cause the District to interfere with TEA'S access rights by censoring or refusing to send TEA'S nail, thereby violating the Association's access rights (section 3543.5(b)) and derivatively interfering with employees' exercise of rights guaranteed by EERA (section 3543.5(a)).

To demonstrate that TEA attempted to cause the District to violate EERA section 3543.5(b), the District must show that its only response to circulation of the political leaflets was to deny the Association access to the mail system. The District has failed to meet this obligation.

The District may have the option of refusing to circulate material that contravenes the Education Code. Assuming that distribution of the recall campaign literature violated section 7054, District restraint on the content of employee organization communications is permissible under EERA if narrowly drawn" to prohibit only material which presents a substantial threat to peaceful school operations. Richmond Unified School Dist. (1979) PERB Decision No. 99. Stated differently, "accommodation to valid employer concerns" is appropriate so long as the "rules are narrowly drawn to avoid overbroad, unnecessary interference with the exercise of statutory rights." Regents of the University of California, Lawrence Livermore Laboratory (1982) PERB Decision No. 212-H, at p. 13-14. It would appear that both parties recognized the possibility of the District regulating content by virtue of the

language in the contract limiting access to the mail system to "reasonable use . . . for Association business." (Article 14, section G.)

In addition to the District objecting to the leaflets and seeking to implement a reasonable, and therefore valid, policy to accommodate its concerns, the District may have at least two other options that would not cause it to violate Association access rights. First, distribution of the leaflets may be permitted by section 7054. Second, the District could file a civil action for declaratory relief seeking a judicial order to enjoin the Association's use of the mail system. With all these possibilities, the District has failed to show that its only option is to violate the EERA and thus has failed to demonstrate that TEA was attempting to cause the District to interfere with its access rights under EERA.[1]

It is also conceivable that the Association was attempting to cause the District to unilaterally implement a new access policy in violation of subsection (c) of 3543.5. If the District decided to harmonize its access policy with the requirements of the Education Code, there are no facts alleged to indicate that the District could not negotiate with the TEA over such a change. In San Mateo City School Dist, v. PERB (1983) 33 Cal.3d 850, 866, the Court stated: "PERB [does] •How negotiations which might culminate in the inclusion of the terms established by the Education Code within a collectively negotiated contract. Such an agreement would not supersede the relevant part of the Education Code, but would strengthen it." Id.

The mandate of section 7054 may even be outside the scope of representation to the extent it can be said that "the statutory language [of the Education Code] clearly evidences an intent to set an inflexible standard or insure immutable provisions." Id., at p. 864-865 (quoting Board member Moore in California School Employees Assn. v. Healdsburg Union High Sen. Dist.

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[1]The thrust of this charge is that the District seeks an advisory opinion from PERB as to whether it could restrict access based on section 7054. Even if the case were ripe for resolution by virtue of the District taking some action to create the existence of a controversy, the dispute would essentially be a contract matter which would be more properly adjudicated through the grievance procedure.

(1980) PERB Decision No. 132). In that case the District's implementation of a new policy would not violate section 3543.5(c). Therefore, the Charging Party has not established that the TEA attempted to cause it to make a unilateral change in violation of EERA section 3543.5(c).

This investigation has revealed no additional theories by which it could be argued that TEA caused or attempted to cause the District to violate section 3543.5.

Alleged Violation of 3543.6(b)

Based on Regents of University of California v. PERB, supra, the District's theory here is that because PERB has enforced employee organization access rights it should exercise its jurisdiction in this case. It contends that PERB should determine whether TEA has abused its access rights by distributing mail allegedly in violation of Education Code section 7054. This argument is fallacious for at least two reasons.

First, the Regents case was based on the employer's violation of access rights provided by the statute to employee organizations. There is nothing in the wording of subsection 3543.6(b) indicating that it is intended to require PERB to police an organization's use of its own access rights.

Second, the fact that PERB may consider non-EERA statutes or regulations does not grant PERB the authority to remedy possible violations of those statutes. In the Regents case, the court held that PERB could decide the reasonableness of the employer's regulation by determining whether, as a threshold matter, the regulation and the federal postal laws could be harmonized, without deciding the scope of the latter laws. In contrast, here the Charging Party seeks to have PERB directly enforce a provision of the Education Code. PERB's jurisdiction is limited to enforcing violations of EERA and does not extend to remedying violations of the Education Code. Bracey v. Los Angeles Unified School Dist. (1986) PERB Decision No. 588; Mountain View School Dist. (1977) PERB Decision No. 17.

For these reasons, the charge 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 *n **anended** charge or withdrawal from you before January 23, 1987, I shall dismiss your charge. If you have any questions on how to proceed, please call me at (213) 736-3127.

Sincerely,,

Regional Attorney