**STATE OF CALIFORNIA**
**DECISION OF THE**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

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| VALLEJO CITY UNIFIED SCHOOL DISTRICT, | ) | |
| Charging Party, | ) | Case No. SF-CO-437 |
| v. | ) | PERB Decision No. 1015 |
| VALLEJO EDUCATION ASSOCIATION, CTA/NEA, | ) | September 29, 1993 |
| Respondent. | ) | |

Appearances: Kronick, Moskovitz, Tiedemann & Girard by John L. Bukey, Attorney, for Vallejo City Unified School District; California Teachers Association by A. Eugene Huguenin, Jr., Attorney, for Vallejo Education Association, CTA/NEA.

Before Caffrey, Carlyle and Garcia, Members.

DECISION AND ORDER

CARLYLE, Member: This case is before the Public Employment Relations Board (Board) on appeal by the Vallejo City Unified School District (District) of a Board agent's dismissal (attached hereto) of their unfair practice charge. The District alleged that the Vallejo Education Association, CTA/NEA (Association) violated section 3543.6(c) and (d) of the Educational Employment Relations Act (EERA)[1] by engaging in numerous acts in violation of their rights.

[1]EERA is codified at Government Code section 3540 et seq. Section 3543.6 states, in pertinent part:

> It shall be unlawful for an employee organization to:
>
> (c) Refuse or fail to meet and negotiate in good faith with a public school employer of any of the employees of which it is the exclusive representative.
>
> (d) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).

The Board has reviewed the warning and dismissal letters, the original and amended charge, the District's appeal and the Association's response thereto.[2] The Board finds the Board agent's dismissal to be free of prejudicial error and adopts it as the decision of the Board itself.

The unfair practice charge in Case No. SF-CO-437 is hereby DISMISSED WITHOUT LEAVE TO AMEND.[3]

Members Caffrey and Garcia joined in this Decision.

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[2]The District filed a brief responding to the Association's response to their appeal. The Association opposed this filing as not conforming with PERB regulations. (PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.) However, PERB regulations do not provide for nor preclude the filing of additional briefs, and the Board has discretion to review the materials submitted. In this case, the District's brief did not contain newly discovered evidence, newly discovered law, nor an explanation why its brief should be reviewed by the Board. For these reasons, the Board did not consider the District's brief in reaching its determination.

[3]Member Garcia would additionally note that he finds County Sanitation Dist. No. 2 v. Los Angeles County Employees' Assn. (1985) 38 Cal.3d 564 [214 Cal.Rptr. 424], to be dispositive of this case and while he joins in the decision he does not adopt the Board agent's rationale.

STATE OF CALIFORNIA PETE WILSON. *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

Office of the General Counsel
1031 18th Street
Sacramento, CA 95814-4174
(916) 323-8015

May 13, 1993

John L. Bukey, Esquire
Kronick, Moskovitz, Tiedemann, & Girard
770 "L" Street, Suite 1200
Sacramento, CA 95814

Re: Vallejo City Unified School District v. Vallejo Education Association, CTA/NEA
Unfair Practice Charge No. SF-CO-437
**DISMISSAL AND REFUSAL TO ISSUE COMPLAINT**

Dear Mr. Bukey:

The above-referenced charge alleges that the Vallejo Education Association, CTA/NEA (Association) threatened to strike, gave notice to strike, and struck against the Vallejo City Unified School District (District). This conduct is alleged to violate Government Code sections 3543.6(c) and (d) of the Educational Employment Relations Act (EERA).

I indicated to you in my attached letter dated March 23, 1993 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. You were further advised that unless you amended the charge to state a prima facie case or withdrew it prior to March 30, 1993, the charge would be dismissed. On March 26 and March 29, 1993 you requested and were granted extensions of time in which to file the first amended charge. The first amended charge was filed on April 12, 1993. The Association's opposition was filed on April 26, 1993, the District's reply to the opposition was filed on May 3, 1993, and the Association's response to the reply to the opposition was, filed on May 10, 1993. The first amended charge incorporates the initial unfair practice charge, request for injunctive relief and contains the following addition information: On the two days of strike, March 16 and 17, approximately 100 teachers reported for work. Average

teacher attendance on a normal work day is 795 teachers out of 862. Student attendance during these two days averaged approximately 54 percent, with the absence rate being particularly high for Hispanic children. During the two day strike, the resources specialist and speech therapy programs were unavailable to students; individual education plan and student study team meetings were cancelled; and the program quality review assessment at one elementary school was cancelled. The charge also alleges various forms of teacher misconduct, including statements to students that attendance during the strike would not count and students' grades would suffer if they attended school. In addition, parents were contacted by teachers and told not to send their children to school.

The Association's opposition includes legal argument and declarations concerning the two days of strike at 11 elementary schools, three junior high schools, two senior high schools, and three other district schools. The declarations assert that: (1) a large number of teachers did not report to work on the days of the strike; (2) that almost all teachers who went on strike were replaced by substitute teachers; (3) student attendance was significantly impacted by the strike, and (4) student attendance on the first day following the strike was slightly lower than normal.

Based on all the information provided and legal theories argued, the District's charge must be dismissed as failing to state a prima facie case based on the reasons contained in my March 23, 1993 letter and which follow.

This charge involves a two-day strike by District employees who are members of the bargaining unit exclusively represented by the Association. The Association and the District are parties to a collective bargaining agreement with a term of September 2, 1991 to June 30, 1994. The strike occurred after the Association and the District were unable to reach agreement over provisions of the agreement which were reopened for negotiations in June 1992. The parties participated in the impasse procedures with a factfinder's report issued on February 10, 1993 and they unsuccessfully engaged in post factfinding negotiations on March 4. The strike occurred on March 16 and 17, following the completion by the Association and the District of impasse procedures.

The legal issues concerning a post-impasse strike were presented to the Board in Compton Unified School District (1987) PERB Order No. IR-50. In that case, the majority of the Board found reasonable cause to believe that an unfair practice had been committed where the strike causes "a total breakdown of two discrete activities that are guaranteed by statute and case law: (1) basic education for students and (2) negotiations free from

coercive tactics that hold hostage that education." (Id.: see concurring opinion of Member Hesse.)

Compton involved a prolonged series of work stoppages lasting from one to five days each, for a total of sixteen days. The work stoppages began in early November 1986 and continued through March 1987. The District was unable to replace the striking teachers with substitutes to any significant degree (average number of teachers on strike was 898 out of approximately 1400 bargaining unit members, with only 43 substitutes.) Student attendance was down approximately 70 percent from normal pre-strike attendance. Moreover, attendance was well below average, even on days when no strike was in progress (40 percent during entire four month period.) Consequently, the Compton majority found that a considerable number of the District's students received little or no meaningful education for the entire period during which teachers engaged in intermitted work stoppages. Based upon these facts, the Compton majority determined that the work stoppages resulted in a "total breakdown in education" satisfied the two-part test described above, and constituted reasonable cause to believe that violations of EERA section 3543.6 (c) and 3540 had occurred.

The allegations made in the present case do no satisfy the standards described in Compton, Although only 100 District teachers out of a normal day attendance of approximately 800 arrived for work, the District was able to recruit a large number of substitutes. It appears there was at least one substitute available to replace each striking teacher. Student attendance at the District schools was approximately half of normal during the two strike days. The first day following the strike witnessed a large increase in student attendance. There has been no evidence presented which indicates that the two days of strike had an impact on student attendance beyond the week of the strike.

The District generally asserts that the resource specialist and speech therapy programs were unavailable to students and meetings for individual education plans and student study teams were also cancelled. However, it is not clear how many students were involved in these programs nor to what extent these problems continued after the strike was ended. Based on this information, it does not appear that the strike in the Vallejo district caused the type of problems which were witnessed in Compton. Nor does it appear that the evidence presented by the District meets the requirement of the Compton case of a total breakdown in the educational process.

The second part of the test under Compton requires that there be a breakdown in negotiations free from coercive tactics that hold hostage the educational process. Here, the parties had completed the factfinding process with a report issuing on February 10,

1993, and had engaged in one unsuccessful post-factfinding negotiations *on* March 4, 1993. There is no evidence that either party sought to continue negotiating or requested negotiations during the time period in which the strike occurred. Thus, there is no evidence showing that there was a breakdown in the negotiations process. Accordingly, charging party's failure to meet either aspect of the Compton test requires that this charge be dismissed for failure to state a prima facie case.

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. (Cal. Code of Regs., tit. 8, sec. 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 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing. (Cal. Code of Regs., tit. 8, sec. 32135). Code of Civil Procedure section 1013 shall apply. 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** (20) calendar days following the date **of service of the appeal.** (Cal. Code of Regs., tit. 8, sec. 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 Cal. Code of Regs., tit. 8, sec. 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. (Cal. Code of Regs., tit. 8, sec. 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,

Robert Thompson
Deputy General Counsel

Attachment

cc: A. Eugene Huguenin, Jr.
California Teachers Association
1705 Murchison Drive
Burlingame, CA 94010

PUBLIC EMPLOYMENT RELATIONS BOARD

Office of the General Counsel
1031 18th Street
Sacramento, CA 95814-4174
(916) 323-8015

March 23, 1993

John L. Bukey, Esq.
Kronick, Moskovitz, Tiedemann, and Girard
770 L Street, No. 1200
Sacramento, California 95814

Re: Vallejo City Unified School District v. Vallejo Education Association
Unfair Practice Charge No. SF-CO-437
WARNING LETTER

Dear Mr. Bukey:

The above-referenced charge alleges that the Vallejo Education Association, CTA/NEA (Association) threatened to strike, gave notice to strike and struck against the Vallejo City Unified School District (District). This conduct is alleged to violate sections 3543.6 (c) and (d) of the Educational Employment Relations Act (EERA).

My investigation revealed the following information. The District and the Association are parties to a collective bargaining agreement with the term of September 2, 1991 to June 30, 1994. This agreement provides for the re-opening of the wages, health and welfare benefits, and two additional items selected by either party during the term of the agreement. In June 1992, the parties re-opened the agreement for negotiations. After resolving four issues, the Association and the District jointly filed for an impasse determination which PERB granted on July 1, 1992. Mediation took place during the month of July and the mediator certified the dispute to factfinding on August 1, 1992. Factfinding occurred during December 1992 and January 1993 and the factfinders' report issued on February 10, 1993. The factfinder recommended acceptance of the District's final proposal on the two issues presented to factfinding, wages and health and welfare benefits. A lengthy dissent was filed by Chuck Davies, the Association's representative on the factfinding panel. The parties engaged in post fact-finding negotiations on March 4, but were unsuccessful.

On March 9, the District Board adopted a resolution which: (1) Reduced salaries by 2.175% effective March 1, (2) reduced

the work year by one day, (3) capped the District's contribution for medical programs at the 1991-92 school year contribution level, and (4) adopted seven tentative agreements reached by the District and the Association during bargaining.

On March 11, the Association circulated an action memorandum informing teachers to remove all of their personal belongings and other materials from their classroom by the end of Friday, March 12. It stated, in addition, "leave only those essential materials that you can remove easily (in a box) once you have been notified of the specific STRIKE day or days." At 6:30 a.m. on Sunday, March 14, the Association gave written notice to the District superintendent that the strike would commence on Tuesday, March 16. The strike began on March 16. The teachers returned to work on March 18.

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

The District argues four theories under which the facts stated above would be a violation of the EERA: (1) A strike is an illegal, unilateral change in the negotiable subject of hours because teachers refuse to appear and conduct classes, (2) a strike is an unfair negotiating pressure tactic because the District serves school children who, generally, have no educational alternatives, (3) teacher strikes are, per se, a violation of the EERA as evidenced by the specific exclusion of the applicability of Labor Code section 923 contained in Government Code section 3549, (4) teachers' strikes are illegal because they constitute an imminent threat to the health and safety of the public under County Sanitation District No. 2 v. Los Angeles County Employees' Association (1985) 38 Cal.3d 564.

The first three theories presented by the District are based on Member Porter's opinion in Compton Unified School District (1987) PERB Order No. IR-50. These theories were not adopted by the concurring opinion of Chairperson Hesse and, therefore, did not form a basis for the Board's decision in the case. These theories have not been adopted by PERB or California courts. In fact, the California Supreme Court has repeatedly rejected the notion that all strikes by public employees such as teachers are illegal. (See San Diego Teachers Association v. Superior Court (1979) 24 Cal.3d 1; El Rancho Unified School District v. National Education Association (1983) 33 Cal.3d 946); and County Sanitation District No. 2 v. Los Angeles County Employees' Association (1985) 38 Cal.3d 564 where the Court had stated at page 571:

> [w]ith the exception of firefighters (Lab. Code section 1962), no statutory prohibition against strikes by public employees in this state exists.

In addition, the Supreme Court in County Sanitation specifically rejected the argument that non-applicability of Labor Code section 923 constitutes a prohibition on the right to strike. The plurality stated at page 573:

> ...an examination of other California statutes governing public employees makes it perfectly clear that section 3509 was not included in MMBA as a means for prohibiting strikes.

Based on the lack of statutory and case law support the District's first three **theories must** be **rejected as** not stating a prima facie violation of the **EERA.**

The District's fourth **theory** is based on language in County Sanitation which states:

> ...strikes by **public employees are** not unlawful unless **or until it is clearly** demonstrated **that such a strike** creates **a** substantial **and imminent threat to** the health or safety of **the public. This standard** allows **exceptions in certain** essential areas of public employment (e.g., the prohibition against firefighters and **law** enforcement personnel). It also requires the courts to determine on a case-by-case basis whether the public interest overrides the basic right to strike.

Thus, the Supreme Court developed a standard which foresaw only two general exceptions, that is, firefighters and law enforcement personnel. All other public employee strike cases would be assessed on a "case-by-case basis" to determine whether the strike constitutes a substantial and imminent threat to the health or safety of the public. In City of Santa Ana v. Santa Ana Police Benevolent Association (1989) 207 Cal.App. 3d 1568, a California Court of Appeal applied the County Sanitation rule to sick-outs by police officers during labor negotiations. They found that such strikes by police officers should be enjoined. However, teachers are not police officers and, therefore, any finding that a teachers' strike constitutes a substantial and

imminent threat to the health or safety of the public must be made on a case-by-case basis.

The Board adopted a similar test in Compton Unified School District, supra, PERB Order No. IR-50 where a majority of the Board found that reasonable cause to find a violation of the EERA existed where a strike caused a total breakdown of two discreet activities that are guaranteed by the statute and case law: 1) basic education for students and 2) negotiations free from coercive tactics that hold hostage that education.

No evidence was presented in this case that there was a total breakdown of either basic education for students or negotiations between the District and the Association. Accordingly, *no* prima facie violation of the EERA has been stated.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts which would correct the deficiencies explained above, please amend the charge. 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 March 30, I shall dismiss your charge. If you have any questions, please call me at (916) 323-8015.

Sincerely,

Robert Thompson
Deputy General Counsel