STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION & ITS CHAPTER 396, Charging Party, v. PARLIER UNIFIED SCHOOL DISTRICT, Respondent.	Case No. SA-CE-2243-E PERB Decision No. 1717 November 30, 2004

Appearances: California School Employees Association by David J. Dolloff, Attorney, for the California School Employees Association & its Chapter 396; Lozano Smith by Richard B. Galtman, Attorney, for Parlier Unified School District.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the California School Employees Association & its Chapter 396 (CSEA) of a Board agent's dismissal (attached) of its unfair practice charge (UPC). The charge alleged that the Parlier Unified School District (District) violated the Educational Employment Relations Act (EERA)[1] by unilaterally changing the policy concerning finality of a hearing officer's findings regarding discipline and dismissal.

The Board has reviewed the entire record in this matter, including the unfair practice charge, the warning and dismissal letters, CSEA's appeal and the District's response. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself, subject to the discussion below.

[1]EERA is codified at Government Code section 3540, et seq.

DISCUSSION

Finality of Hearing Officer's Decision

In this matter, CSEA argues that under the collective bargaining agreement (CBA) a hearing officer's decision on discipline is final. The District counters that such decisions are only recommendations and are subject to adoption by the Board of Trustees. Normally, where contract language is ambiguous, the Board has held that for purposes of determining a prima facie case, a charging party's interpretation must be accepted as true where it is reasonable. (Fullerton Joint Union School District (2004) PERB Decision No. 1633; Westlands Water District (2004) PERB Decision No. 1622-M.) Thus, if the Board agent found the contract language ambiguous, CSEA's interpretation should have been accepted as true.

However, regardless of any ambiguity in contract language, the Board agrees with the Board agent's finding that the hearing officer's decision was not final. This is because Education Code section 45113, as it existed when the contract language was negotiated, did not permit the District to delegate its authority over disciplinary decisions. Thus, even if the contract had clearly attempted such a delegation, it would be unenforceable. Accordingly, the Board affirms the Board agent's holding that the hearing officer's decision was not final, but rather subject to adoption by the Board of Trustees.

Imposition of Penalty by Board

Next, CSEA argues that the District violated Section 6.7[2] of Article 6 by imposing a penalty greater than that recommended by the hearing officer. That section provides as follows:

[2]Due to the appearance in the agreement of two sections numbered as 6.6, this section sometimes is numbered as 6.7 and other times as 6.8. This decision refers to this section as 6.7.

> If the Board of Trustees finds that sufficient cause exists, it may impose disciplinary action proposed by the Superintendent, or his designee, or it may impose a lesser disciplinary penalty. (Response to UPC, Dist. Ex. A, p. 9.)

Here, it is undisputed that the Board of Trustees imposed a greater discipline than that recommended by the hearing officer. However, CSEA has not shown that Section 6.7 applies in this case. Examining the CBA, Section 6.7 appears to only apply in situations where the employee has not requested a hearing. Accordingly, the dismissal is sustained.

ORDER

The unfair practice charge in Case No. SA-CE-2243-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Whitehead joined in this Decision.

STATE OF CALIFORNIA — ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8383
Fax: (916) 327-6377

August 5, 2004

Laurie Mitchell-Cole, Labor Relations Representative
California School Employees Association
2501 West Shaw Avenue, Suite 107
Fresno, CA 93711

Re: California School Employees Association & its Chapter 396 v. Parlier Unified School District
Unfair Practice Charge No. SA-CE-2243-E
DISMISSAL LETTER

Dear Ms. Mitchell-Cole:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 1, 2004. The California School Employees Association & its Chapter 396 (CSEA) alleges that the Parlier Unified School District (District) violated the Educational Employment Relations Act (EERA)[1] by unilaterally changing the policy concerning finality of a hearing officer's findings regarding discipline and dismissal.

I indicated to you in my attached letter dated July 20, 2004, 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 July 30, 2004, the charge would be dismissed.

I have not received either an amended charge or a request for withdrawal. Therefore, I am dismissing the charge based on the facts and reasons contained in my July 20, 2004 letter.

Right to Appeal

Pursuant to PERB Regulations,[2] 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. (Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

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[1] EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

[2] PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Regulations 32135(a) and 32130.) A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

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. (Regulation 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 Regulation 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. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

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. (Regulation 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
General Counsel

By _
Les Chisholm
Regional Director

Attachment

cc: Richard B. Galtman
Robert V. Piacente
Tim Liermann
David Dolloff

STATE OF CALIFORNIA LD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8383
Fax: (916) 327-6377

July 20, 2004

Laurie Mitchell-Cole, Labor Relations Representative
California School Employees Association
2501 West Shaw Avenue, Suite 107
Fresno, CA 93711

Re: California School Employees Association & its Chapter 396 v. Parlier Unified School District
Unfair Practice Charge No. SA-CE-2243-E
WARNING LETTER

Dear Ms. Mitchell-Cole:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 1, 2004. The California School Employees Association & its Chapter 396 (CSEA) alleges that the Parlier Unified School District (District) violated the Educational Employment Relations Act (EERA)[1] by unilaterally changing the policy concerning finality of a hearing officer's findings regarding discipline and dismissal.

CSEA is the exclusive representative of the District's classified employees. CSEA and the District are parties to a written agreement effective July 1, 2001 through June 30, 2004.[2] In Article 6 – Evaluations, Disciplinary Actions and Hearings, Section 6.6 of the agreement provides as follows concerning hearings on the suspension, demotion or dismissal of permanent classified employees:

> Not less than five (5) workdays after receipt of a demand for hearing by a permanent employee who has been given notice of a proposed suspension, demotion or dismissal, a hearing shall be scheduled. The District and CSEA will appoint a Hearing Officer to hear such hearing at a time and place designated by the Board. The employee shall be given at least five (5) workdays' written notice of the time and place of the hearing unless such notice is specifically waived by the employee. The employee and the school administration shall afford [sic] equal opportunity to present evidence. The burden of proof, however rests with the administration. At the closed of the Hearing Officer [sic] shall

[1] EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

[2] The agreement's grievance procedure does not end in final and binding arbitration.

> render a decision which shall be final, but shall not preclude legal redress.

The above-quoted language of Section 6.6 was first negotiated by the parties in July 1999 and incorporated into the agreement effective July 1, 1998 through June 30, 2001. Prior to the changes negotiated in July 1999, the section's language provided for a hearing by either the Board of Trustees itself or a hearing officer, without reference to a role for CSEA in the appointment of a hearing officer, and the last sentence read, "At the close of the hearing, the Board of Trustees shall render its decision, which shall be final, but shall not preclude legal redress." When the parties negotiated their current (2001-2004) agreement, no changes were proposed to or made in Section 6.6.

However, Article 6 also includes a section that was left unchanged both in July 1999 and in the current agreement, titled "Disciplinary Penalties Imposed by the Board,"[3] that provides as follows:

> If the Board of Trustees finds that sufficient cause exists, it may impose disciplinary action proposed by the Superintendent, or his designee, or it may impose a lesser disciplinary penalty.

Lupe Barela is employed in the unit represented by CSEA. In December 2003, Ms. Barela was placed on administrative leave with pay, pending the outcome of a disciplinary investigation relating to an alleged physical assault of another employee by Ms. Barela. Following a Skelly hearing, Ms. Barela was placed on unpaid leave and served with notice of dismissal.

A formal termination hearing, pursuant to Article 6, was conducted on February 6, 2004, and the hearing officer rendered a decision on February 9, 2004. The hearing officer found just cause for discipline but determined that dismissal was too harsh a penalty based on Ms. Barela's work history and prior behavior. The hearing officer recommended a suspension without pay from December 22, 2003 through February 12, 2004, a stern letter of reprimand, and a "last chance agreement" between Ms. Barela and the District.

However, on February 12, 2004, the District's board of trustees rejected the hearing officer's recommendations, concluding that the penalties contained therein were not appropriate, and voted to dismiss Ms. Barela effective February 12, 2004.

The Hearing Officer's Decision

The hearing officer in Ms. Barela's case was Jennifer J. Looney. She titled her decision "Findings of Fact and Recommended Decision Re: Disciplinary Hearing." Ms. Looney indicates preliminarily therein that she was selected by mutual agreement of the District and CSEA to "preside over the hearing and render a proposed decision to the Board of Trustees."

[3] Due to the appearance in the agreement of two sections numbered as 6.6, this section sometimes is numbered as 6.7 and other times as 6.8.

She then prefaces her findings by stating that "the Hearing Officer makes the following findings and recommendations to the Board of Trustees."

The section of Ms. Looney's decision titled "Recommended Decision" first notes that her "recommendation is based on the provisions of [Education Code] 45113 which allows the Board of Trustees to delegate its authority to determine whether sufficient cause exists for disciplinary action against classified employees." Ms. Looney concludes that while just cause existed to discipline Ms. Barela, dismissal was too harsh. Ms. Looney then proceeds to "recommend" the disciplinary actions summarized above.

Education Code Section 45113

CSEA notes that the provisions of Education Code section 45113 currently provide as follows in subsection (e):

> Nothing in this section shall be construed to prohibit the governing board, pursuant to the terms of an agreement with an employee organization under Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code, from delegating its authority to determine whether sufficient cause exists for disciplinary action against classified employees, excluding peace officers as defined in Section 830.32 of the Penal Code, to an impartial third party hearing officer. However, the governing board shall retain authority to review the determination under the standards set forth in Section 1286.2 of the Code of Civil Procedure.[4]

[4] Code of Civil Procedure section 1286.2 provides:

> (a) Subject to Section 1286.4, the court shall vacate the award if the court determines any of the following:
>
> (1) The award was procured by corruption, fraud or other undue means.
>
> (2) There was corruption in any of the arbitrators.
>
> (3) The rights of the party were substantially prejudiced by misconduct of a neutral arbitrator.
>
> (4) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.

However, Education Code section 45113 did not read the same way in July 1999, when the parties' current language was first negotiated, as it does today. Current subsection (e) of Education Code section 45113 was not added until 2001, when the Legislature and Governor approved Assembly Bill 128 (Chapter 839, Statutes of 2001). This legislation, which became effective January 1, 2002, was described in the Legislative Counsel's Digest as follows:

> Under existing law, the governing board of a school district and the governing board of a community college district are required to prescribe written rules and regulations governing the personnel management of the classified service. Existing law requires that any employee designated as a permanent employee be subject to disciplinary action only for cause as prescribed by rule or regulation of the governing board, but the governing board's determination of the sufficiency of the cause for disciplinary action is required to be conclusive.
>
> This bill would provide that nothing in those provisions shall be construed to prohibit the governing board, pursuant to the terms of an agreement with an employee organization, under specified provisions, from delegating its authority to determine whether sufficient cause exists for disciplinary action against classified employees, excluding peace officers, as defined, to an impartial 3rd-party hearing officer, and would provide that the governing

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> (5) The rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title.
>
> (6) An arbitrator making the award either: (A) failed to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware; or (B) was subject to disqualification upon grounds specified in Section 1281.91 but failed upon receipt of timely demand to disqualify himself or herself as required by that provision. However, this subdivision does not apply to arbitration proceedings conducted under a collective bargaining agreement between employers and employees or between their respective representatives.
>
> (b) Petitions to vacate an arbitration award pursuant to Section 1285 are subject to the provisions of Section 128.7.

> board retains authority to review the determination under the standards set forth in specified provisions.

The bill analyses of the legislation included discussion of a decision of the California Appeals Court in United Steelworkers v. Board of Education (1984) 162 Cal.App.3rd 823 (Board of Education), holding that the Education Code prohibited a governing board from delegating its exclusive authority to discipline classified employees to binding arbitration. The California School Employees Association was listed, in the bill analysis, as both a supporter of the proposed legislation and a co-source of information concerning it.

Discussion

In determining whether a party has violated EERA section 3543.5(c), PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Decision No. 143.) Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Walnut Valley Unified School District (1981) PERB Decision No. 160; Grant Joint Union High School District (1982) PERB Decision No. 196.)

CSEA contends that the District's rejection of the hearing officer's recommendations in Ms. Barela's case violates the policy established under Article 6 that such recommendations shall be final, pursuant to the District's delegation of authority under Education Code section 45113. To find a violation under the above-summarized standard, it is necessary to find that the established policy is, as argued by CSEA, that the hearing officer's recommendations are final and binding on the District. When considering contract interpretation disputes it is proper to consider the whole contract taken together, so as to give effect to every part. (Riverside Community College District (1992) PERB Order No. Ad-229, quoting, in part, "An interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful or of no effect." 1 Watkin, Summary of Cal. Law (9th ed. 1987) sections 686 and 690; p. 3; see also Barstow Unified School District (1996) PERB Decision No. 1138; Trustees of the California State University (1996) PERB Decision No. 1174-H; State of California (Department of Corrections) (1999) PERB Decision No. 1317-S, as well as National City Police Officers' Association v. City of National City (2001) 87 Cal.App.4th 1274.)

The following considerations argue against finding in favor of CSEA. First, the provisions of the parties' agreement, read as a whole, are ambiguous. Significant in this respect is the agreement to continue the language of Section 6.8 that provides for a determination by the Board of Trustees as to whether sufficient cause exists for discipline and the authority to impose such discipline. CSEA argues, in part, that the language limits the Board of Trustees to imposing only a "lesser" disciplinary penalty than that proposed by the Superintendent, but this argument misses the larger problem with CSEA's case. The problem can be framed as a

question: If the hearing officer's decision is "final and binding," then how can the Board of Trustees alter it to be lesser or greater? In other words, a decision is either final and binding, or it is not. Here, it appears to be not.

Even more problematic for CSEA is the state of the law when the current contract language was negotiated. CSEA argues that, in 1999, the District agreed to cede final and binding authority over discipline to a neutral third party,[5] even though the Education Code, by its express terms, required that decisions of a governing body be conclusive in matters of discipline of classified employees, and even though the Court of Appeal had held that school districts were precluded by Education Code section 45113 from subjecting their disciplinary conclusions to binding arbitration, notwithstanding provision for same in a collective bargaining agreement. (Board of Education.) It is correct that the law has changed to allow for such delegation, as a result of the enactment of Assembly Bill 128, but CSEA has not alleged that the parties, subsequent to enactment of that legislation, negotiated further over the meaning of the provisions of Sections 6.6 and 6.8 of their agreement.

Finally, an additional factor arguing for this conclusion is the language of the hearing officer's decision in Ms. Barela's case. Though the decision makes reference to a delegation of authority under Education Code section 45113, the decision is framed as and is replete with reference to its constituting recommendations to the Board of Trustees. There is no indication that CSEA objected to the hearing officer's decision or the language concerning its "recommendations."

Conclusion

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 that 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 have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an

[5] Though not determinative of the issues in this case, one cannot help but note that the same District alleged to have negotiated away its authority over discipline apparently has not agreed to final and binding arbitration over grievances.

amended charge or withdrawal from you before July 30, 2004, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Les Chisholm
Regional Director

cc: Tim Liermann
David Dolloff