STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

EL DORADO UNION HIGH SCHOOL DISTRICT.	)	
Charging Party.	)	Case No. S-CO-117
v.	)	Request for Reconsideration
	)	PERB Decision No. 537a
EL DORADO UNION HIGH SCHOOL DISTRICT FACULTY ASSOCIATION. CTA/NEA.	)	PERB Decision No. 537b
Respondent.	)	May 5, 1986

Appearances: Littler. Mendelson, Fastiff & Tichy by Thomas M. Griffin for the El Dorado Union High School District; Kirsten L. Zerger. Attorney for the El Dorado Union High School District Faculty Association, CTA/NEA.

Before Hesse. Chairperson; Morgenstern, Burt, Porter and Craib, Members.

DECISION

CRAIB, Member: The El Dorado Union High School District Faculty Association, CTA/NEA (Association) requests reconsideration of Decision No. 537a issued by the Public Employment Relations Board (PERB or Board) on February 3, 1986. The request is based on the contention that Decision No. 537a contains errors of both law and fact. For the reasons which follow, we deny the request.

DISCUSSION

In a hearing before an administrative law judge of this agency, it was shown that the Association and its members had engaged in the following conduct: (1) a boycott of extra-duty

assignments beginning September 11. 1984 and ending October 11. 1984; and (2) a refusal to begin work duties for the first 30 minutes of the workday on October 8 and 10. 1984. It was also shown that the parties reached impasse in their negotiations at the close of a bargaining session on September 12, 1984.

In PERB Decision No. 537, the Board found that both types of conduct violated section 3543.6(c) of the Educational Employment Relations Act (EERA or Act)[1] and issued an order so stating. In PERB Decision No. 537a, the Board reconsidered Decision No. 537 at the request of the Association. We concluded that, while we had committed no error in finding that the Association had violated the EERA, we had incorrectly identified the specific sections of the Act violated by each

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[1]The EERA is codified at Government Code section 3540 et. seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

Section 3543.6 provides in pertinent part as follows:

> 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).

type of Association conduct. Thus, the Board's Order in Decision No. 537. which stated that the Association had violated only section 3543.6(c), was in error.

Our conclusion in Decision No. 537a was based on the court of appeal decision in Moreno Valley Unified School District v. PERB (1983) 142 Cal.App.3d 191. In that case, the court made clear that a party's failure to participate in good faith in the statutory impasse procedures will violate subdivision (e) of section 3543.5 (for employers) or subdivision (d) of 3543.6 (for employee organizations). It will not, however, give rise to a violation of the mutual duty to meet and negotiate since, where impasse has been reached, that duty is suspended.

In the case before PERB, the facts showed that the Association had begun to engage in boycott activity on September 11. at a time when it still had an obligation to meet and negotiate in good faith. After impasse was declared on September 12, additional boycott activity occurred, at a time when the Association then had an obligation to participate in good faith in the impasse procedures. So. too. the refusal on two occasions to report to work for 30 minutes occurred during this latter period. In Decision No. 537a, therefore, the Board amended its Order in the case consistent with the following conclusions: (1) that boycott activity which occurred prior to

the declaration of impasse violated section 3543.6(c); and (2) boycott activity subsequent to that declaration, together with the refusals to report to work, violated section 3543.6(d).

In Decision No. 537a. the term "post-impasse" was used to characterize that Association conduct which occurred after impasse was reached on September 12, 1984. In the instant request for reconsideration, the Association adamantly asserts that the Board's description of events after September 12 as "post-impasse" was erroneous. In fact, says the Association, that conduct occurred "during the impasse-resolution process." (Emphasis in the original.)

Plainly, the Association has mistaken the Board's meaning. It has apparently interpreted the term "post-impasse" as referencing the period following the exhaustion of the impasse procedures. No such meaning was intended.

ORDER

Finding no error of fact or of law in Decision No. 537a, the instant request for reconsideration of the Decision is DENIED.

Members Morgenstern, Burt and Porter joined in this Decision.

Chairperson Hesse's concurrence begins on page 5.

Hesse, Chairperson, concurring: I concur with the result reached by my colleagues. I find it unnecessary to rely on Moreno Valley Unified School District v. PERB (1983) 142 Cal.App.3d 191. In that case, the Court of Appeal held that the employer's institution of its last best offer after the parties' declaration of impasse was only a violation of Government Code section 3543.5(e) but not (c).[1] In this case, the employee organization violated EERA by its unlawful partial strike. Significantly, the court in Moreno Valley noted that

> It is manifest that a unilateral change in employment conditions is not the same thing as a strike, at any stage of an employment dispute. . . ." (Id. at p. 197.)

The court noted this distinction because the employer's institution of its last best offer "signals an end to the mutual dispute resolution process regarding those terms. The employer loses incentive to participate in the dispute resolution process, because it has imposed terms it has deemed satisfactory." *(Id.* at 197-98.)

A strike, however, is designed to be used as a tool during negotiations, indeed, an economic strike only has meaning in the setting of the parties' attempts to reach agreement. A strike is a lever to force the employer to make a change in a

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[1]Section 3543.5 sets forth employer unfair practices. The equivalent description of employee organization unfair practices is set forth at section 3543.6(c) and (d).

negotiation stance, just as a lockout is designed to make a union change its position. To sever the strike tactic from the negotiation process is impossible because the strike is designed "to exert economic pressure on the other party to resolve disputed issues." (Id. at 197, emphasis added.) This necessarily implies that the duty to negotiate in good faith is vulnerable to the accusation that an illegal strike abrogates that duty.

I am not persuaded that Moreno Valley stands for the proposition that any unfair practice committed after impasse has been declared can only be a violation of the duty to participate in impasse procedures. The decision merely holds that an employer's unilateral change is a violation of section 3543.5(e). But the decision simply did not address the duty to bargain in good faith when an unlawful strike occurs.[2] Thus, I find Moreno Valley distinguishable, and therefore not controlling here.

Instead, I believe the record supports a finding that a partial work stoppage prior to the exhaustion of impasse procedures violates the duty to negotiate in good faith and the duty to participate in impasse procedures because the presence

[2]The court did state that the refusal to participate in the meeting and negotiating process must be a separate violation from the refusal to participate in impasse procedures, otherwise sections 3543.5(e) and 3543.6(d) would be superfluous. By the same token, I would find that this quality of separateness also means that the duty to bargain is not always subsumed by the duty to participate in impasse procedures.

of strikers in this setting skews the negotiations process, interferes with the very act of meeting together, and exerts economic pressure on the employer while shielding the employees from any real hardship because they continue to draw salaries.