

STATE OF CALIFORNIA
DECISION OF THE PUBLIC
EMPLOYMENT RELATIONS BOARD

In the Matter of:)	
)	
ROSS SCHOOL DISTRICT TEACHERS)	Case No. SF-CE-39
ASSOCIATION,)	
)	
Charging Party,)	
)	PERB Decision No. 48
vs.)	
)	
ROSS SCHOOL DISTRICT BOARD OF)	
TRUSTEES,)	February 21, 1978
)	
Respondent .)	
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Appearances: David P. McCullum, Attorney, for Ross School District Teachers Association; Margaret O'Donnell, Attorney (Breon, Galgani and Godino), for Ross School District Board of Trustees.

Before Gonzales and Cossack Twohey, Members.

OPINION

This case is before the Public Employment Relations Board on the Ross School District Board of Trustees' exception to the hearing officer's Recommended Decision, dated October 21, 1977, in the above-captioned unfair practice charge. The Ross School District Board of Trustees takes exception to "the conclusion of law that the Educational Employment Relations Act (EERA), Government Code, Section 3549.1(a) requires that negotiating sessions between a public school employer and the exclusive representative be closed to the public unless the parties mutually agree otherwise."

The Board has considered the record and the Recommended Decision in

light of the exception,¹ stipulated facts and briefs. We affirm the findings of fact, the discussion and conclusions of law of the hearing officer, and adopt his recommended order.

By: Raymond J. Gonzales, Member

Jerilou Cossack Twohey, Member

¹ Member Twohey would have accepted Charging Party's response to the District's exceptions since the hearing officer's recommended decision had already been appealed to the Board, requiring the Board to examine the record. However, in this case Charging Party has prevailed in all material respects. Charging Party would derive no benefit from delaying issuance of this decision in order to consider its response to the District's exceptions.

EDUCATIONAL EMPLOYMENT RELATIONS BOARD
OF THE STATE OF CALIFORNIA

In the matter of:

ROSS SCHOOL DISTRICT TEACHERS
ASSOCIATION,

Charging Party,

vs.

ROSS SCHOOL DISTRICT BOARD OF
TRUSTEES,

Respondent.

CASE No. SF-CE-39

RECOMMENDED DECISION

October 21, 1977.

Appearances; Donald P. McCullum, Attorney, for Ross School District Teachers Association; Margaret O'Donnell, Attorney (Breon, Galgani and Godino) for Ross School District Board of Trustees.

Before Gerald A. Becker, Hearing Officer.

PROCEDURAL HISTORY

On December 21, 1976, the Ross School District Teachers Association (hereinafter "Association") filed an unfair practice charge against the Ross School District Board of Trustees (hereinafter "District") essentially alleging that the District violated Government Code §§ 3543.5(b) and 3543.5 (c) by unilaterally requiring that negotiating sessions with the Association be open to the public. The District filed an answer not denying the factual allegations of the charge, but affirmatively alleging that it interprets Government Code §3549.1(a) to support its position, which position is in accord with the wishes of the community.

Instead of holding a hearing, the parties agreed to submit the matter to this hearing officer for a recommended decision based on a stipulated statement of facts and written briefs. The essential stipulated facts are summarized below under Findings of Fact.

ISSUE

Can one party unilaterally insist that negotiating sessions under the EERA between an exclusive representative and a public school employer's designated representative be open to the public?

FINDINGS OF FACT

The essential stipulated facts may be summarized as follows:

From the start of negotiations for the 1976-77 school year, pursuant to a vote of its governing board, the District insisted that all negotiating sessions be open to the public. The Association negotiated with the District's negotiations representatives in public under protest. Its requests to the District to reconsider its position were to no avail.

The parties negotiated in public on 19 occasions between December 20, 1976 and May 3, 1977, for periods of time ranging between one-half and five hours for a total of 52 hours. Between three and eleven members of the public attended the negotiating sessions through early March, 1977. There is no evidence as to how many attended thereafter. On May 9, 1977, agreement was reached

between the Association and the District for July 1, 1976 through June 30, 1978.¹ However, under a "reopener" clause in the contract, certain topics presently are being renegotiated.

The District's position to negotiate in public was in accord with the wishes of the community. The District claims that open sessions eliminated the need for interim, written memoranda on items upon which agreement had been reached, and that through early March, 1977, the negotiating sessions were free from "inflammatory interpretations and accusations" on both sides.

DISCUSSION AND CONCLUSIONS OF LAW

The arguments of the parties focus on the language of Government Code §3549.1 of the Educational Employment Relations Act (EERA)² which provides as follows:

3549.1. All the proceedings set forth in subdivisions (a) to (d), inclusive, shall be exempt from the provisions of Sections 965 and 966 of the Education Code, the Bagley Act (Article 9 (commencing with Section 11120) of Chapter 1 of Part 1 of Division 3) and the Ralph M. Brown Act (Chapter 9 commencing with Section 54950) of Part 1 of Division 2 of Title 5, unless the parties mutually agree otherwise:

(a) Any meeting and negotiating discussion between a public school employer and a recognized or certified employee organization.

¹ Although the stipulated statement of facts indicates that the agreement is for only the 1976-77 school year, official notice is taken of the agreement on file in the San Francisco Regional Office pursuant to EERB Regulation 32120, which agreement states that it is operative through June 30, 1978

Government Code §§3540 et seq.

(b) Any meeting of a mediator with either party or both parties to the meeting and negotiating process,

(c) Any hearing, meeting, or investigation conducted by a factfinder or arbitrator.

(d) Any executive session of the public school employer or between the school employer and its designated representative for the purpose of discussing its position regarding any matter within the scope of representation and instructing its designated representatives.

Subsection (a) clearly exempts negotiating sessions between a public school employer and an exclusive representative from various open meeting laws³ unless the parties agree otherwise. In addition to the public meeting requirement, other exempted requirements concern the taking of minutes and public notices and agendas.

But a literal reading of §3549.1 does not provide a complete answer to the question here for two reasons. First, the exempted open meeting requirements apply only to meetings of a quorum of the school board. See Government Code §54952.3; 32 Ops. Cal. Atty. Gen. 240 (1958). Since meetings of less than a quorum or having only school board representatives in attendance (e.g. a negotiating session) are not subject to the open meeting laws, limiting our discussion for the moment to the exemptions themselves in §3549.1, it would be meaningless surplusage to construe §3549.1 to exempt such already exempt meetings. Such a construction is to be avoided

³ The exemption from the Bagley Act appears to be superfluous since by its terms it does not apply to school districts. Read Government Code §1121 of the Bagley Act in conjunction with Government Code §54951 of the Brown Act. The apparent explanation is that Government Code §3549.1 was amended into SB 160 by the Assembly and was taken almost in its entirety from AB 1781 of the same legislative session which applied to all public employees.

(45 Cal. Jur. 2d, "Statutes," §117) and thus the exemptions themselves in §3549.1 must apply only to actual meetings of the school board itself.

The second reason why a literal reading of §3549.1 does not provide a complete answer is that exemption from mandatory open meetings does not necessarily imply the opposite, i.e., that all negotiating sessions must be in private. Nevertheless, as discussed below, the overall treatment in the EERA of public participation in the negotiations process, as well as a review of the authorities from other jurisdictions, leads to the conclusion that negotiating sessions are intended to be private unless both parties agree otherwise.

The EERA provides for public participation in only certain portions of the negotiations process. Government Code §3547 requires all initial negotiating proposals to be made public. New subjects of negotiations similarly must be made public within 24 hours. Also, upon conclusion of negotiations, the Brown Act requires the school board's ratification of the agreement to be at an open meeting. Under the Public Records Act (Government Code §6250 et seq.), the written agreement also becomes a public record when filed with the EERB Regional Office as required by EERB Regulation 32120.

Having provided for public disclosure essentially only at the opening and close of negotiations, it must be assumed that the Legislature did not intend that the intermediate portions of the negotiations process be subject to public scrutiny. Government Code §3547(d), which requires new negotiations subjects to be made public

within 24 hours after they arise, assumes that negotiations will be private. Private strategy sessions between the employer and its negotiator are authorized by Government Code §3549.1(d). See also Government Code §54957.6. Government Code §3549.1(a) specifically exempts negotiating sessions conducted by the school board itself from open meeting requirements. If negotiating sessions with the school board itself are not required to be open unless the parties agree otherwise, there is no reason why a different result should obtain when the board conducts negotiations through a representative as permitted by Government Code §3543.3.

Subsections (b) and (c) of §3549.1 exempt mediation and factfinding from the Brown Act. The legislative intent must have been to guarantee the privacy of such sessions without the school board in attendance since most fact-finding or mediation sessions do not take place during a school board meeting. As with negotiations, these activities traditionally are conducted in private. (See Government Code §3548.3 which provides that fact-finding reports are to be submitted to the parties privately.)

Respondent's argument that exemption from the open meeting requirement merely leaves the issue of closed negotiations undecided is answered by considering the exemption in light of the above discussion and the phrase, "unless the parties mutually agree otherwise." While this language could have been more clearly drafted, it is apparent when read in context that the legislative intent is to protect certain aspects of the negotiations process

from public scrutiny unless both parties agree otherwise. Thus it is found that the legislative intent of §3549.1 is not only to exempt negotiations-related school board meetings from open meeting requirements, but also to guarantee the privacy of the enumerated activities unless both parties desire the presence of the public.

In other states with public employee collective bargaining statutes the issue of public bargaining has been confronted with similar results. In Pennsylvania it was held that :

"The parties can only impose their presence upon each other. Bringing in non-mutually-agreed-upon third parties is a violation of the obligation of the party who brought the third party into the negotiations."

(Bethlehem Area School District (Pa. 1973)
3 PPER 102, 104.

At the time, Pennsylvania had no open meeting law and no reference in its Public Employee Relations Act to open or closed negotiating sessions. The Board did note that its Act provided for public disclosure when deemed beneficial to the public interest, i.e., of fact finders' reports in certain circumstances.

In Massachusetts, the rule is the same.

"The underlying principal (sic) for this rule is that open collective bargaining sessions may have the effect of inhibiting 'the give and take so necessary for successful bargaining.'"

(Town of Norton (Mass. 1976) 3 MLC
1140, 1141; see also Town of Marion
(Mass. 1975) 2 MLC 1256; Town of Win-
chendon (Mass. 1976) 3 MLC 1316.;)

Massachusetts's open meeting law allows for executive sessions to conduct collective bargaining sessions. It was held that this law allows for open bargaining sessions only if agreeable to both parties. If one party refuses, however, continued insistence on

open sessions by the other party constitutes a per se violation of the duty to bargain in good faith. Town of Norton, supra, at 1142; Town of Winchendon, supra, at 1317.

See also, Opinion of Counsel (N.Y. 1976) 9 PERB 5013 .

A public employer may not unilaterally permit outside participation in negotiations. Cf. Bassett v. Braddock (Fla. 1972) 262 So.2d 425, 80 LRRM 2955 and Talbot v. Concord Union School District (N.H. 1974) 323 A.2d 912, 87 LRRM 3159, which held that despite open meeting laws, the public had no right to attend negotiating sessions.⁴ In the Bassett case, the Florida Supreme Court noted the:

"impressive, uncontroverted testimony by respectable national authorities in the field , that meaningful collective bargaining in the circumstances here would be destroyed if full publicity were accorded at each step of the negotiations." (262 So.2d 425, 426)

There is no NLRB precedent directly on point since the federal law concerns only private, and not public, sector bargaining. However, in L.G. Everist, Inc. (1953) 103 NLRB 308, 309, 31 LRRM 1553, the NLRB held, among other things, that the employer's insistence upon bargaining in the presence of rank-and-file employees "was contrary to uniform industrial practice and was not conducive to the orderly, informal and frank discussion of the issues... ." See also Fruit Packers v. NLRB (D.C. Cir. 1963) 316 F. 2d 389, 52 LRRM 2537, 2538.

⁴ The Bassett case has been legislatively overruled . By statute, negotiating sessions now are required to be open to the public. See 2 Fla. St. L. Rev. 537, 540 (1974). There is no similar statute in California.

In Architectural Fiberglass (1967) 165 NLRB 238, 239, 65 LRRM 1331 and Southern Transport, Inc. (1964) 150 NLRB 305, 58 LRRM 1017, cases respectively involving insistence on the use in negotiations of a tape recorder and a binding verbatim transcript of the bargaining sessions, the NLRB viewed the actions in the context of the respondent's entire course of conduct, and in both cases found that unilateral insistence on these preconditions constituted bad-faith bargaining. The Eighth Circuit denied enforcement of the latter case, however, noting that a verbatim transcript would not inhibit negotiations since the parties were free to engage in "off-the-record" statements and discussion. NLRB v. Southern Transport, Inc. (8th Cir., 1966) 355 F. 2d 978, 61 LRRM 2277, 2280. In the present case, there is no indication that the District permitted such off-the-record discussion.

Therefore, in view of the above discussion and authorities, it is concluded that one party to negotiations may not unilaterally insist on public negotiations sessions, and that to do so constitutes a refusal to meet and negotiate in good faith under Government Code §3543.5(c). Having so found, it follows that Government Code §3543.5(b) also has been violated by the District since its actions have interfered with the Association's right under Government Code §3543.1 to represent its members in their employment relations with the District.

RECOMMENDED ORDER

Upon the foregoing findings of fact, conclusions of law and the entire record of this case, and pursuant to Government Code §3541.5 (c) of the Educational Employment Relations Act, it is hereby ordered that the Ross School District, its Board of Trustees, superintendent and representatives shall:

A. CEASE AND DESIST FROM:

1. Unilaterally insisting on conducting negotiations sessions with the Ross School District Teachers Association in public;
2. In like manner denying to the Ross School District Teachers Association rights guaranteed by the EERA.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

1. Prepare and post at its headquarters office and in each school for twenty (20) working days in a conspicuous place at the location where notices to certificated employees are customarily posted, a copy of this order; .
2. At the end of the posting period, notify the San Francisco Regional Director of the action it has taken to comply with this order.

Pursuant to Title 8, California Administrative Code Section 35029, this recommended decision and order shall become final on November 2, 1977, unless a party files a timely statement of exceptions. See Title 8, California Administrative Code Section 35030.

Dated: October 21, 1977

GERALD A. BECKER
Hearing Officer