

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



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|------------------------|---|--------------------------|
| HARVEY ARNOLD NEILMAN, |) | |
| |) | |
| Charging Party, |) | Case No. LA-CE-367-78/79 |
| |) | |
| v. |) | PERB Decision No. 92 |
| |) | |
| BALDWIN PARK UNIFIED |) | |
| SCHOOL DISTRICT, |) | April 4, 1979 |
| |) | |
| Respondent. |) | |
| |) | |
| |) | |
| |) | |

Appearances: Harvey Arnold Neilman In Pro Per; Jerry D. Holland, Superintendent for Baldwin Park Unified School District.

Before Gluck, Chairperson; Gonzales, Member.¹

DECISION

The charging party, Neilman, is a teacher employed by the Baldwin Park Unified School District (hereafter District) at its North Park High School. In June 1978, he filed a grievance with the principal of North Park High School based on an alleged violation of the negotiated agreement between the District and the Baldwin Park Employees Association, the exclusive representative of the unit in which he is employed. The principal responded to the grievance in July stating that Neilman "had no grievance." Later, in the same month, Neilman sought a meeting on his grievance with the District personnel

¹Board Member Moore did not participate in this decision.

officer, but again received a written response to the effect that he "had no legal grievance." On the following day, he received another response from a source unidentified in the charge, which stated that he "had no grievance." The charging party asserts that he was denied his right to pursue his grievance and that he and other North Park High School teachers were being discriminated against by being required to teach six subjects in each teaching period, whereas teachers at other District high schools were only required to teach one subject per period. Apparently, this complaint was the subject of the grievance originally filed. The charge alleges a violation of section 3543.5(a) of the Educational Employment Relations Act (hereafter EERA).² The hearing officer dismissed the charge without a hearing, finding that the charge was "deficient because it fails to allege which right guaranteed by the EERA was infringed upon by respondent."

DISCUSSION

Rule 326153 of the Public Employment Relations Board (hereafter Board or PERB) reads in pertinent part:

(a) The charge shall be in writing, signed by the party or its agent and contain the following information:

.
(4) The sections of the Government Code alleged to have been violated.

²The Educational Employment Relations Act is codified at Government Code sections 3540 et seq.

³California Administrative Code, title 8, section 32615.

Section 3543.5(a)⁴ of the EERA prohibits an employer from engaging in conduct which violates rights granted to employees by the Act. This section does not spell out those rights; other sections of the EERA do. It is quite probable that the intent of rule 32615, namely the identification of the specific section in which the right is defined and granted, escaped Mr. Neilman. He is not a professional advocate and there is no indication that he possesses any technical sophistication in labor representation. In citing section 3543.5(a) he undoubtedly believed he was complying with our filing requirements.

The hearing officer did grant Neilman leave to amend his charge. Neilman elected, instead, to appeal the dismissal. Under these circumstances it is appropriate for the Board to search the facts alleged in his charge to determine whether any right under the EERA has apparently been violated.⁵

⁴Government Code section 3543.5(a) states:

It shall be unlawful for a public school employer to:

(a) 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.

⁵The form required by PERB to be filed in unfair practice cases instructs the charging party as follows:

Provide a clear and concise statement of the conduct alleged to constitute an unfair practice, including, where known, the time and place of each instance of respondent's conduct, and the name and capacity of each person involved. This must be a statement of the facts that support your claim and not conclusions of law.

The charge informs us that Neilman filed a grievance to which the District's response was that the facts stated therein did not constitute a legal grievance. There is no indication that the District disputed Neilman's right to file a grievance. We interpret the District's response as a denial of the grievance for the reason that it failed to state facts constituting a violation of the collective agreement on which the grievance was predicated. Whether this response was accurate or justified is a matter for the grievance procedure itself, assuming appeal steps are therein provided. It is not a matter for this Board to consider through an unfair practice charge. As the hearing officer indicated, PERB is prohibited from enforcing negotiated agreements unless the facts alleged constitute an independent violation of the EERA.⁶ Similarly, the assignments given Neilman and other North Park teachers, even if "discriminatory," are not demonstrably or inferentially

⁶Government Code section 3541.5(b) states:

The initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board. Procedures for investigating, hearing, and deciding these cases shall be devised and promulgated by the board and shall include all of the following:

.
(b) The board shall not have authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of such an agreement that would not also constitute an unfair practice charge under this chapter.

related to the exercise by the teachers of any rights granted by the EERA. For "discriminatory" conduct to support an unfair practice charge, there must be a relationship between the exercise of employees' rights and the employer's conduct.⁷ The facts in this case do not establish that any relationship existed between the employer's response to the grievance and the exercise by Neilman of any rights granted to him by the EERA.

For the reasons stated, the unfair practice charge is dismissed. To the extent that the hearing officer's proposed decision considers the foregoing reasoning and is consistent therewith, it is affirmed. In all other respects it is expressly set aside.

⁷Government Code section 3543.5(a), ante, at fn. 3.

ORDER

On the foregoing decision and the entire record in this case the unfair practice charge filed before the Public Employment Relations Board by Harvey Arnold Neilman against the Baldwin Park Unified School District is hereby dismissed.

By: Harry Gluck, Chairperson Raymond J. González, Member

PUBLIC EMPLOYMENT RELATIONS BOARD
OF THE STATE OF CALIFORNIA



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|------------------------|---|--------------------------|
| HARVEY ARNOLD NEILMAN, |) | |
| |) | Case No. LA-CE-367-78/79 |
| Charging Party, |) | |
| |) | |
| v. |) | |
| |) | |
| BALDWIN PARK UNIFIED |) | NOTICE OF DISMISSAL |
| SCHOOL DISTRICT, |) | WITH LEAVE TO AMEND |
| |) | |
| Respondent. |) | |
| <hr/> | | |

NOTICE IS HEREBY GIVEN that the above-entitled unfair practice charge is dismissed with leave to amend within twenty (20) calendar days following service of this Notice. The dismissal is based on the following grounds:

The charge, as detailed in its attachments, alleges that respondent violated section 3543.5(a) of the Educational Employment Relations Act (hereafter EERA)¹ in two ways. First, it is alleged that the respondent denied charging party his contractual right to present a grievance relating to the number of subjects he was required to teach in each period. Second, it is alleged that respondent is discriminating against teachers at charging party's school because they are required to teach more subjects in a single period than are teachers at other of respondent's schools.

¹Government Code sec. 3540 et seq.

Section 3543.5(a) provides that it shall be unlawful for a public school employer to:

(a) 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.
(Emphasis added.)

Thus, in order for the public school employer to be found to have committed an unfair practice charge under section 3543.5(a), its conduct must be related to some right which is guaranteed to employees by the EERA. The charge is deficient because it fails to allege which right guaranteed by the EERA was infringed upon by respondent. The following discussion may be of assistance in determining what kinds of rights are and are not guaranteed by the EERA.

A. The EERA does not guarantee employees the right to enforce the provisions of the written agreement through an unfair practice proceeding.

Section 3541.5(b) states:

The board shall not have authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of such an agreement that would not also constitute an unfair practice under this chapter.

Thus, there must be independent grounds for finding that an unfair practice has occurred other than that there was a violation of a written agreement. As explained below, the charge fails to establish that there was any right guaranteed by the EERA which was allegedly infringed upon by the District. Absent a violation of a right specifically guaranteed by the

EERA, enforcement of a written agreement is left to binding arbitration, where there is such a provision in the agreement,² or to the courts.

B. The EERA establishes a right of employees to file grievances with the public school employer, but it does not impose upon the employer an obligation to process or consider or adjust them.

The only provision of the EERA specifically relating to the right of employees to file grievances is the second paragraph of section 3543, which states:

Any employee may at any time present grievances to his employer, and have such grievances adjusted, without the intervention of the exclusive representative, as long as the adjustment is reached prior to arbitration pursuant to Sections 3548.5, 3548.6, 3548.7 and 3548.8 and the adjustment is not inconsistent with the terms of a written agreement then in effect; provided that the public school employer shall not agree to a resolution of the grievance until the exclusive representative has received a copy of the grievance and the proposed resolution and has been given the opportunity to file a response.

While this paragraph does grant employees the right to file grievances with the employer, it does not necessarily impose an obligation upon the public school employer to process or consider or adjust them. The entire paragraph must be read in the context of the intent of the Legislature in including it as part of the EERA. In the absence of specific legislative

²The legislative scheme provides for specific enforcement of arbitration provisions (See Cal. Civ. Proc. Section 1281 and 1281.2) outside of the provisions of the EERA.

history, the intent of the Legislature must be ascertained by examining a similar provision contained in the Labor Management Relations Act, as amended (hereafter LMRA), an act passed by Congress to govern employer-employee relations in the private sector.³

Section 9(a) of the LMRA states:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment. (Emphasis added.)

The language of the second paragraph of section 3543 of the EERA and the underscored portion of section 9(a) of the LMRA are so similar, it must be concluded that the Legislature intended to accomplish the same purpose in enacting that

³See 29 U.S.C. sec. 151 et seq.

In Los Angeles Unified School District (11/24/76) EERB Decision No. 5, the PERB, citing Fire Fighters' Union v. City of Vallejo (1974) 12 Cal. 3d 608, 615-616 stated: "While we are not bound by NLRB decisions we will take cognizance of them, where appropriate. Where provisions of California and federal legislation are parallel, the California courts have sanctioned the use of federal statutes and decisions arising thereunder, to aid in interpreting the identical or analogous California legislation."

portion of the EERA as the Congress did in enacting section 9(a). In Emporium Capwell Co. v. WACO (1975) 420 U.S. 50 [88 LRRM 2660, 2665], the United States Supreme Court analyzed the Congressional intent behind section 9(a):

Respondent clearly misapprehends the nature of the "right" conferred by this section. The intentment of the proviso is to permit employees to present grievances and to authorize the employer to entertain them without opening itself to liability for dealing directly with employees in derogation of the duty to bargain only with the exclusive bargaining representative, a violation of section 8(a)(5). H.R. Rep. No. 245 80th Cong., 1st Sess., p. 7 (1947); H.R. Rep. No. 510, 80th Cong. 1st Sess., p. 46 (1947) (Conference Comm.) The Act nowhere protects this "right" by making it an unfair labor practice for an employer to refuse to entertain such a presentation, nor can it be read to authorize resort to economic coercion. This matter is fully explicated in Black-Clawson Co. v. Machinists, 313 F.2d 179, 52 LRRM 2038 (CA2 1962). See also Republic Steel v. Maddox, 379 U.S. 650, 58 LRRM 2193 (1965).

As noted in the above quotation, the U.S. Supreme Court approved the analysis of the Court of Appeals in Black-Clawson Co. v. Machinists, supra, (2d Cir. 1962) 313 F.2d 179 [52 LRRM 2038, 2042], which stated, in part:

Prior to the adoption of this proviso in section 9(a), the employer had cause to fear that his processing of an individual's grievance without consulting the bargaining representative would be an unfair labor practice; section 9(a) made the union the exclusive representative of the employees in the bargaining unit, and section 8(a)(5) made a refusal to bargain with the exclusive representative an unfair labor practice. The proviso was apparently designed to safeguard from charges of violation of the

act the employer who voluntarily processed employee grievances at the behest of the individual employee, and to reduce what many had deemed the unlimited power of the union to control the processing of grievances.

Thus, it is concluded that section 3543 merely restricts the right of the exclusive representative to interfere with an individual employee's grievance (prior to the arbitration stage) rather than imposing an obligation upon the public school employer to process or consider or adjust the grievance.

Nevertheless, it should be noted that since there is a right to file a grievance, it would be unlawful for a public school employer to impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against them, or otherwise to interfere with, restrain or coerce them merely for filing grievances. However, the charge does not allege that the District interfered with the right to file the grievance or otherwise imposed or threatened reprisals, discrimination, restraint or coercion against charging party because he filed the grievance. The charge only alleges that the District would not process it. As previously explained, it had no obligation to do so.

C. The right to participate in the activities of an employee organization does not in and of itself encompass the right of an individual employee to have a grievance processed or considered or adjusted.

The first sentence of section 3543 states:

Public school employees shall have the right to form, join, and participate in the activities of employee organizations of

their own choosing for the purpose of representation on all matters of employer-employee relations.

It might be argued that this language is a basis for creating a statutory right of employees to have a grievance processed, considered and adjusted. The theory would be that an individual who seeks to adjust a grievance based on an alleged violation of a written agreement would in effect be "participating in the activities of an employee organization" by attempting to enforce contractual provisions which would benefit other employees as well as himself. This argument is not persuasive.

The intent in this portion of the EERA is to preclude the public school employer from interfering with the relationship between the individual employee and the employee organization of his choice. In addition to forming an organization or joining one, an employee may do such things as: seek office in the organization, vote in its elections, go to organization picnics, issue newsletters, etc. It simply would not be reasonable to interpret the phrase "participate in the activities of employee organizations" to mean that an individual employee has a statutory right under the EERA to have a grievance processed or considered or adjusted. A grievance procedure is one of the mandatory subjects of negotiations between a public school employer and an exclusive representative.⁴ This means that the establishment of a

⁴See section 3543.2.

grievance procedure is something which is not required unless agreed to by the parties during negotiations. Thus, the right to have a grievance processed, considered and adjusted, if any, arises from the written agreement rather than from the phrase "participate in the activities of employee organizations."

D. Reprisals, discrimination, interference, restraint and coercion are prohibited if they are imposed or threatened because of employees' participation in organizational activities generally.

Although the right to have a grievance processed, considered and adjusted is not specifically guaranteed by the EERA, the right to participate generally in organizational activities is protected from actions of a public school employer which are intended to inhibit the exercise of that right. Thus, charging party could state a prima facie case by alleging that the reason the District failed to process his grievance was that the District desired to take punitive measures against him because it was dissatisfied with his organizational activities in general. What this means is that the District would not have handled the grievance in the alleged manner but for charging party's activities in organizational matters (either on behalf or against an employee organization). Charging party has not alleged this kind of motivation in his unfair practice charge. The matter is being dismissed with leave to amend in accordance with this legal theory, if there are facts to support such an allegation.

Any amended charge must allege specific facts which would support a conclusion that the District intended to take reprisals or discriminate against charging party. It will be insufficient if charging party merely alleges that the District refused to process his grievance because of his organizational activities generally without specific facts indicating what organizational activities he engaged in.

E. Charging party may not, as an individual, file an unfair practice charge on behalf of the other teachers at his school.

The second allegation of the charge relating to discrimination against the teachers at charging party's school is deficient for all the reasons outlined above. In addition, however, charging party does not have standing as an individual teacher to file an unfair practice charge on behalf of the other teachers. In order to file a charge on behalf of the other teachers, it would be necessary for each affected teacher to be named as a charging party, or for the exclusive representative to file the charge naming itself as charging party. In the alternative, assuming a prima facie case is stated, each teacher may file a charge alleging a violation of his individual rights under the EERA.

This action is taken pursuant to section 32630(a) of title 8 of the California Administrative Code, formerly section 35007(a).

If charging party chooses to amend, the amended charge must be filed at the Los Angeles Regional Office of the PERB within

twenty (20) calendar days following service of this Notice.

(Section 32630(b).) Such amendment must be actually received before the close of business (5:00 p.m.) on Sept. 11, 1978 in order to be timely filed. (Section 32135.)

If charging party chooses not to amend the charge, he may obtain review of the dismissal by filing an appeal to the Board itself within twenty (20) calendar days following service of this Notice. (Section 32630(b).) Such appeal must be actually received by the Executive Assistant to the Board before the close of business (5:00 p.m.) on Sept. 11, 1978 in order to be timely filed. (Section 32135.) Such appeal must be in writing, must be signed by charging party or his agent, and must contain the facts and arguments upon which the appeal is based. (Section 32630(b).) The appeal must be accompanied by proof of service upon all parties. (Section 32630(b).)

Dated: August 22, 1978

WILLIAM P. SMITH
General Counsel

By:

David Schlossberg
Hearing Officer

PROOF OF SERVICE BY MAIL - C.C.P. 1013a

I declare that I am employed in the county of Los Angeles.

I am over the age of eighteen years, and not a party to the within entitled cause;

my business address is 3550 Wilshire Blvd., Suite 1708, Los Angeles CA 90010

_____. On August 22, 1978, I served the attached

NOTICE OF DISMISSAL WITH LEAVE TO AMEND, etc. on the

_____ by placing a true copy

thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the

United States Mail, at Los Angeles

addressed as follows:

Harvey Arnold Neilman

Jerry D. Holland, Superintendent
Baldwin Park Unified School District

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on August 22, 1978, at Los Angeles, California.

Alicia C. Jimenez

(Type or print name)

(Signature)