STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

GROSSMONT COLLEGE TEACHERS ASSOCIATION, CTA/NEA,	)	Case No. LA-CE-196
Charging Party,	)	PERB Decision No. 117
v.	)	March 19, 1980
GROSSMONT COMMUNITY COLLEGE DISTRICT,	)	
Respondent.	)	

Appearances: Daniel C. Cassidy, Attorney (Paterson and Taggart) for Grossmont Community College District; Charles R. Gustafson, Attorney (California Teachers Association) for Grossmont College Teachers Association.

Before Gluck, Chairperson; Gonzales and Moore, Members.

DECISION

This matter is before the Public Employment Relations Board (hereafter PERB or Board) on exceptions by the Grossmont College Teachers Association (hereafter GCTA) to the attached hearing officer's proposed decision dismissing unfair practice charges against the Grossmont Community College District (hereafter District). Exception has been taken to the hearing officer's finding that the District's refusal to rehire 55 to 60 part-time instructors who had worked two semesters in the previous three years was not motivated by anti-union animus. The hearing officer found, instead, that the District's legitimate business motivation for not rehiring the part-time instructors was to avoid potential overstaffing problems that

might arise from the California Supreme Court's then-pending decision in Peralta Federation of Teachers v. Peralta Community College District[1] and a similar suit against the Grossmont District. These actions had been filed to secure tenure status for part-time instructors with a certain level of teaching experience.

The Board has considered the entire record of this case and the proposed decision in light of the GCTA's exceptions. The Board is in substantial agreement with the hearing officer's findings of fact and conclusions of law. However, the Board differs in some respects with the proposed decision, and the decision is therefore modified herein:

I. The Section 3543.5(a) Allegation.

The hearing officer held that there was no violation of section 3543(a) because there was no evidence that the employees who were not retained were also engaged in activity protected by the Educational Employment Relations Act.[2] We

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[1]24 Cal.3d 369 (May 25, 1979).

[2]EERA is codified at Government Code section 3540, et seq. All statutory references in this decision are to the Government Code. The charging party has alleged violations of section 3543.5, which provides, in relevant part:

> 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

affirm that the Association has not demonstrated any threshold connection between the action of the employer and protected rights of employees under EERA.

II. The Section 3543.5(b) Allegation.

We also affirm the hearing officer's dismissal of the section 3543.5(b) charge on the grounds that there was no evidence introduced that the employees were members of any unit represented by the Association (or members of the Association itself) and that there was no evidence of discriminatory conduct against the employee organization in connection with any right of representation protected by EERA. In this regard, the Board expressly disavows the hearing officer's comments on burden of proof. (See p. 7, fn. 5 of the proposed decision.) In our view, the charging party has the initial burden of showing a harmful nexus between a right protected by EERA and

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> to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.
>
> (d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

the respondent's actions; but, contrary to the hearing officer's suggestion, the charging party does not have the burden of going forward with evidence at the outset of its case that would overcome affirmative defenses available to the respondent. In this case, the Association simply failed to establish by a preponderance of the evidence[3] that the District's action denied the Association any of its statutory rights, regardless of defenses put forward by the employer.

III. The Section 3543.5(c) Allegation.

At the close of the GCTA's case-in-chief, the hearing officer granted the District's motion to dismiss the subdivision (c) allegation, basing his ruling on the holding in Hanford High School Federation of Teachers (6/27/78) PERB Decision No. 58. (See p. 2, fn. 2 of proposed decision.) In Hanford the Board rejected an attempt by a non-exclusive, minority representative to pursue an unfair practice case that would interfere with the meet and negotiate right of an already recognized exclusive representative. Here, we would dismiss the refusal to negotiate charge, but for reasons distinguishable from those advanced in Hanford. At the time of the alleged unlawful acts in this case, GCTA was not the

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[3]Board Rule 32178 (8 Cal. Admin. Code, sec. 32178) states:

> The charging party shall prove the charge by a preponderance of the evidence in order to prevail.

exclusive representative, nor was any other employee organization, and the employer was not obliged to "meet and negotiate."[4] Further, there is no indication in the record that GCTA made any request to negotiate before or after it was certified as the exclusive representative.

ORDER

Upon the findings of fact, conclusions of law and the entire record in this case, except as hereinabove modified, it is ORDERED that the unfair practice charge filed by the Grossmont College Teachers Association against the Grossmont Community College District alleging violation of section 3543.5(a), (b), (c), and (d) is hereby DISMISSED.

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

Barbara D. Moore, Member

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[4]Section 3543.3 sets forth the employer's duty to negotiate:

> A public school employer . . . shall meet and negotiate with and only with representatives of employee organizations selected as exclusive representatives . . .

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

GROSSMONT COLLEGE TEACHERS ASSOCIATION, Charging Party, v. GROSSMONT COMMUNITY COLLEGE DISTRICT, Respondent.	Unfair Practice Case No. LA-CE-196 PROPOSED DECISION (8-18-78)

Appearances: Daniel C. Cassidy, Attorney (Paterson and Taggart) for Grossmont Community College District; Charles R. Gustafson, Attorney for Grossmont College Teachers Association.

Before Bruce Barsook, Hearing Officer.

PROCEDURAL HISTORY

On October 24, 1977, the Grossmont College Teachers Association (hereafter Association) filed an unfair practice charge against the Grossmont Community College District (hereafter District) alleging that the District's refusal to rehire part-time community college instructors who had taught two semesters out of the previous five semesters violated section 3543.5(a), (b) and (d) of the Educational Employment Relations Act (hereafter EERA).[1]

The District filed its Answer on November 30, 1977 and a Motion to Dismiss on December 20, 1977.

After an informal settlement conference proved unsuccessful, a formal hearing on the matter was held

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[1]Gov. Code sec. 3540 et. seq. All section references are to the Government Code unless otherwise specified.

March 27, 1978. At the commencement of the hearing, the Association amended its charge to allege a violation of section 3543.5(c) while dropping its allegation of a subdivision (d) charge.

At the close of the Association's case in chief, the hearing officer granted the District's motion to dismiss the subdivision (c) allegation.[2]

ISSUES

1. Whether the District by refusing to rehire part-time instructors who had taught two semesters out of the previous five semesters interfered with, restrained or coerced these employees because of their exercise of rights guaranteed by the EERA. (Section 3543.5(a).)

2. Whether the above action denied to the Association rights guaranteed to them by the EERA. (Section 3543.5(b).)

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[2]The reasons for my ruling are as follows: The evidence demonstrated that the Association was certified as the exclusive representative on October 12, 1977. The District's decision not to rehire the part-time instructors in issue was communicated on May 9, 1977 (for the fall 1977 semester) and October 7, 1977 (for the spring 1978 semester). A District is under no obligation to meet and negotiate with a non-exclusive representative. Hanford Joint Union High School District (6/27/78) PERB Decision No. 58. Furthermore, there is no evidence indicating that the Association requested the District to meet and negotiate with it over this issue nor is there evidence indicating that the action taken in October of 1977 was anything other than a continuation of existing District policy.

FINDINGS OF FACT

The Grossmont Community College District has an ADA of 10,000 students.

The Association represents a unit of approximately 500 certificated employees. The unit includes full-time instructors as well as department chairpersons and part-time instructors who have taught at least three semesters out of the prior six semesters inclusive.[3]

In August of 1976, the Grossmont College Federation of Teachers filed a lawsuit against the District regarding part-time employee's tenure. The issue in the case was whether part-time employees who had taught three semesters or more in a three-year period should be considered probationary employees and thereby obtain reemployment rights.

On October 19, 1976, a superior court judge ruled that the controverted part-time instructors were not entitled to permanent status. Subsequent to that, a rehearing was granted and on March 31, the judge, by letter to the parties, reversed his prior ruling. On May 31, after another rehearing, the judge decided to take the case off calendar pending a determination by the California Supreme Court in Peralta Federation of Teachers v. Peralta Community College District (1977) 69 Cal.App.3d 281, hearing granted.

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[3]Following the PERB's decision in Los Rios Community College District (6/9/77) EERB Decision No. 18, the District, the Grossmont Federation of Teachers and the Grossmont Teachers Association in a consent election agreement agreed upon appropriateness of the above unit. Although patterned after the Los Rios determination, the parties in this District decided to include department chairpersons in the unit.

In the spring of 1977, Trudy Hill, vice-president for instructional service, recommended to the president of the District that because of the tenure litigation part-time instructors who had worked two semesters out of the last five semesters not be rehired for the fall 1977 semester.

It was Ms. Hill's understanding that if the Supreme Court ruled in favor of the teachers, the ruling would be retroactive. This would mean that the approximately 200 part-time instructors who had already taught three or more semesters would obtain reemployment rights. Consequently, Ms. Hill and the District decided that these employees should be rehired. There were an additional 55-60 part-time instructors who had taught two semesters and if rehired for a third semester, would also be eligible for reemployment rights if the Federation won its lawsuit. To retain flexibility in scheduling, it was Ms. Hill's determination that these 55-60 individuals should not be retained.

On May 1, 1977, the District president told Ms. Hill that a final decision had been made not to rehire these part-time instructors. Ms. Hill relayed this decision to department chairpersons attending an instructional council[4] meeting on May 9. Ms. Hill told the department chairpersons that the decision was based upon the District's concern over the tenure

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[4]The instructional council is composed of all department chairpersons, all of the instructional administration and some instructional coordinators. It is an advisory committee to Ms. Hill.

suit and its possible repercussions if part-time instructors were given reemployment rights. Ms. Hill further explained to the members of the instructional council that if they could not find qualified replacements, exceptions would be granted. The deans were asked for written justification regarding any exceptions, and Ms. Hill approved approximately ten exceptions each semester.

On October 7, 1977, Ms. Hill sent a memorandum to the deans, with copies to the department chairpersons, indicating that for the spring 1978 semester the District would continue its policy of nonretention of part-time instructors who had taught two semesters out of the previous five semesters pending a decision from the California Supreme Court in the Peralta case.

Approximately 50 part-time employees were affected by the District's decision not to rehire part-time instructors who had taught two semesters out of the last five semesters.

CONCLUSIONS OF LAW

I. The Section 3543.5(a) Allegation

The Association alleges that the part-time employees in issue are being denied the opportunity to be represented by the Association solely because they have reached the employment status where reemployment for one more semester would put them in the unit. This denial of reemployment in the absence of a business justification, the Association argues, violates section 3543.5(a).

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

> 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.]

Significantly, the section provides that the interference, coercion, discrimination or other specified conduct must be done because of an employee's exercise of a right guaranteed by the EERA. It follows that non-retention, without evidence that an employee is engaged in activity protected by the EERA, is not a violation of section 3543.5(a). Since there was no evidence presented indicating that part-time instructors who had taught two semesters out of the last five semesters were exercising any rights guaranteed by the EERA, section 3543.5(a) has not been violated.

II. The Section 3543.5(b) Allegation

The Association alleges that the District's refusal to rehire the part-time instructors denies the Association the opportunity to represent such part-time employees and therefore violates section 3543.5(b).

Section 3543.5(b) provides that it shall be an unfair practice for a public school employer to:

> Deny to employee organizations rights guaranteed to them by this chapter.

Although the Association does not specify what particular right guaranteed by the EERA has been infringed, the argument that the Association has been denied the opportunity to

represent these part-time employees appears to be based upon section 3543.1(a), which provides:

> Employee organizations shall have the right to represent their members in their employment relations with public school employers, except that once an employee organization is recognized or certified as the exclusive representative of an appropriate unit pursuant to Section 3544.1 or 3544.7, respectively, only that employee organization may represent that unit in their employment relations with the public school employer. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership.

However, the employees in issue are not members of the unit which the Association represents nor is there any evidence that these employees are members of the Association.

Furthermore, while the Association may have a legitimate interest in seeing that the District does not discriminatorily prevent employees from entering the negotiating unit, the Association has failed to show that such discriminatory conduct occurred.[5] Rather, the facts indicate that the District had a legitimate reason for its policy of not rehiring part-time instructors who had taught two semesters out of the last five semesters--its concern over the loss of scheduling flexibility if the part-time tenure suit was won by the teachers.

For the above reasons, the Association has failed to carry its burden of showing by a preponderance of the evidence that

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[5]The Association's attempt to shift the burden to the District to justify its action is misplaced. The burden of proof is on the Association to show that the District's action is unjustified or that the action taken is inherently destructive of employee interest.

the District's action violates section 3543.5(b). The Association's charge in this matter is therefore dismissed.

PROPOSED ORDER

Based on the findings of fact, conclusions of law and the entire record in this case, it is the proposed order that the unfair practice charge filed by the Grossmont College Teachers Association against the Grossmont Community College District alleging violation of section 3543.5(a), (b), (c) and (d) is hereby DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on September 11, 1978 unless a party files a timely statement of exceptions and supporting brief within twenty (20) calendar days following the date of service of this decision. Such statement of exceptions and supproting brief must be actually received by the Executive Assistant to the Board at the headquarters office in Sacramento before the close of business (5:00 P.M.) on September 7, 1978 in order to be timely filed. (See California Administrative Code, title 8, part III, section 32135.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, part III, sections 32300 and 32305, as amended.

Dated: August 18, 1978

Bruce Barsook
Hearing Officer