

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



GRANT DISTRICT EDUCATION ASSOCIATION,)	
CTA/NEA,)	
)	
Charging Party,)	Case No. S-CE-366
)	
v.)	PERB Decision No. 196
)	
GRANT JOINT UNION HIGH SCHOOL)	February 26, 1982
DISTRICT,)	
)	
Respondent.)	
)	

Appearances: Kirsten L. Zerger, Attorney, and Brian Bertino
for Grant District Education Association, CTA/NEA.

Before Gluck, Chairperson; Jaeger and Moore, Members.

DECISION

The Grant District Education Association, CTA/NEA
(hereafter Association) excepts to the dismissal with leave to
amend of its charge against Grant Joint Union High School
District (hereafter District). The Association alleges that
the District engaged in conduct which violated terms of the
parties' collectively negotiated contract and also constituted
an unfair practice under subsections 3543.5(a), (b) and (c) of
the Educational Employment Relations Act (hereafter EERA or
Act).¹

¹The EERA is codified at Government Code section 3540 et
seq. All statutory references are to the California Government
Code unless otherwise stated.

The hearing officer dismissed the charge, finding that the Public Employment Relations Board (hereafter PERB or Board) is without jurisdiction to hear the case.

We reverse the hearing officer's proposed decision in part and affirm it in part, consistent with the discussion below.

FACTS

The Association alleges that the District breached three separate terms of the parties' collective agreement.² Such conduct, it argues, constitutes a unilateral modification of the agreement and a repudiation of a negotiable subject matter in violation of subsection 3543.5(c).

Since the employer conduct which forms the basis of the Association's charge is also a breach of the parties' collective agreement, the hearing officer found, pursuant to his interpretation of subsection 3541.5(b), that the Board has no jurisdiction over the case.³ Accordingly, the charge was dismissed. The Association appeals this dismissal, arguing that PERB does have jurisdiction over the case.

The three breaches of contract which the Association alleges are as follows:

²The Association also charged that the District violated subsections 3543.5(a), (b), and (c) by bypassing it as exclusive representative and subsections 3543.5(b) and (c) by engaging in surface bargaining. The Association does not appeal the hearing officer's dismissal of these charges.

³Subsection 3541.5(b) is quoted in full at p. 7, infra.

A. The Transfer Issue

The Association and the District entered into a collective agreement on September 5, 1979. On April 28, 1980, the Association and the District executed a side agreement concerning layoff and transfer policy. Section 1 of the agreement provides the following procedure for the filling of vacancies:

1. VACANCIES

- 1.1 Vacancies shall be posted starting not later than May 1st and updated at least weekly. Applications must be submitted, in writing, to the building principal or district within forty-eight (48) hours of the time of the posting of the notice.
- 1.2 Vacancies shall be open to all bargaining unit members to apply. (Emphasis added.)
- 1.3 Vacancies shall be all vacancies, including those created by program reductions, (i.e., such as, but not limited to, the movement of 9th grade to the high school and closing junior high schools).

The Association alleges that after several postings of vacancies were made, in accordance with the terms of the agreement, the District began posting the following notice:

Note: You are encouraged to continue to apply for the currently posted positions even though you may have applied for the same subject area position on a previous posting -- unless you have been recently notified of a new assignment for 1980-81 school year.

The Association alleges that such posting had the purpose and effect of preventing the more senior teachers from gaining access to vacancies and thereby constituted a unilateral change

in policy. Additionally, the Association alleges: (1) that, as further indication of the District's intent to narrow eligibility, principals at certain schools were not posting the availability of existing vacancies until certain unit members, who were otherwise qualified for such positions, had received assignment and, (2) that the principals "guaranteed better jobs" to some less senior teachers, corroborating the claim that the more senior teachers would be precluded from competing for such positions.

B. Contingency Pay Issue

Article X, section 3 of the collective agreement states:

The Association and the Public School Employer agree to review the income and expenditures of the district on or about June 1, 1980, to determine if additional monies are available for members represented by the unit subject to the following conditions:

- a. Income would include all non-categorical or non-restricted sources beyond the amounts included in the adopted budget of the district. It is specifically recognized that Adult Education is one of the several categorical programs exempted from such review.
- b. Under no circumstances will the district's general reserve fall below \$400,000 in order to make additional funds available for distribution to members represented by the unit.
- c. The general reserve of the district must also include provision for any legal action which may be adverse to the district prior to distributing any additional income to members represented by the unit.

- d. Any additional income distribution will be one time only for the 1979-80 school year and will not represent a permanent addition to the certificated salary schedules for members represented by the unit.
- e. Upon examination of all non-categorical or non-restricted fund balances, sixty percent (60.0%) of any excess funds will be subject to distribution to members by the unit.
- f. Such review of expenditures specifically recognizes that contingent liabilities will be deducted from any excess funds prior to distribution to any members of the unit.

The District will make available to the GDFA such public records as may be required to implement this review process.

Beginning in June of 1980, representatives of the District and the Association met to review the financial situation of the District. After several meetings, the District announced that, in accordance with the terms of Article X, the members of the bargaining unit were entitled to 60 percent of \$33,284.

The Association alleges that the contract allows the District to spend its surplus only on "adverse legal action or other contingent liabilities." Thus it contends that the District unilaterally expended funds for non-authorized purposes and therefore, the bargaining unit members were entitled to 60 percent of \$96,680.27.

C. The Duration of Health Benefits Issue

Article XI of the collective agreement provides:

1. For all participating employees:
 - a. The employer shall provide the following insurance benefits for employees represented by the unit:
 - (1) The employee's contribution for medical insurance to one of the following plans: Blue Cross, Kaiser, or Healthcare.
 - (2) The employee's contribution for Dental Insurance.
 - (3) The cost of the employee's decreasing Term-Life Insurance Program to a maximum of \$7.50 per month.

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8. Duration of Benefits

- a. The benefits provided in this Article shall remain in effect during the term of this Agreement. Should an employee's employment terminate (excluding retirement) during the school year, he/she shall be entitled to continue coverage under the Life, Health, and Dental Insurance plans for a period not to exceed six (6) months if allowed by the carrier. Such employee shall pay the premium for the continued coverage on a month-to-month basis.
- b. Should an employee's employment terminate following the last day of the school year and before the commencement of the ensuing school year, such employee shall be entitled to continue coverage under the Life, Health, and Dental Insurance plans until October 1, of the ensuing school year if allowed by the carrier. Such employee shall pay the premium for the continued coverage on a month-to-month basis.

On March 15, 1980, the District laid off 64 bargaining unit members. Soon thereafter, it sent letters to the laid-off employees announcing that, since their employment was to end on June 30, 1980, their health benefits would cease unless they assumed the cost of the premiums themselves. The Association contends that under the terms of the parties' contract, the District was responsible for payment of the insurance premiums on behalf of laid-off employees for the agreement's duration.

The Association alleges that, by requiring all laid-off employees to assume the obligation to pay their own health insurance premiums, the District unilaterally initiated a policy concerning a matter within the scope of representation which violated its duty to negotiate in good faith.

DISCUSSION

Subsection 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.
(Emphasis added.)

The hearing officer's error lies in failing to acknowledge that portion of subsection 3541.5(b) which is emphasized above. Contrary to the hearing officer's interpretation, subsection 3541.5(b) does not divest PERB of jurisdiction to resolve an unfair practice charge simply because the employer's conduct also constitutes the breach of an existing collective

agreement. Rather, subsection 3541.5(b) grants PERB the authority to resolve an unfair practice charge even if it must interpret the terms of a collective agreement to do so. There is, of course, no doubt that in the absence of a collective agreement PERB has jurisdiction over all conduct which allegedly violates the Act. That such conduct might also breach an existing agreement does not defeat the Board's jurisdiction, though it may give rise to a separate remedy for breach of contract. Victor Valley Joint Union High School District (12/31/81) PERB Decision No. 192; C & C Plywood Corporation (1967) 385 U.S. 421 [64 LRRM 2065].⁴

The Act is designed to foster the negotiation process. Such a policy is undermined when one party to an agreement changes or modifies its terms without the consent of the other party. PERB is concerned, therefore, with a unilateral change in established policy which represents a conscious or apparent reversal of a previous understanding, whether the latter is embodied in a contract or evident from the parties' past practice. Anaconda Aluminum Co. (1966) 160 NLRB 35 [62 LRRM 1370], Perry Rubber Co. (1961) 133 NLRB 275, [48 LRRM 1630].

⁴It is appropriate for the Board to take guidance from federal labor law precedent when applicable to public sector labor relations issues. Firefighters Union, Local 1186 v. City of Vallejo (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507]; Los Angeles County Civil Service Commission v. Superior Court (1978) 23 Cal.3d 65 [151 Cal.Rptr. 547].

In the words of the National Labor Relations Board:

. . . [Such] conduct, . . . [amounts] to a rejection of the most basic of collective bargaining principles . . . the acceptance and implementation of the bargaining reached during negotiations. Sea Bay Manor Home (1980) 253 NLRB 68 [106 LRRM 1010, 1012].

This is not to say that every breach of contract also violates the Act. Such a breach must amount to a change of policy, not merely a default in a contractual obligation, before it constitutes a violation of the duty to bargain. This distinction is crucial. A change of policy has, by definition, a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members. On the other hand, when an employer unilaterally breaches an agreement without instituting a new policy of general application or continuing effect, its conduct, though remediable through the courts or arbitration, does not violate the Act. The evil of the employer's conduct, therefore, is not the breaching of the contract per se, but the altering of an established policy mutually agreed upon by the parties during the negotiation process. Walnut Valley Unified School District (3/30/81) PERB Decision No. 160; C & S Industries (1966) 158 NLRB 454 [62 LRRM 1043]. By unilaterally altering or reversing a negotiated policy, the employer effectively repudiates the agreement. Sea Bay Manor Home, supra.

In order to set aside the hearing officer's dismissal of the unfair practice complaint, it must be found that the

charging party has stated a prima facie violation of the Act.⁵ A prima facie case will be successfully stated if the Association's complaint alleges facts sufficient to show: (1) that the District breached or otherwise altered the parties' written agreement with regard to transfers, contingency pay, or the duration of health benefits; and (2) that those breaches amounted to a change of policy; that is, that they had a generalized affect or continuing impact upon the terms and conditions of employment of bargaining unit members.⁶

⁵When determining whether a charge states a prima facie violation of the Act, the facts alleged are deemed to be true. San Juan Unified School District (3/10/77) EERB Decision No. 12. Prior to January 1, 1978, PERB was called the Educational Employment Relations Board (EERB).

⁶The charging party must also show that the alleged change concerned a matter within the scope of representation. Since the parties do not dispute the negotiability of these issues, we assume them to be within the scope of representation within the meaning of section 3543.2. That section states:

The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8, and the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code. In addition, the exclusive representative of certificated

We find that only as to the transfer issue does the Association state a prima facie violation of the Act. As to the other two issues, the Association pleads no facts which arguably constitute a change of policy.

With respect to the transfer issue, the Association alleges that the District's decision to prohibit previously assigned teachers from applying for vacancies directly conflicted with section 1.2 of the negotiated side agreement, which specifies that vacancies "shall be open to all bargaining unit members." Since, by its terms, the need-not-apply notice was directed to all employees who, when vacancies arose, had already been assigned to a position for the 1980-81 academic year, the District's conduct would, by necessity, have a continuing impact on the bargaining unit. Therefore, its conduct, if

personnel has the right to consult on the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks to the extent such matters are within the discretion of the public school employer under the law. All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating, provided that nothing herein may be construed to limit the right of the public school employer to consult with any employees or employee organization on any matter outside the scope of representation.

true, would constitute the adoption of a new policy of general application in conflict with the parties' negotiated agreement. Anaconda Aluminum Co., supra; Perry Rubber Co., supra.

We therefore find that the Association has stated a prima facie violation of the Act, and we reverse the hearing officer's proposed decision as to that portion of the charge concerning the change in transfer policy.

With respect to the contingency pay and health benefits issues, we find that the Association has failed to allege any unilateral change in District policy.

The Association claims that the District repudiated Article X of the agreement concerning contingency pay. However, the facts asserted by the Association actually challenge the District's application of the contract's provision. The District does not deny its contractual obligation but claims it properly implemented the provision both as to the use and the amount of the surplus funds. We find in these competing claims nothing which demonstrates a "policy change."

Unlike Article X, Article XI of the collective bargaining agreement, dealing with health benefits, is unambiguous on its face and does not support the Association's allegations. Section 8(b) of Article XI, expressly provides that a separated employee desiring to continue insurance coverage after his or

her date of separation "shall pay the premium for the continued coverage on a month-to-month basis." There are no facts pled which reveal an agreement between the parties that laid-off persons, who wish to maintain health insurance coverage, do not have to pay monthly premiums.

ORDER

Upon the foregoing decision and the entire record in this case, the Public Employment Relations Board ORDERS that the hearing officer's dismissal of that portion of the charge concerning employee transfers is reversed and remanded to the chief administrative law judge for a hearing or other resolution of this matter according to PERB procedure. Those portions of the charge concerning contingency pay and duration of health benefits are DISMISSED.

By: John W. Jaeger, Member

Harry Gluck, Chairperson

Barbara D. Moore's concurrence begins on page 14.

Barbara D. Moore, Member, concurring:

While I concur in the results reached by the majority, I find the standard it proposes unworkable and I disagree in certain other particulars.

First, I reject the majority's characterization of the hearing officer's interpretation of subsection 3541.5(b) of the Act. Rather than concluding that PERB was divested of its jurisdiction because the employer's conduct also constituted a breach of the parties' agreement, the hearing officer found that the conduct was not otherwise an unfair but was merely a contract dispute. While I am not in accord with this view, it did not entail a misapplication of the statutory language.

Second, I disagree with the standard used by the majority to distinguish mere breaches of contract from unfair practice charges. The majority would entertain those unfair practice charges which allege a unilateral change involving a "new policy of general application" having "a generalized effect or continuing impact." I find this standard unworkable.

Requiring that the unilateral change have a continuing impact imposes no limitation nor does it afford any guidance. Any change necessarily continues to alter existing conditions to the extent that it remains in effect as a change. I also reject the requirement that the altered policy have a generalized applicaton. In fact, in Walnut Valley Unified School District (3/30/81) PERB Decision No. 160 cited by the

majority, this Board entertained as an unfair practice a charge that unlawful overtime assignments were made to four individual employees.¹ It continues to be my view that a unilateral change may be an unfair practice if it impacts on a portion of the negotiating unit.²

The essence of my disagreement, however, lies with the majority's determination that, by characterizing the matter at issue as a change in "policy," we can thereby identify it as an unfair practice. Since the majority has failed to provide any assistance in identifying what constitutes a "policy," I doubt the Board's ability to apply this test with consistency or with sufficient predictability to guide the parties. Cases relied on in the majority opinion are of no assistance since they do not rely on a "policy" standard. C & S Industries (1966) 158 NLRB 454 [62 LRRM 1043], for example, is cited by the majority

¹Contrary to the impression raised by the majority's opinion, Walnut Valley does not, nor was it intended to, set forth a standard by which the Board would distinguish unfair practice claims from contract violations. The issue in Walnut Valley was whether the assignment of overtime to four individual employees violated subsection 3543.5(c) by bypassing the exclusive representative. The Board found that no unlawful conduct occurred because the overtime assignments were directed in accordance with the provisions of the parties' contract. Thus, it was unnecessary to reach the issue addressed herein.

²See Garland Distributing Company (1978) 234 NLRB 1275 [98 LRRM 1197] where the National Labor Relations Board, finding an unfair labor practice, held that the employer's failure to apply the prohibitions of the work preservation clause of the contract to one individual "involves more than a simple default in a contractual obligation."

to suggest that the National Labor Relations Board (hereafter NLRB) examines the employer's conduct to determine whether it altered an established policy. In fact, the decision in C & S Industries does not speak in terms of policy at all. As the NLRB stated in that case:

While it is true that a breach of contract is not ipso facto an unfair labor practice, it does not follow from this that where given conduct is of a kind otherwise condemned by the Act, it must be ruled out as an unfair labor practice simply because it happens also to be a breach of contract. Of course, the breadth of section 8(d) is not such as to make any default in a contract obligation an unfair labor practice, for that section, to the extent relevant here, is in terms confined to the "modification" or "termination" of a contract. But there can be little doubt that where an employer unilaterally effects a change which has a continuing impact on a basic term or condition of employment, wages for example, more is involved than just a simple default in a contractual obligation. Such a change manifestly constitutes a "modification" within the meaning of section 8(d). And if not made in compliance with the requirements of that section, it violates a statutory duty the redress of which becomes a matter of concern to the Board. [Emphasis added, footnote omitted.]³

In accordance with this view, I would follow the NLRB's approach which reserves to the administrative agency jurisdiction over contract violations which are substantial infringements on statutory rights.

³Section 8(d) of the National Labor Relations Act expressly declares that neither party to a contract is required to discuss or agree to any modification of contract terms.

As more recently stated by the NLRB in Sea Bay Manor Home
(1980) 253 NLRB No. 68 [106 LRRM 1010]:

[W]hile the Board does not have general jurisdiction to entertain questions concerning contract interpretation or to determine the extent of the parties' contractual rights, it is the Board's obligation to protect the process by which employers and unions may reach agreements with respect to terms and conditions of employment. And, where the breach of contract substantially infringes on the statutory rights of a bargaining representative or amounts to a substantial renunciation of the principles of collective bargaining, the Board has found a violation of the Act. [Emphasis added.]⁴

The NLRB approach strikes a balance between acceptance of every contract violation case artfully pled to allege a unilateral change and refusal to accept any unfair practice complaint that also involves contract violations. I would adopt that standard.

In this instant case, I find that the Association has established a prima facie case as to the transfer issue. The Association has alleged that the District deliberately repudiated the transfer article of the parties' contract by restricting eligibility for vacant positions and preventing senior teachers from seeking some of the "better jobs." If proven, the District's institution of a new transfer policy

⁴The majority's opinion at page 9 also includes quoted material from this case. However, the quotation is dicta and does not represent the NLRB's articulation of its jurisdictional standard.

would amount to a substantial renunciation of the principles of collective negotiations in that it unilaterally altered a basic term and condition of employment. Such action would constitute a substantial infringement on the statutory rights of the exclusive representative and the employees it represents.

Thus, this case represents a situation similar to that in Anaconda Aluminum Co. (1966) 160 NLRB 35 [62 LRRM 1370] and is an appropriate case for us to entertain. I would therefore remand the case for hearing.

Utilizing the same test, I find that the Association did not allege facts sufficient to constitute an unfair practice on either the health benefits or contingency pay issues. Both issues are simply disputes over the contractual rights and obligations of the parties, and I would dismiss both charges.

Barbara D. Moore, Member