STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MODESTO TEACHERS ASSOCIATION, Charging Party, v. MODESTO CITY SCHOOLS AND HIGH SCHOOL DISTRICT, Respondent.	)	Case No. S-CE-741 PERB Decision No. 482 January 16, 1985

Appearance: Ken Burt for Modesto Teachers Association.

Before Tovar, Jaeger and Morgenstern, Members.

DECISION

JAEGER, Member: The Modesto Teachers Association appeals the dismissal of portions of its charge against the Modesto City Schools and High School District which allege that the District violated its duty to negotiate by unilaterally altering teacher evaluation procedures, engaged in unlawful reprisal against one teacher, and failed to respond to the Association's request for certain information during its processing of related grievances. The investigating regional attorney for the Public Employment Relations Board concluded that the facts alleged failed to state a prima facie violation of the Educational Employment Relations Act and dismissed the charge accordingly.

ORDER

The Board has reviewed the entire record, including the exceptions and arguments filed by the Association on appeal, and finding no error of fact or law in the regional attorney's notice of dismissal (attached hereto) AFFIRMS the dismissal of the charge.

Members Tovar and Morgenstern joined in this Decision.

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD
Sacramento Regional Office
1031 18th Street, Suite 102
Sacramento, California 95814
(916) 322-3198

May 21, 1984

Ken Burt
Executive Director
Modesto Teachers Association
1600 Sunrise, Suite 15
Modesto, CA 95350

Re: Modesto Teachers Association v. Modesto City Schools and High School District
Unfair Practice Charge No. S-CE-741, 1st Amended Charge

Dear Mr. Burt:

The above-referenced charge alleges that the Modesto City Schools and High School District (District) has made a unilateral change with respect to working conditions and refused to provide information to the Modesto Teachers Association (Association or MTA), the exclusive representative of certificated employees. This conduct is alleged to violate sections 3543.5(a), (b), (c), (d) and (e) of the Educational Employment Relations Act (EERA).

I indicated to you in my letter dated April 27, 1984 that certain allegations in the above-referenced charge did not state a prima facie case, and that unless you amended these allegations to state a prima facie case, or withdrew them prior to May 4, 1984, they would be dismissed. More specifically, I informed you that if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge accordingly.

On April 30, Charging Party requested an extension of the deadline due to illness. On May 14, the first amended charge was filed. Based on the facts contained in the first amended charge as well as those discovered during the investigation, only the allegations that the District denied a request for information concerning the grievances of Ms. Gurney, Mr. Delao, Mr. Driscoll, Ms. Trujillo,[1] and Mr. Choate state a prima

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[1]Only part of the request for information regard the grievance of Mr. Delao, Mr. Driscoll and Ms. Trujillo states a prima facie case. The remainder of the allegation is dismissed as explained in the text of this letter.

facie case. The remainder of this charge fails to state a prima facie case and is dismissed for the reasons which follow.

1. The allegation that the District unilaterally changed the policy concerning evaluations does not state a prima facie case because the Charging Party has not demonstrated that Mr. Sabatino's second evaluation was not performed in accord with District policy. Charging Party alleges that the status quo allowed for a second year evaluation only when the first year evaluation showed serious deficiencies and then, the evaluation would cover only those areas where the deficiency occurred. As detailed in my April 27, 1984 letter (Exhibit 1), Modesto City Schools (9/27/83) PERB Decision No. 347 concluded that back-to-back evaluations of teachers had been allowed under the District practice during the 1970's and until 1981. On May 4, 1981, the District and the Association signed a side letter which reads:

> The following will be effective September 1, 1981. If serious deficiencies exist and are identified during the evaluation process, the District may offer assistance to and monitor and record the response of the employee during the following year. This process shall not be used as a means of harassment of any employee.

Although Charging Party asserts that this language was intended to limit the second year evaluation to the area where the serious deficiency existed, a reading of the passage does not support such an interpretation.

In addition, Charging Party argues that the agreement requires the existence of serious deficiencies. Mr. Sabatino's evaluation stated that he was below District standards, and Charging Party has failed to demonstrate why such performance is not to be considered a "serious deficiency." Accordingly, Charging Party has failed to show that Mr. Sabatino's second year evaluation constitutes a change in the past practice and this allegation is dismissed.

2. The first amended charge additionally states that Mr. Sabatino was "given various documents which were written without affording him any notice of the allegations against him

or without resort to effective Association representation." This conduct is alleged to constitute a unilateral change and a reprisal against Mr. Sabatino for seeking Association representation. In addition, it is alleged the District took reprisals against Mr. Sabatino by making false statements about him.

As explained in the April 27 letter, a prima facie case of a unilateral change requires a showing that the District changed a negotiable policy. There is no clear and concise statement in the charge (as required by Board Rule 32615(a)(5)) nor was any information revealed during the investigation, indicating what the policy concerning the presentation of documents to an employee was or is. Without evidence of the past practice, it is impossible to determine whether a change has occurred. Therefore, no prima facie case has been made out.

Violations of EERA section 3543.5(a) requires the Charging Party demonstrate: (1) the employee has exercised rights under the EERA; (2) the employer has imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained, or coerced the employee because of the exercise of rights guaranteed by the EERA. Carlsbad Unified School District (1/30/79) PERB Decision No. 89; Novato Unified School District (4/30/82) PERB Decision No. 210. Although the charge does not specifically state what rights Mr. Sabatino had exercised, it was discovered during the investigation that he had an Association representative appear with him for two meetings with the District during the fall of 1983. Charging Party has not presented any further evidence of protected conduct nor has it alleged facts supporting an inference that the documents were given to Mr. Sabatino or the alleged false statements made because of Mr. Sabatino's protected activities. Without these facts these allegations do not state a prima facie case and are dismissed.

3. The allegations that EERA sections 3543.5(d) and (e) are dismissed based on the reasoning contained in the April 27 letter.

4. The allegations that the District refused to provide information to the Association are contained in paragraph 11 of the charge. As explained in the April 27 letter, the Association must demonstrate that the information requested is necessary and relevant to the processing of the grievances before a prima facie case is made out.

Specifically, with respect to the allegation contained in paragraphs 11a of the amended charge, the Association gives two reasons to support its request for information. First, the Association argues that the District must provide all other requests for leave of absence so that the Association can determine whether the leave of absence provisions were applied in a discriminatory manner to these grievants. Second, according to the Association all other notices of unauthorized absence must be provided in order for the Association to determine whether the notices received by the grievants, Mr. Delao, Mr. Driscoll and Ms. Trujillo, were timely. As the collective bargaining agreement prohibits the District from acting discriminatorily, the Association has demonstrated that its request for leave of absence material is necessary and relevant to the processing of these grievances. However, the collective bargaining agreement does not contain a provision which prohibits the giving of "untimely" notices of unauthorized absence. Although the actual grievances, which were examined during the investigation, refer to a finding by an arbitrator in a different case that a notice of unauthorized absence given four months after the fact was a punitive measure, there is no mention in the grievance that the contract was violated by an untimely notice. In addition, the Association can argue "untimeliness" from the facts of the instant grievance in comparison to what the arbitrator found untimely in the referred-to case. Accordingly, the charging party has not demonstrated that it is relevant and necessary for the Association to be given copies of all notices of unauthorized absences. The allegation that the District failed to provide copies of notice of unauthorized absences does not state a prima facie case and is dismissed.

5. With respect to the allegation in paragraph 11c of the charge, the additional information contained in the amended charge does not alter the conclusion reached in the April 27 letter. Mr. Hambric's requests for information were answered by the District and Charging Party has not demonstrated why these answers are inadequate. Thus no prima facie case has been stated and the allegation is dismissed.

Pursuant to Public Employment Relations Board regulation section 32635 (California Administrative Code, title 8, part III), you may appeal the refusal to issue a complaint (dismissal) to the Board itself.

Right to Appeal

You may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal (section 32635(a)). To be timely filed, the original and five (5) copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) on June 10, 1984, or sent by telegraph or certified United States mail postmarked not later than June 10, 1984 (section 32135). The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five (5) copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal (section 32635(b)).

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany the document filed with the Board itself (see section 32140 for the required contents and a sample form). The document will be considered properly "served" when personally delivered or deposited in the first-class mail postage paid and properly addressed.

Extension of Time

A request for an extension of time in which to file a document with the Board itself must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party (section 32132).

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Very truly yours,

DENNIS M. SULLIVAN
General Counsel

By Robert Thompson
Robert Thompson
Regional Attorney

PUBLIC EMPLOYMENT RELATIONS BOARD
Sacramento Regional Office
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April 27, 1984

Ken Burt
Executive Director
Modesto Teachers Association
1600 Sunrise, Suite 15
Modesto, CA 95350

Re: Modesto Teachers Association v. Modesto City Schools and High School District
Unfair Practice Charge No. S-CE-741

Dear Mr. Burt:

The above-referenced charge alleges that the Modesto City Schools and High School District (District) has made a unilateral change with respect to working conditions and refused to provide information to the Modesto Teachers Association (Association or MTA), the exclusive representative of certificated employees. This conduct is alleged to violate sections 3543.5(a), (b), (c), (d) and (e) of the Educational Employment Relations Act (EERA).

My investigation revealed the following facts. Carmen Sabatino is a District teacher represented by the Association. On October 26, 1982, Mr. Sabatino was evaluated over "all aspects of the Stull process." The evaluator commented:

> Mr. Sabatino is below District standards in his teaching program. It is recommended that he be reevaluated next year. Mr. Sabatino needs to improve in the following areas:
>
> 1. Staying in the classroom the entire period when he is responsible for students.
>
> 2. Being to class on time.
>
> 3. Preparing lessons and arranging for instructional materials.
>
> 4. Following District and school policy on attendance accounting.

EXHIBIT I

On September 14, 1983, Mr. Sabatino received a memorandum from a District administrator which indicated that Mr. Sabatino would be evaluated over all aspects of the Stull process for the school year 1983-84.

The District and Association have a signed letter of understanding dated May 4, 1981, which states in part:

> If serious deficiencies exist and are identified during the evaluation process, the District may offer assistance to and monitor and record the response of the employee during the following year. This process shall not be used as a means of harassment of any employee.

The issue of whether the District can schedule back-to-back evaluations over the entire Stull process was the subject of a previous unfair practice charge resolved by the Public Employment Relations Board in Modesto City Schools (9/27/83) PERB Decision No. 347. That decision reads at page 15:

> Based on the totality of the evidence presented, we conclude that MTA has failed to demonstrate that the District has unilaterally altered its evaluation policy because we find that the District has regularly conducted consecutive evaluations of substandard teachers.

During the period September 19, 1983, through January 19, 1984, Mr. Sabatino was given several memoranda from the District administration which discussed areas where the administration felt that Mr. Sabatino had been deficient in his duties. Some of these memoranda were placed in his personnel file.

On September 19, 1983, John Delao, William Driscoll, and Gail Trujillo filed a grievance against the District generally concerning a denial of personal necessity leave and the placement of a notice of unauthorized absence in their personnel files. As part of this grievance the Association requested:

> A. Names of all those sent notices of unauthorized absence for the 1982-83 school year and copies of each notice.

B. Copies of all leaves of absences approved for the 1982-83 school year with backup data.

On November 4, 1983, the District denied these requests as irrelevant to the grievance, as well as burdensome and oppressive.

On November 1, 1983, Patricia Gurney filed a grievance against the District alleging that she had not been properly paid as a member of the bargaining unit. As part of the grievance the Association requested:

A. Please indicate if art classes were scheduled at Downey High School prior to September 1, 1983. If so, what was the projected enrollment.

B. Who, if anyone, was scheduled to teach art at Downey High School prior to September 1, 1983, for the 1983-84 school year.

C. On what date in the 1983-84 school year were art classes offered at Downey High School.

On December 6, the District indicated the information would follow, however, no response from the District has been given to date.

On November 17, 1983, Gerard Hambric filed a grievance against the District alleging that he was being paid on the incorrect step of the salary schedule. As part of this grievance the Association requested the District provide the following information:

A. PIease indicate if there was any substitute teacher work performed in September, October, through November 8, 1981.

B. If so, was the work performed by any persons without "44918" rights?

C. Was the grievant given the opportunity for substitute work? If so, when and by whom.

On December 5, 1983, District director of personnel responded to the request for information stating:

> A. Yes, substitute teacher work was performed during September, October, November 1981.
>
> B. I am unable to respond to whether people without "44918" rights served as substitutes. Furthermore, the issue is not relevant to grievant (see answer to "C" below).
>
> C. I am informed and believe that grievant had no interest in substituting and that grievant did not sign up to be called as a substitute during September, October, and November 1981. The answer to this question is more fully within grievant's knowledge.

On January 4, 1984, Leonard Choate filed a grievance against the District alleging generally an improper denial of personal necessity leave and threatened placement of a notice of unauthorized absence in his personnel file. The Association requested the following information as part of this grievance:

> A. Please supply all requests for personal necessity leave, personal leave, and partial paid leave for the 1982-83 school year and to date for the current school year 1983-84.
>
> B. Please provide backup sheets for the requests (any documents attached or filed with the requests explaining the requests).

On March 16, 1984, the District denied the request for information as overly burdensome, irrelevant and violative of other employees' privacy rights.

The allegations contained in this charge with the exception of the denial of request for information concerning Ms. Gurney do not state a prima facie case for the reasons which follow.

First, in determining whether a party has violated section 3543.5(c) of the EERA, the Public Employment Relations Board

(PERB) utilizes either the "per se" or the "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. Stockton Unified School District (11/3/80) PERB Decision No. 143. Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer has implemented a change in policy concerning a matter within the scope of representation, (2) the change is implemented prior to the employer notifying the exclusive representative and giving it an opportunity to request negotiations. Walnut Valley Unified School District (3/30/81) PERB Decision No. 160; Grant Joint Union High School District (2/26/82) PERB Decision No. 196.

Although the charge alleges that the District has made a unilateral change with regard to the treatment of Mr. Sabatino there are no facts presented which indicate that any such change has been made. The language of the May 4, 1981 letter of understanding and PERB Decision No. 347 clearly state what the practice has been in the District. PERB regulation 32615(a)(5) requires:

> A clear and concise statement of facts and 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.

There have been no facts presented in the charge nor discovered during the investigation which indicate that Mr. Sabatino has not been treated in accord with past practice. Accordingly, the allegations of the unilateral change are insufficient to state a prima facie case and will be dismissed.

Second, the employer is obligated by law to supply the exclusive representative with information that is necessary and relevant to the organization's performance of its representational function. Stockton Unified School District, supra. Failure to do so constitutes a violation of EERA section 3543.5(c). Although the Charging Party has provided copies of the grievances and the District's responses, there are no facts contained in these documents nor in the charge which provide the basis of a finding that the information requested was necessary and relevant to the Association's

pursuit of the grievances, with the exception of the grievance concerning Ms. Gurney. Without this information the charge does not state a prima facie case and will be dismissed. Thus, with the exception of the request for information regarding the grievance of Ms. Gurney the charge does not state a prima facie violation of 3543.5(c). In the same way, the alleged derivative violations of sections 3543.5(b) and (a) are also insufficient and will be dismissed.

Charging Party also alleges that section 3543.5(d) has been violated. To demonstrate a violation of this section, the Charging Party is required to present evidence which would show that the District has dominated or interfered with the formation or administration of the employee organization, or contributed financial or other support to it, or in any way encouraged employees to join any organization in preference to another. There are no facts presented in the charge nor any discovered during the investigation which indicate that the District has acted in this way. Without such facts, this allegation will be dismissed.

The charge also contains an allegation that section 3543.5(e) has been violated. To find that a prima facie case of violation of this section exists it must be determined that the District has refused to participate in good faith in the impasse procedure. There are no facts in the charge, nor any discovered during the investigation which indicate that the District was involved in the impasse procedures with regard to this particular change. Again, without such facts, this allegation will be dismissed.

For these reasons, all allegations with the exception of the request for information concerning the grievance of Ms. Gurney contained in charge number S-CE-741, as presently written, does not state a prima facie case. If you feel that there are any factual inaccuracies in this letter or any additional facts which would correct the deficiencies explained above, please amend the charge accordingly. The amended charge should be prepared on a standard PERB unfair practice charge form clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must be served on the respondent and the original proof of service must be filed with PERB. If I do not receive an amended charge or

withdrawal from you before May 4, 1984, I shall dismiss the above-described allegation from your charge. If you have any questions on how to proceed, please call me at (916) 322-3198.

Sincerely yours,

Robert Thompson
Regional Attorney