STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

TURLOCK AMERICAN FEDERATION OF TEACHERS, AFT LOCAL 2424,	)	
Charging Party,	)	Case No. S-CE-1697
v.	)	PERB Decision No. 1151
TURLOCK JOINT UNION HIGH SCHOOL DISTRICT,	)	May 22, 1996
Respondent.	)	

Appearances: Van Bourg, Weinberg, Roger and Rosenfeld by Stewart Weinberg, Attorney, for Turlock American Federation of Teachers, AFT Local 2424; Littler, Mendelson, Fastiff, Tichy & Mathiason by Richard J. Currier, Attorney, for Turlock Joint Union High School District.

Before Garcia, Johnson, and Dyer, Members.

DECISION AND ORDER

DYER, Member: This case comes before the Public Employment Relations Board (Board) on appeal by the Turlock American Federation of Teachers, AFT Local 2424 (Federation) from a Board agent's dismissal (attached) of its unfair practice charge. The charge alleges that the Turlock Joint Union High School District (District) violated section 3543.5(b) and (c) of the Educational Employment Relations Act (EERA)[1] by failing to bargain in good

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[1]EERA is codified at Government Code section 3540 et seq. Section 3543.5 states, in pertinent part:

> It shall be unlawful for a public school employer to do any of the following:
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

faith during contract reopener negotiations. After investigation, the Board agent dismissed the charge for failure to establish a prima facie case for violation of the EERA.

The Board has reviewed the entire record in this case, including the unfair practice charge, the Board agent's dismissal and partial warning letters, the Federation's appeal and the District's response thereto.[2] The Board finds the dismissal and partial warning letters free of prejudicial error and adopts them as the decision of the Board itself.

Accordingly, the unfair practice charge in Case No. S-CE-1697 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Garcia and Johnson joined in this Decision.

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

[2]The District requested attorney fees in its response to the appeal. That request is denied.

STATE OF CALIFORNIA

PETE WILSON, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916) 322-3198

February 22, 1996

Richard Hemann, Field Representative
California Federation of Teachers
One Kaiser Plaza, Suite 1440
Oakland, CA 94612

Re: **DISMISSAL LETTER**
Turlock American Federation of Teachers, AFT Local 2424 v.
Turlock Joint Union High School District
Unfair Practice Charge No. S-CE-1697

Dear Mr. Hemann:

On October 18, 1995, you filed a charge on behalf of the Turlock American Federation of Teachers, AFT Local 2424 (AFT), in which you allege that the Turlock Joint Union High School District (District or Employer) violated sections 3543.5 (b) and (c) of the Educational Employment Relations Act (EERA). More specifically, your charge alleges that the District failed to bargain in good faith with AFT in the current round of bargaining on reopeners. As evidence of the District's bad faith you allege that three incidents demonstrate the Districts intent. The District and AFT were bargaining over reopeners in the 1994-1996 contract.

First, you contend that the District by presenting a single salary proposal on or about August 15, 1995, and failing to move from that proposal, is evidence of bad faith. That proposal calls for a 3.5% increase. The District has informed AFT that it has a 15+% reserve and if an agreement wasn't reached pre-impasse, it had room to increase its salary offer another 1.5%. Those failures you contend, are evidence of the District's intent to slow down bargaining.

Secondly, you allege that the District refused to negotiate issues related to the placement of two School Improvement days on the school calendar. You contend that AFT has tried to negotiate the dates, but the District refused by arguing the School Improvement days are part of the academic calendar and it only has to bargain work calendars.

Finally, you contend that the District has refused to reopen Article VIII of the current agreement as it relates to new

curriculum, namely, Opportunity Class. AFT seeks to negotiate the subject of class size as it relates to this new offering. On August 25, 1995, AFT made a formal demand to bargain the subject. You allege that when Article VIII was negotiated the Opportunity Class was not contemplated and since the class size maximums of these classes effects other class offerings, the District has an obligation to at the very least bargain the effects. The District refused to bargain this issue.

I indicated to you, in my attached letter dated of November 3, 1995 that certain allegations of the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to November 14, 1995, the charge would be dismissed.

Subsequent to that letter, we have had several phone discussions regarding the charge, and you did submit additional argument through a November 20, 1995 position paper. As we discussed, the additional argument that you filed did not overcome the deficiencies that I spelled out in the November 3rd letter.

In addition, we discussed the remaining allegation relating to the District's refusal to negotiate the scheduling of two School Improvement days. I advised you that this allegation was also deficient. Relying on Imperial Unified School District (1990) PERB Decision No. 825, I advised you that PERB caselaw in the area of work schedule, placed the burden on the charging party to show that a change in the instructional day affected the work day or duty free time of employees. Further, PERB in San Jose Community College District (1982) PERB Decision No. 240 in interpreting an employer's duty to bargain work year held that the substitution of teaching days for inservice days did not affect a matter within scope since the employer's actions did not require the employees to alter their workdays or year.

I asked you to provide additional facts that might demonstrate some impact on employee workday or year. Through our phone conversations, I learned that you could provide no additional facts. Therefore, I am dismissing the charge based on the facts and reasons contained herein and in my November 3, 1995, letter.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, 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. (Cal. Code of Regs., tit. 8, sec. 32635(a).) To be timely filed, the original and five copies of such appeal must be actually received by the Board itself before the close of business (5 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing. (Cal. Code of Regs., tit. 8, sec. 32135.) Code of Civil Procedure section 1013 shall apply. 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 copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code of Regs., tit. 8, sec. 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 each copy of a document served upon a party or filed with the Board itself. (See Cal. Code of Regs., tit. 8, sec. 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. (Cal. Code of Regs., tit. 8, sec. 32132.)

Final Date

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

Sincerely,

ROBERT THOMPSON
Deputy General Counsel

By _____
Roger Smith
Board Agent

Attachment
cc: Richard J. Currier

STATE OF CALIFORNIA

PETE WILSON, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916) 322-3198

November 3, 1995

Richard Hemann, Field Representative
California Federation of Teachers
One Kaiser Plaza, Suite 1440
Oakland, CA 94612

Re: **PARTIAL WARNING LETTER**
Turlock American Federation of Teachers, AFT Local 2424 v.
Turlock Joint Union High School District
Unfair Practice Charge No. S-CE-1697

Dear Mr. Hemann:

On October 18, 1995, you filed a charge on behalf of the Turlock American Federation of Teachers, AFT Local 2424 (AFT), in which you allege that the Turlock Joint Union High School District (District or Employer) violated sections 3543.5 (b) and (c) of the Educational Employment Relations Act (EERA). More specifically, your charge alleges that the District failed to bargain in good faith with AFT in the current round of bargaining on reopeners. As evidence of the District's bad faith you allege that three incidents demonstrate the Districts intent. The District and AFT were bargaining over reopeners in the 1994-1996 contract.

First, you contend that the District by presenting a single salary proposal on or about August 15, 1995, and failing to move from that proposal, is evidence of bad faith. That proposal calls for a 3.5% increase. The District has informed AFT that it has a 15+% reserve and if an agreement wasn't reached pre-impasse, it had room to increase its salary offer another 1.5%. Those failures you contend, are evidence of the District's intent to slow down bargaining.

Secondly, you allege that the District refused to negotiate issues related to the placement of two School Improvement days on the school calendar. You contend that AFT has tried to negotiate the dates, but the District refused by arguing the School Improvement days are part of the academic calendar and it only has to bargain work calendars.

Finally, you contend that the District has refused to reopen Article VIII of the current agreement as it relates to new curriculum, namely, Opportunity Class. AFT seeks to negotiate the subject of class size as it relates to this new offering. On August 25, 1995, AFT made a formal demand to bargain the subject. You allege that when Article VIII was negotiated the Opportunity Class was not contemplated and since the class size maximums of

these classes effects other class offerings, the District has an obligation to at the very least bargain the effects. The District refused to bargain this issue.

In analyzing allegations of bad faith on "surface bargaining," PERB in Muroc Unified School District (1978) PERB Decision No. 80, stated that:

> It is essence of surface bargaining that a party goes through the motions of negotiations, but in fact is weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent argument. Specific conduct of the charged party, which when viewed in isolation may be wholly proper, may, when placed in the narrative history of the negotiations, support a conclusion that the charged party was not negotiating with the requisite subjective intent to reach agreement.

Examples of evidence of surface bargaining are: (1) a party's failure to respond to the other side's proposal or to offer counterproposal; (2) efforts to renege on ground rules; (3) insistence on unrelated conditions such as the withdrawal of grievances or unfair practice charge prior to negotiating another subject: (4) dilatory tactics in scheduling meetings or being late to meetings: or (5) efforts to modify previously agreed upon items.

PERB in Oakland Unified School District (1981), PERB Decision No. 178, held that a refusal to reconcile differences by failing to offer counter-proposals could be construed as bad faith if no explanation supports the position of the recalcitrant party. Total inflexibility in bargaining, together with other indicia may be grounds for finding bad faith. See Fremont Unified School District (1980) PERB Decision No. 136. Insistence on a firm position by itself, however is not evidence of bad faith. The obligation to bargain in good faith only requires that the parties explain the reasons for a particular position with enough detail to "permit the negotiating process to proceed on the basis of mutual understanding." See Jefferson School District (1980) PERB Decision No. 133.

In this case, the employer explained its position relative to movement on its salary proposal in sufficient detail to allow "the process to proceed." There is certainly no requirement that a party make its final and last offer sometime prior to an impasse being declared.

As to the allegation that the District failed to respond to a demand to bargain class size in the Opportunity classes, PERB has held that an employer may take action on clear contract language. Marysville Joint Unified School District (1983) PERB Decision No. 314. Article VIII, Section II of the current 1994-1996 agreement, provides that "The District shall have final authority to determine class size and pupil assignment." This Article continues by stating that the District shall consider such variables as nature of the subject taught, overall balance of departments, teaching methods employed (lecture v. laboratory or individualized), and organization of instruction, i.e. team teaching. There is no allegation that Article VIII is subject to the limited re-opener items of the contract. Therefore under Marysville, supra, no complaint should issue.

For these reasons the allegations that the District held fast to its salary proposal and that the District's refusal to negotiate the class size of Opportunity Classes, as presently written, do not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts which would correct the deficiencies explained above, please amend the charge. 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 November 14, 1995, I shall dismiss the above-described allegation from your charge. If you have any questions, please call me at (916) 322-3198 ext. 358.

Sincerely,

Roger Smith
Board Agent

RCS:cb