STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

UNITED EDUCATORS OF SAN FRANCISCO, Charging Party, v. SAN FRANCISCO UNIFIED SCHOOL DISTRICT, Respondent.	Case No. SF-CE-2015-E PERB Decision No. 1438 May 22, 2001

Appearances: VanBourg, Weinberg, Roger & Rosenfeld by Stewart Weinberg, Attorney, for United Educators of San Francisco; Morrison & Foerster by James E. Boddy, Jr., Attorney, for San Francisco Unified School District.

Before Amador, Baker and Whitehead, Members.

DECISION

AMADOR, Member: This case comes before the Public Employment Relations Board (Board) on exceptions filed by the United Educators of San Francisco to an administrative law judge's (ALJ) proposed decision (attached). The charge alleged that the San Francisco Unified School District (District) violated the Educational Employment Relations Act (EERA)[1] when it unilaterally changed terms and conditions of employment at a charter school within the District. The ALJ found that PERB lacks jurisdiction over this charge and dismissed it.

After reviewing the entire record, the Board hereby affirms the ALJ's dismissal.

[1] EERA is codified at Government Code section 3540 et seq.

ORDER

The unfair practice charge and complaint in Case No. SF-CE-2015-E are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Baker and Whitehead joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

UNITED EDUCATORS OF SAN FRANCISCO, Charging Party, v. SAN FRANCISCO UNIFIED SCHOOL DISTRICT, Respondent.	)	Unfair Practice Case No. SF-CE-2015 PROPOSED DECISION (2/16/2001)

Appearances: Van Bourg, Weinberg, Roger & Rosenfeld by Stewart Weinberg, Attorney, for United Educators of San Francisco; Morrison & Foerster by James E. Boddy, Jr., Attorney, for San Francisco Unified School District.

Before James W. Tamm, Administrative Law Judge.

PROCEDURAL HISTORY

On December 1, 1998, United Educators of San Francisco (Charging Party) filed this unfair practice charge against the San Francisco Unified School District (District). On August 20, 1999, after conducting an investigation, the general counsel's office of the Public Employment Relations Board (PERB or Board) issued a complaint alleging that the District violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA or Act),[1] by adopting a charter school petition which

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[1]EERA is codified at Government Code section 3540 et seq. EERA section 3543.5 states, in pertinent 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 to interfere with, restrain, or coerce

unilaterally changed terms and conditions of employment at the charter school.

On September 14, 1999, the District answered the complaint denying the allegations. The District also asserted an affirmative defense that the EERA was not applicable to the charter school and, therefore, PERB had no jurisdiction in this matter.

On September 15, 1999, the District filed a request with the general counsel's office of PERB to certify an appeal of the issuance of the complaint to the Board itself. The general counsel's office denied that request.

On September 27, 1999, a settlement conference was held and the parties reached an interim settlement agreement. The interim settlement agreement contained a process that the parties hoped would lead to a final settlement prior to March 28, 2000, the date selected for a formal hearing in the matter. The complaint was then placed in abeyance. The parties were, however, unable to resolve the dispute and after several party-requested continuances, a hearing was scheduled for October 24 through 27, 2000. On October 24, during the first day of formal hearing, the

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> 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.

parties agreed to a stipulated record. Briefs were filed and the case was submitted for decision on November 20, 2000.

FINDINGS OF FACT

Charging Party is an employee organization within Government Code section 3540.1(d) and is the exclusive representative of classified and certificated units within the District. The District is a public school employer within the meaning of Government Code section 3540.1(k). Although the parties have a collective bargaining agreement which ends in binding arbitration, there is nothing in the agreement that arguably prohibits the District's action. Therefore, deferral of this matter to arbitration is not appropriate.

In 1998, the District began working with Edison Schools, Inc., formerly known as the Edison Project (Edison) to convert one of the District schools to a charter school run by Edison. Edison is a private business that establishes and operates charter schools throughout the United States on a for-profit basis. On June 23, 1998, the District's Board of Education adopted a resolution approving a charter and thereby creating Edison Charter School. The District action was pursuant to California Education Code section 47600 et seq., known as the Charter Schools Act of 1992.

During the time period covered by this complaint, all employees of the Edison Charter School have been employees of the District. As District employees they have occupied allocated District positions, have accrued credit during employment at

Edison Charter School toward tenure with the District, and have accrued seniority for purposes of the collective bargaining agreement between the District and Charging Party in regard to salary schedules, layoff and transfers.

The adoption of the charter changed the terms and conditions of employment for employees who remained at the Edison Charter School. For classified employees, changes occurred to the grievance procedure, organizational security, salary and the evaluation procedure. For certificated employees remaining at the charter school, changes occurred to the grievance procedure, organizational security, salary, transfer rights, length of the workday and work year, evaluation procedures and class size.

At the time leading up to the establishment of the charter school, the classified and certificated employees of the proposed charter school were represented by the charging party. The parties stipulated that the District did not negotiate with Charging Party regarding these changes to terms and conditions of employment at the Edison Charter School. The parties also stipulated that the Charging Party did not waive any rights that it may have to bargain in regard to these changes.

ISSUE

Did the District violate section 3543.5(a), (b) and (c) of the EERA by establishing the Edison Charter School and thereby unilaterally changing terms and conditions of employment at Edison Charter School?

DISCUSSION

Charging Party concedes that the District had no duty to bargain over its decision to create the charter school. Charging Party further concedes that PERB had no jurisdiction over the Edison Charter School or Edison itself at times pertinent to this complaint.[2] Charging Party's claim is that the District should be required to negotiate regarding the effects of its decision to approve the charter. Charging Party cites numerous examples of changes to terms and conditions of employment conflicting directly with the collective bargaining agreement between Charging Party and the District.

The District argues that both the decision to approve a charter school and the effects of that decision upon employees of the charter school are excluded from PERB's jurisdiction by the Charter Schools Act of 1992.

The Charter Schools Act of 1992 is an experiment encouraging the development of creative educational approaches within California. The legislative intent stated within the Charter Schools Act of 1992 is:

> To provide opportunities for teachers, parents, pupils, and community members to establish and maintain schools that operate independently from the existing school district structure. . . .

Very strong evidence supports the District's argument that the EERA does not apply and, therefore, PERB is without

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[2]The Charter Schools Act was amended effective January 1, 1999, to permit collective bargaining at charter schools.

jurisdiction in this case. The strongest evidence is the plain language of the Charter Schools Act itself. Education Code section 47610 provides:

> A charter school shall comply with this part and all of the provisions set forth in its charter, but is otherwise exempt from the laws governing school districts except [regarding participation in the State Teachers Retirement System].

The EERA is a state law governing school districts. There is nothing within the Charter Schools Act suggesting that the EERA is not one of the laws from which charter schools are exempt.

The omission of any role for a union in the process was not inadvertent. When the Charter Schools Act became law, there were two rival bills enacted by the Legislature. One of them, Assembly Bill 2585, provided for collective bargaining as a part of the ongoing charter school process. The second enactment, Senate Bill 1448, did not provide for collective bargaining. Governor Wilson vetoed AB 2585 and SB 1448 became law. The Governor's veto message to the assembly stated:

> While I support the charter school concept, the restrictions in this bill will not allow a fair test of this experimental approach. I have this date signed Senate Bill No. 1448, which permits the creation of charter schools without the excessive controls contained in this bill.
>
> The essential elements of the charter school concept are freedom from state regulation and employee organizational control, and choice on the part of parents, pupils, teachers, and administrators. This bill requires teacher union approval of all charter schools, state review and approval of the charter

> application, continuation of elaborate collective bargaining processes, and limitations on who can attend a charter school. On all accounts this bill fails to embrace the basic ingredients of the charter school concept.

The Charter Schools Act specifies the procedure for establishment and operation of a charter school. In contrast to the EERA, a union, even one with exclusive representative status, is not a party to the decision making process resulting in a charter school, nor, at times pertinent to this unfair practice complaint, were unions given any legal status as representatives of employees within a charter school. Even the current law as amended, which allows collective bargaining rights, limits union and PERB involvement in the process:

> The approval or a denial of a charter petition by a granting agency pursuant to subdivision (b) of Section 47605 shall not be controlled by collective bargaining agreements nor subject to review or regulation by the Public Employment Relations Board. [California Education Code section 47611.5(e).]

While not controlling in the case at hand, the only court case relating to this issue is consistent with this reasoning. In Desert Sands Unified School District v. Public Employment Relations Board (Cal.Sup.Ct., Nov. 1, 1996) Case No. BC 126357 (Desert Sands) PERB sought jurisdiction when the district made unilateral changes to terms and conditions of employment pursuant to the establishment of a charter school within the district. In granting an injunction against PERB, the court stated:

> To permit PERB to assert jurisdiction over terms and conditions of employment for

> employees who will work at charter schools when the charter is approved by the State Board of Education would eviscerate the charter school's exemption from laws governing school districts, including the EERA and the administration of that Act by PERB. The exemption is the central feature of the Charter Schools Act. California Education Code section 47600 . . . .

Charging Party seeks to distinguish Desert Sands by arguing the complaint in this case is not against Edison but rather against the San Francisco Unified School District. However, in Desert Sands PERB also sought jurisdiction against the district. In both cases when the district adopted the charter it unilaterally changed terms and conditions of employment at the charter school. Thus, the material aspects of both cases are indistinguishable.

Charging Party also argues that PERB should assert jurisdiction because the charter itself acknowledges that charter school employees are employees of the District. This is a distinction without a difference, however, because nothing in the Charter Schools Act reflects a legislative intent that charter school employees cease being District employees. The Legislature simply created a separate experimental environment where District employees at a charter school were free to innovate creative educational processes without the interference or protection of other state laws. The participation of employees and students at a charter school is entirely voluntary.[3]

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[3]Education Code section 47605(e) and (f) provides that the District shall not require students or employees to attend or be employed at a charter school.

This conclusion is also consistent with opinions of the attorney general (see 80 Ops.Cal.Atty.Gen. 52 (1997); 81 Ops.Cal.Atty.Gen. 80 (1998)).

At the time of this complaint, the EERA was not applicable to districts creating charter schools or the ongoing operation of those charter schools. PERB is, therefore, without jurisdiction to resolve this complaint.

While Charging Party's brief raises a whole host of interesting questions about disputes over terms and conditions of employment at charter schools, the only thing that is clear is that PERB and the EERA are not available options for resolution of those questions in this case.[4]

CONCLUSION

At all times pertinent to this complaint, the Charter Schools Act of 1992 specifically exempted districts creating charter schools from the jurisdiction of the Public Employment Relations Board over unilateral changes to terms and conditions of employment at the charter school. Therefore, the complaint in Case No. SF-CE-2015, United Educators of San Francisco v. San Francisco Unified School District, is hereby dismissed.

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[4]I do not conclude by this discussion that a district can never have a bargaining obligation when it creates a charter school. It is conceivable that a district and/or a charter school could unilaterally adopt changes that could impact terms and conditions of employment of employees not at the charter school. The complaint in this case, however, as well as the stipulated record, is limited to changes for employees at the charter school itself.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, sec. 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, sec. 32135(a); see also Cal. Code Regs., tit. 8, sec. 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Cal. Code Regs., tit.8, sec. 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service,

in the U.S. mail. (Cal. Code. Regs., tit. 8, secs. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

James W. Tamm
Administrative Law Judge