STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, STATE CENTER CHAPTER 379, Charging Party, v. STATE CENTER COMMUNITY COLLEGE DISTRICT, Respondent.	Case No. SA-CE-1908-E PERB Decision No. 1471 December 12, 2001

Appearances: California School Employees Association by Alan S. Hersh, Attorney, for California School Employees Association, State Center Chapter 379; Law Firm of Zampi and Associates by Elizabeth Plavan, Attorney, for State Center Community College District.

Before Amador, Baker and Whitehead, Members.

DECISION

BAKER, Member: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions filed by the State Center Community College District (District) to an administrative law judge's (ALJ) proposed decision (attached). The unfair practice charge alleged that the District violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA) [1] by refusing to provide certain requested

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.5 provides, in pertinent part:

> It shall be unlawful for a public school employer to do any of the following:

information to the California School Employees Association, State Center Chapter 379 (CSEA). The ALJ found a violation.

After reviewing the entire record in this case, including the proposed decision, the District's exceptions[2], and CSEA's response, the Board adopts the decision of the ALJ as the decision of the Board itself in accordance with the following discussion. The Board also modifies the ALJ's proposed order to reflect that an employee's expression that their information not be disclosed at all is sufficient to extinguish CSEA's right to the information.

DISCUSSION

The District argues in its exceptions to the proposed decision that the ALJ made numerous factual errors which, in the aggregate, are prejudicial and warrant reversal of the proposed decision. The eight alleged errors were: (1) the date post-hearing briefs were filed; (2) the number of labor relations representatives assigned to the District in 1997; (3) the 'insinuation' that Derek Pullinger is not experienced with labor relations with the District; (4) failure to note that the 1997 roster provided to CSEA also included social security numbers; (5)

> (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 employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (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.

[2] The District has requested oral argument. The request is denied as the record and briefs adequately present the issues and positions of the parties.

an inaccurate triggering event for Dr. Henry Padden's May 3, 1999 letter; (6) failure to note that the District directory also lists employees' names in addition to home addresses, home telephone numbers and facility locations; (7) failure to note that the District directory form also contains a third option for non-disclosure of both the employees address and telephone number (not just two options: one for non-disclosure of the address and one for non-disclosure of the telephone number); and (8) a statement that the District refused to give CSEA home addresses.

It is not necessary to make a determination on the veracity of the statements in dispute because none of the eight alleged factual errors are prejudicial, individually or in the aggregate. Only District allegation number 8 warrants discussion. The District is correct that the ALJ erroneously stated that the District failed to provide CSEA with home addresses. The unfair practice charge in this case is very clearly only about the failure to provide home telephone numbers. The Board does not adopt the ALJ's erroneous statement that the District refused to provide CSEA with home addresses. The remainder of the ALJ's proposed decision accurately reflects that this case is about a failure to provide home telephone numbers. As such, it is clear that this misstatement was not prejudicial.

The District argues in its exceptions to the proposed decision that the ALJ erred in finding that the charge in this matter was timely filed, erred in finding that the settlement agreement and withdrawal of a prior unfair practice charge does not act as collateral estoppel barring relitigation of the same issue in the instant case and erred in finding that CSEA did not waive by contract its right to the home telephone numbers. These same arguments were presented to and rejected by the ALJ. The dissent in this case would reverse the ALJ's proposed decision based upon collateral estoppel and contractual waiver stemming from the

filing and settlement of the previous unfair practice charge. Consistent with the following, the Board rejects the District's exceptions and adopts the rationale and conclusions of the ALJ.

The first PERB case (SA-CE-1795) concerned the District's refusal to provide employees' home addresses and home phone numbers. The parties entered into a settlement agreement in that case which was drafted by the District. The language of the settlement agreement reads that the District will provide bargaining unit names, addresses, home telephone numbers and date of hire with the District "except that telephone numbers will not be provided in any case where the unit member has requested such information not be disclosed by the District." As the settlement language arose in the context of a dispute over the release of information to CSEA, the Board interprets that language to mean in any case where the employee has specifically requested such information not be disclosed to CSEA or not disclosed to anyone. The District home directory form at the center of this case does neither.

The dissent reads "in any case" in the settlement agreement too broadly and out of context when it includes, as an exception to disclosure by the District, instances where a unit member seeks to keep his or her home phone number out of an employee home directory distributed to all District employees. It is a very different decision to keep your home phone number (and/or address) out of a quasi-public directory than keeping your home phone number from your exclusive representative who is charged with representing you in your employment relations with your employer.

Each year the District distributes to its employees, including the bargaining unit employees in this case, a District data entry form which includes boxes to be checked by the employee to signify that the employee does not want his/her home address, home phone number or either to be published in the District directory. The form, titled 1999 District

directory Data Entry Form, very clearly on its face concerns nothing more than the District Directory which includes home addresses and phone numbers. Nowhere on this form is there an indication that an employee's expression on this form intends to express his or her statutory right to withhold this information from CSEA or from anywhere other than the District home directory. There is no evidence in the record to support the notion that the 112 employees desired to withhold this information from either CSEA or from anyone else (except readers of the home directory) by checking a box on what is very clearly only a home directory form.

It is absolutely true that if the 112 employees in this case indicated they did not want their information to go to CSEA or if they said they did not want the information released to anyone, they would have expressed a desire to keep the information private, as the statutory scheme allows them to do.[3] However, the Board views the home directory form as insufficient to express such a desire and therefore insufficient to extinguish CSEA's right to the information. As such, the District's withholding of the unit members' home telephone numbers is in violation of the EERA following the Board's precedent in Bakersfield City School District (1998) PERB Decision No. 1262.

ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found that the State Center Community College District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b) and (c).

[3] It is not necessary for an employee to say specifically that they do not want the information released to CSEA. Saying they do not want the information released to anyone also extinguishes CSEA's right to the information. As such, the Board has modified the ALJ's proposed order in this case by including the phrase "or not given to anyone."

Pursuant to section 3541.5(c) of the EERA, it is hereby ORDERED that the District and its representatives shall:

A. CEASE AND DESIST FROM:

1. Denying the California School Employees Association, State Center Chapter 379 (CSEA) its right to home telephone numbers of bargaining unit members, unless such members have requested that the District not release such information to CSEA or have requested the information not be released to anyone.

2. Denying bargaining unit members their right to be represented by CSEA.

3. Interfering with CSEA's right to bargaining unit home telephone numbers.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EERA:

1. Within ten (10) workdays of service of this decision, give to CSEA the home telephone numbers of bargaining unit members, except for those members who have requested that such information not be given to CSEA or not be given to anyone.

2. Within ten (10) workdays of the service of this decision, post at all work locations where notices to employees customarily are posted in the District, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that the District will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

3. Upon issuance of this decision, make written notification of the actions taken to comply with this Order to the Sacramento Regional Director of the Public Employment Relations Board in accord with the director's instruction.

Member Whitehead joined in this Decision.

Member Amador's dissent begins on page 8.

AMADOR, Member, dissenting: I would dismiss the unfair practice charge and complaint in this case because the State Center Community College District (District), in withholding home telephone numbers of unit members, did exactly what the parties agreed to.

The unfair practice charge alleged that the District violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act by refusing to provide certain requested information to the California School Employees Association, State Center Chapter 379 (CSEA).

This is not the first time that the District has declined to provide CSEA with that same information. Years prior to the filing of the instant unfair practice charge, upon a request from CSEA, the District refused such a request. At that point, CSEA filed unfair practice charge number SA-CE-1795.

After an exchange of letters in October of 1997, the parties agreed to the following language to settle the unfair practice charge:

> The District will provide to CSEA upon an annual request from CSEA, Chapter 379, bargaining unit member names, addresses, home telephone numbers and date of hire with the District, except that telephone numbers will not be provided in any case where the unit member has requested such information not be disclosed by the District. [Emphasis added.]

Although this language was more restrictive than the language originally proposed by CSEA, it nevertheless accepted the District's terms and signed the settlement agreement in October 1997. Subsequently, CSEA withdrew unfair practice charge SA-CE-1795 with prejudice, referencing the settlement agreement. In addition to resolving the immediate dispute, union representative Derek Pullinger (Pullinger) later testified in the case at bar that the settlement agreement constituted an amendment to the collective bargaining agreement (CBA) provisions with respect to CSEA's right to information.

Following the settlement described above, in 1997 and 1998 the District provided CSEA with a roster containing a list of employees' names, addresses, home phone numbers, and hire dates. On each of those lists, roughly a third of the employees' home telephone numbers were redacted.

After receiving the redacted lists in 1997 and 1998, Pullinger did not question the District or the local chapter officers about redacted home telephone numbers, despite the fact that the phone numbers of two CSEA officers were redacted.

On February 11, 1999, CSEA made the annual information request. The District complied shortly thereafter by providing a roster which again had close to a third of the telephone numbers redacted. Upon inquiry from Pullinger as to the reason for the redactions, Henry Padden (Padden) told Pullinger that he had used the directory consent form for a number of years to guide him in releasing telephone numbers to CSEA.

Padden later elaborated by letter, stating that:

> . . . in light of the Collective Bargaining Agreement . . . the District will comply with your request and produce the name and hire date, primary classification and primary job site for each bargaining unit member. This information has previously been deemed by the parties to be adequate for the CSEA to effectively represent the classified unit in collective bargaining and labor relation issues.

Because the District declined to provide home telephone numbers, CSEA filed the instant unfair practice charge.

Identification of the precise issue in this case is critical to understanding why dismissal is appropriate. The issue is not simply whether the District had an obligation to provide CSEA with the home telephone number of certain unit members; more precisely, the issue is whether the parties' settlement agreement modified the union's right to receive that information. Had

there been no prior unfair practice charge challenging the District's refusal to provide home telephone numbers, followed by a negotiated settlement that is clear on its face, an agreement which CSEA concedes modified the parties' CBA, this would be a very different case.

It is beyond dispute that a public school employer has an obligation to provide the exclusive representative with information that is necessary and relevant to discharge its duty to represent employees. The Public Employment Relations Board (PERB) has held that unit members' home telephone numbers are presumptively relevant information. (Bakersfield City School District (1998) PERB Decision No. 1262.) The employer's refusal to supply necessary and relevant information is a refusal to negotiate in good faith, unless the employer can provide adequate justification for the refusal. Thus, this case hinges on the validity of the District's defenses.

Collateral Estoppel Defense

The District argues that dismissal of this charge is required because the underlying matter is barred by collateral estoppel.

Collateral estoppel bars relitigation of an issue if: (1) the issue is identical to one necessarily decided at a previous proceeding; (2) the previous proceeding resulted in a final judgment on the merits; and (3) the parties against whom collateral estoppel is asserted was a party or in privity with a party at the prior proceeding. (State of California (Department of Developmental Services) (1987) PERB Decision No. 619, proposed dec. at p. 14, citing People v. Sims (1982) 32 Cal. 3d 468 at 484.) The District asserts that the settlement and withdrawal of the earlier unfair practice charge compels dismissal of this case on the grounds of collateral estoppel.

Identical Issues

CSEA filed an earlier unfair practice charge, Case No. SA-CE-1795, which dealt with the District's authority to delete home telephone numbers from the classified roster it forwarded to CSEA. The issue presented in the instant unfair practice charge is whether the District can withhold employee home telephone numbers from the classified roster to be forwarded to CSEA. The complaint in the prior charge is almost identical to that in the current case. Therefore, the issue is the same and it was necessarily decided when the parties settled the dispute underlying the prior unfair practice charge.

Settlement and Withdrawal With Prejudice Constituted a Final Judgment on the Merits

In October 1997, PERB issued a notice of withdrawal and closure of case for Case No. SA-CE-1795. This letter notified the parties that CSEA had withdrawn the charge with prejudice and PERB had dismissed the complaint. Where a dismissal is by consent or stipulation of both parties after a compromise or settlement of the case, the judgment, entered with prejudice, will bar a new action. (B.E. Witkin, California Procedure (4th ed. 1997), Judgment, sec. 321, p. 873; see Arciniega v. Bank of San Bernardino (1997) 52 Cal.App. 4th 213, 228.)

When CSEA withdrew the prior unfair practice charge with prejudice based upon the parties' settlement agreement, the effect is a final judgment on the merits. Therefore, the second element of collateral estoppel has been satisfied.

Identical Parties

The third element that must be present in order for collateral estoppel to preclude relitigation of an issue is that the party against whom the doctrine of collateral estoppel is asserted must have been a party to the prior proceeding. Here, the parties are identical to those in the prior unfair practice charge. As a result, all three elements of collateral estoppel have been met and the charge could be dismissed on this ground alone. Even if this were not the case, however, I also find that CSEA waived its right to employees' home telephone numbers through the negotiated settlement agreement that, as CSEA concedes, modified the parties' CBA in this regard.

Waiver

The relevant language of the settlement reads as follows:

> The District will provide to CSEA upon an annual request from CSEA, Chapter 379, bargaining unit member names, addresses, home telephone numbers and date of hire with the District, except that telephone numbers will not be provided in any case where the unit member has requested such information not be disclosed by the District. [Emphasis added.]

Waiver may be found where there is clear and unmistakable language or demonstrative behavior waiving a reasonable opportunity to bargain over a decision not already firmly made by the employer. (Los Angeles Community College District (1982) PERB Decision No. 252.) Such a waiver must be an intentional relinquishment of statutory rights. (Id.)

It is very clear that the parties negotiated the issue of CSEA's right to home telephone numbers. Pullinger testified that the parties engaged in a give-and-take whereby CSEA's proposal was met by a counter-offer from the District. The result of those negotiations was that CSEA signed an agreement that limited the situations in which the District was obligated to provide employee home telephone numbers to CSEA.

By negotiating this language, the parties superseded all other language in their CBA which dealt with this issue. Waiver by contract will only be found when there is an intentional relinquishment of rights, expressing clear and unmistakable terms. (Grossmont Union High School District (1983) PERB Decision No. 313 (Grossmont).) The Board in Grossmont stated that:

> Every contract requires mutual assent or consent. There must be an agreement of definite terms. [Citation omitted.] But ordinarily (in the absence of fraud, mistake, etc.) the outward manifestation or expression of assent is controlling. Mutual assent is gathered from the reasonable meaning of the words and acts of the parties, and not from their unexpressed intentions or understanding.

The unambiguous meaning of the plain language of the parties' agreement is that "in any case," i.e., whenever and in whatever form the employee's request for the District to suppress the home telephone number takes, that number will not be disclosed. Applying the principles of contract law which PERB has long followed, the plain language leads to a finding that CSEA waived its right to unfettered access to employee home telephone numbers. It should also be noted that the language the parties ultimately agreed to was proposed by the District as a more limited counteroffer to CSEA's broader proposal. Therefore, the fact that CSEA signed the settlement agreement furnishes evidence that it consented to the restrictions inherent in the narrower language.

In order for CSEA's position to be persuasive, we must accept its argument that "in any case" does not mean "in any case." I am not prepared to second-guess the parties' intentions when the plain meaning of the settlement language is available as a guide. For that reason, I find that by signing the settlement agreement, CSEA waived its right to obtain from the District the home telephone number of any employee who requests the District not to disclose

it. To conclude otherwise would effectively nullify the parties' settlement agreement. As the District has a valid defense for withholding the information in question under the terms of the parties' mutually negotiated settlement, I would dismiss the unfair practice charge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. SA-CE-1908, California School Employees Association, State Center Chapter 379 v. State Center Community College District, in which all parties had the right to participate, it has been found that the State Center Community College District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b) and (c), by withholding home telephone numbers of bargaining unit members.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Denying the California School Employees Association, State Center Chapter 379 (CSEA) its right to home telephone numbers of bargaining unit members, unless such members have requested that the District not release such information to CSEA or have requested the information not be released to anyone.

2. Denying bargaining unit members their right to be represented by CSEA.

3. Interfering with CSEA's right to bargaining unit home telephone numbers.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EERA:

1. Within ten (10) workdays of service of the decision in this matter, give to CSEA the home telephone numbers of bargaining unit members, except for those members who have requested that such information not be given to CSEA or not be given to anyone.

Dated: _____

STATE CENTER COMMUNITY
COLLEGE DISTRICT

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED, OR COVERED WITH ANY OTHER MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, STATE CENTER CHAPTER 379, Charging Party, v. STATE CENTER COMMUNITY COLLEGE DISTRICT, Respondent.	)	Unfair Practice Case No. SA-CE-1908 PROPOSED DECISION (6/7/2000)

Appearances: Tim Liermann, Senior Labor Relations Representative, for California School Employees Association, State Center Chapter 379; Zampi and Associates, by Joseph P. Zampi and Elizabeth Plavan, Attorneys, for State Center Community College District.

Before Gary M. Gallery, Administrative Law Judge.

PROCEDURAL HISTORY

The exclusive representative of classified employees requested and was denied the home telephone numbers of some bargaining unit employees. The district contends those employees had directed the district not to disclose that information.

This case commenced on June 21, 1999, when the California School Employees Association, State Center Chapter 379 (CSEA) filed an unfair practice charge against the State Center Community College District (District). After investigation, and on July 29, 1999, the general counsel of the Public Employment Relations Board (PERB or Board) issued a complaint against the District. The complaint alleges that on or about February 11, 1999, CSEA requested the following information which is relevant and necessary to discharge its duty to represent employees:

name, classification, home address, home phone number and hire date for each bargaining unit member. It is further alleged that on February 25, 1999, the District refused to provide the information requested. This refusal is alleged to constitute failure and refusal to meet and negotiate in good faith with CSEA in violation of the Educational Employment Relations Act (EERA or Act) section 3543.5(c).[1] This same conduct is alleged to interfere with the rights of unit members to be represented by CSEA in violation of section 3543.5(a) and denied CSEA its right to represent unit members in violation of section 3543.5(b).

The District filed its answer on September 8, 1999, denying any violation of the Act. The District also filed a motion to dismiss based upon the statute of limitations. That motion was denied.

A settlement conference did not resolve the dispute. Formal hearing was held on January 26, 2000, in Fresno, California. At

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[1]Unless otherwise indicated, all statutory references are to the Government Code. EERA is codified at section 3540 et seq. In relevant part, section 3543.5 provides that it is unlawful for the 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 employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (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.

hearing, the District raised a second motion to dismiss on collateral estoppel grounds. This will be discussed below. The District also moved to dismiss the case on the grounds of the statute of limitations at the conclusion of CSEA's case. The motion was denied. Post-hearing briefs were filed on March 8, 2000, and the matter was then submitted for decision.

FINDINGS OF FACT

The District is a public school employer within the meaning of the Act. CSEA is the exclusive representative of an appropriate unit of employees within the meaning of EERA.

In 1997, the State Center CSEA local chapter had two labor relations representatives, Derek Pullinger (Pullinger) and Denise Blassingame (Blassingame). It was Pullinger's first year to serve the District.

On February 11, 1997, Pullinger wrote to District Chancellor Bill Stewart requesting bargaining unit information, specifically, the social security number, name, address, phone number and hire date for each bargaining unit member represented by CSEA and those employees in the unit who were not union members.

The District provided only a list of names and hire dates of employees in the unit. It refused to provide home addresses, telephone numbers or the social security number of CSEA's unit

members.[2] CSEA filed an unfair labor practice charge against the District (PERB Case No. SA-CE-1795).

On October 2, 1997, Pullinger wrote to Doctor Henry Padden (Padden), vice chancellor of personnel,[3] offering to settle the unfair practice charge by the following:

> Upon request by [CSEA] and its Chapter 379, that bargaining unit information would comprise employees name, address, home telephone number, and their date of hire with the district, that the district would honor our request.

Padden responded on October 8, 1997, as follows:

> The District will provide to CSEA upon an annual request from CSEA, Chapter 379, bargaining unit member names, addresses, home telephone numbers and date of hire with the District, except that telephone numbers will not be provided in any case where the unit member has requested such information not be disclosed by the District. [Emphasis added.]

Pullinger accepted the District's terms on October 8, 1997, and withdrew the unfair practice charge with prejudice. As a result, PERB closed the case file.

At the formal hearing, Pullinger agreed this agreement constituted an amendment to the collective bargaining agreement (CBA) provisions on CSEA's right to information. Article 7 of that agreement gives CSEA the right to receive all "materials and data available to the public."

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[2]At some point, CSEA abandoned its request for employee social security numbers. It is not an issue in this case.

[3]Padden is the chief negotiator for the District.

After the settlement agreement referred to above, and for three years thereafter, the District provided CSEA with a roster, consisting of a list of employees by name, address, home phone number and date of hire. On each of the three lists were a number of employees with home telephone numbers redacted.

The roster provided on October 8, 1997, just following settlement of the above-referenced unfair practice case, had 120 employee telephone numbers redacted out of 345 employees listed.

The roster for the next year, dated February 11, 1998, had 121 employee home telephone numbers redacted out of 344 employees listed.

On February 11, 1999, Blassingame made the annual informational request. The District complied around February 25, 1999. This roster had 112 employees telephone numbers blacked out of 362 employees listed.

Pullinger testified initially that it was noticed on this roster that "there were an exorbitant number of telephone numbers that were blacked out on the roster." Pullinger also testified that he noticed the CSEA executive board officers telephone numbers were blacked out on the list.

In fact, phone numbers of two CSEA officers, Cathy Johnson and Jerry Loheide, were blanked out not only on this list, but, as pointed out below, on all three rosters provided by the District. Until 1999, Pullinger never asked Johnson or Loheide why their telephone numbers were redacted.

On May 3, 1999, Padden wrote to Pullinger in reply to the February 11 request.

> Under Article 7.4 of the Collective Bargaining Agreement, upon written request not more than every twelve (12) months, CSEA shall be supplied with a complete "hire date" seniority roster of all bargaining unit employees. Under the CBA this roster shall also indicate the employee's present classification and primary job site.
>
> If Article 7.4 is the section of the CBA under which you are making your request, information such as the social security number, address and phone number are not specifically enumerated in the mutually agreed upon list of acceptable information and therefore appear to be outside the scope of Article 7. CSEA also has access to all materials and data made available to the public under Article 7.7. However, the District has never made it a practice to provide personal information such as social security numbers or home phone numbers to the public. In addition, there are a number of cases supporting the position that the disclosure of certain information such as social security numbers would be considered an invasion of the employees' privacy rights. Los Rios Community College District 12 PERC 19083.
>
> Therefore, in light of the Collective Bargaining Agreement, Article 7, Subsection 4 and the employees' rights to privacy, and to the extent this information has not been previously provided earlier this year, the District will comply with your request and produce the name and hire date, primary classification and primary job site for each bargaining unit member. This information has previously been deemed by the parties to be adequate for the CSEA to effectively represent the classified unit in collective bargaining and labor relation issues.

The Public Records Act (Section 6254.3)

A part of the Public Records Act, section 6254.3, provides:

> (a) The home addresses and home telephone numbers of . . . employees of a school district . . . shall not be deemed to be public records and shall not be open to public inspection, except that disclosure of that information may be made as follows:
>
> . . . . . .
>
> (3) To an employee organization pursuant to regulations and decisions of the Public Employment Relations Board, . . .
>
> (b) Upon written request of any employee, a . . . school district . . . shall not disclose the employee's home address or home telephone number pursuant to paragraph (3) of subdivision (a) and an agency shall remove the employee's home address and home telephone number from any mailing list maintained by the agency, except if the list is used exclusively by the agency to contact the employee.

The District Directory

The District annually publishes a directory listing every District employee by name, department classification and District telephone number. Included in this directory is an employee home directory. This directory lists, alphabetically, District employees' home address, home telephone number and facility location.

The employee's home information will not be placed in the home directory if the employee so directs the District. This option is accomplished by a annual survey conducted by the District. In August of each year, prefatory to issuing the District directory, the District distributes to all employees a

District directory data entry form which includes boxes to be checked by the employee to signify that the employee does not want his/her home address, or home phone number or either to be published in the home directory.

If an employee marks either the home address or home phone as not to be listed in the Directory, the District will not list that information in the home directory.

The gist of this case is that, based upon the employee signifying he or she does not want home information in the home directory, as reflected in this annual survey, the District also refuses to give CSEA the unit member's home address or phone number.[4]

Johnson, a CSEA member, and a CSEA officer for the last two years, completed the Directory data form during the 1998-99 school year, indicating she did not want her home phone or address to be placed in the school home directory. She testified that she did not intend, nor indicate that CSEA was not to get such information. She made no other restriction on the information. She works in the financial aid office and does not want students calling her at home.

Loheide, president of CSEA since January 1999 and an employee of the District, also filled out the information

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[4]The District's position on the evidence is inconsistent on this point. Both Johnson and Loheide testified that they completed the directory form indicating that neither their home addresses or telephone numbers be listed in the home directory. Yet, on the roster provided to CSEA, both of their home addresses were listed, and only their home phone numbers were redacted.

declining to have his home address or home phone number in the District directory. No one indicated to him that this restriction would also apply to releasing the information to CSEA. He made no other requests that such information should not go to CSEA. Loheide served as chief job steward for two years prior to assuming the CSEA presidency. In 1998, the chief job steward position was designated an executive officer in the CSEA organization.

Pullinger did not ask Loheide about his listing in the two years preceding 1999, because, he testified, Loheide was not then president. He did inquire of Loheide why his phone was blacked out in 1999, as he was then chapter president.

In early April 1999, Pullinger received a copy of the 1999 roster, Charging Party Exhibit 2, from the District. It had, in his judgement, an "exorbitant number of telephone numbers blackened out." He spoke to Pat Taylor, an employee in the District's personnel department. She explained the process of blackening out those telephone numbers of employees who had completed the form relating to the District directory.

On April 12, 1999, the District sent to Pullinger a copy of the data form used for the directory. Pullinger testified that this was the first he knew that the District used this form as a basis for not providing CSEA with home phone numbers of unit members.

Padden told Pullinger he had used the directory consent form for a number of years to guide him in releasing telephone numbers to CSEA.

The parties' CBA contains a waiver provision, Article 6, that provides:

> 1. This Agreement shall constitute the full and complete commitment between both parties. This Agreement may be altered, changed, added to, deleted from, or modified, only through the voluntary, mutual consent of the parties in a written and signed amendment to this Agreement.
>
> 2. Except as otherwise provided in this Agreement, the District and CSEA expressly waive and relinquish the right to bargain collectively on any matter:
>
> (a) Whether or not specifically referred to or covered in this Agreement;
>
> (b) Even though not within the knowledge or contemplation of either party at the time of negotiations;
>
> (c) Even though during negotiations the matters were proposed and later withdrawn.
>
> 3. All federal and state laws or rules, mandatorily affecting classified employees and not included in this contract will have the same force and effect as those spelled out in full.

In addition, Article 26 provides, in part:

> CSEA recognizes and agrees that the District's powers, rights, authority, duties and responsibilities include, but without limiting the generality of the foregoing, the exclusive right to manage, plan, organize, staff, direct and control; to decrease and increase the work force; to establish and change standards; to determine soley the extent to which the facilities of any department therefore shall be operated, and the outside purchase of products or services (such purchases of products or services shall

> not be the reason for a reduction in present allocated positions held by members); the right to introduce new, or improved methods and facilitates; and, to otherwise take any action desired to run the entire operation efficiently, except as modified by this Agreement. [Emphasis added.]

ISSUE

Did the District violate the Act when it refused to provide CSEA with the home telephone number of certain unit members?

CONCLUSIONS OF LAW

PERB has determined that the duty to bargain in good faith requirement of section 3543.5(c) carries with it an obligation to provide the exclusive representative with information that is necessary and relevant to discharge its duty to represent employees. (Stockton Unified School District (1980) PERB Decision No. 143 (Stockton).) PERB has expressly held that unit members' home telephone numbers are presumptively relevant. (Bakersfield City School District (1998) PERB Decision No. 1262 (Bakersfield).) The employer's refusal to supply information is a refusal to negotiate in good faith, unless the employer can provide adequate justification for the refusal. (Stockton.)

The Statute of Limitations

The District filed a pre-hearing motion to dismiss the complaint based upon the statute of limitations. The motion was formally denied on the grounds it was premature. Evidence was necessary to show CSEA knew or should have known the District's refusal to release home telephone numbers of unit employees.

At hearing, upon the conclusion of CSEA's case-in-chief, the District again moved to dismiss the complaint on the grounds of the statute of limitations.

The statute of limitations is found in section 3541.5(a)(1) and provides, in relevant part, that the Board shall not:

> Issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge.

This provision is jurisdictional. In Regents of the University of California (1990) PERB Decision No. 826-H, PERB stated:

> . . . The statute of limitations begins to run on the date the charging party has actual or constructive notice of the respondent's clear intent to implement a unilateral change in policy, providing that nothing subsequent to that date evinces a wavering of that intent. . . .

Here the charge was filed on June 21, 1999. Thus, any violation must have occurred on or after January 21, 1999, to be timely filed.

CSEA argues that the refusal to provide the telephone numbers was a "stand alone" right, and that this was not a unilateral change. Under the Bakersfield analysis, the "stand alone" right, was denied within the six-month statute of limitations period.

The District disputes that its conduct is of a "continuing nature." It argues under El Dorado Union High School District (1984) PERB Decision No. 382 (El Dorado) that this is not a

continuing violation. There, PERB recited its holding in the precedential case regarding a continuing violation that:

> . . . a continuing violation would only be found where active conduct or grievances occurred within the limitations period that independently constituted an unfair practice. [Citation.] However, a continuing violation would not be found where the employer's conduct during the limitations period constituted an unfair practice only by its relation to the original offense. [Citation.] Where the underlying theory of the charge is an alleged unilateral change occurring outside the limitations period, the employer must engage in conduct during the limitations period "such as reimplementation or subsequent refusals to negotiate . . . [which] revive[s] the viability of the unfair practice." San Diequito [Union High School District (1982) PERB Decision No. 194].

In El Dorado the District implemented a new teaching assignment in March and September 1978. The union had actual notice prior to the commencement of the limitations period, but did not file its unfair practice charge until more than six months later.

The District also relies on UCLA Labor Relations Division (1989) PERB Decision No. 735-H. It contends that conduct consistent with and constituting an unfair practice charge only in relation to the original offense occurring outside the six-month time period will not be a continuing violation. Here, contends the District, it has maintained the same stance from the beginning, to protect the employee's request for privacy. If it had committed a violation, it was only at the time it originally adopted its practice of withholding the information based upon the District directory data form.

As CSEA noted, this is not a unilateral change case. Rather, the union's right to necessary and relevant information is based upon the District's obligation to bargain in good faith, and with that obligation is the duty to respond to requests for necessary and relevant information. As noted, PERB has found unit members home telephone numbers presumptively relevant.

On February 11, 1999, CSEA requested the telephone numbers of unit members. The District refused on May 3, 1999. This refusal was not predicated upon a unilateral change made in 1997, as the District had never before provided the home phone numbers. Rather, the refusal was a continuing rejection of CSEA's right to the telephone numbers. CSEA filed its charge on June 21, 1999, well within the six-month limitations period.

The District's defense on the statute of limitations is rejected.

Collateral Estoppel

The District next raises the defense of collateral estoppel. It asserts that the filing, settlement and withdrawal of the earlier unfair practice charge is dispositive of this case.

In State of California (Department of Developmental Services) (1987) PERB Decision No. 619-S, PERB adopted an administrative law judge's explanation of collateral estoppel:

> The doctrine of collateral estoppel precludes a party to an action from relitigating in a second proceedings matters litigated and decided in a prior proceeding. People v. Sims (1982) 32 Cal.3d 468, 477 [186 Cal.Rptr. 77]. Collateral estoppel is an aspect of, but not coextensive with, the broader concept of res judicata. Where res judicata operates

> to prevent relitigation of a cause of action once adjudicated, collateral estoppel operates . . . to obviate the need to relitigate issues already adjudicated in the first action." Lockwood v. Superior Court (1984) 160 Cal.App.3d 667, 671 [206 Cal.Rptr. 785]. The purpose of the doctrine is "to promote judicial economy by minimizing repetitive litigation, to prevent inconsistent judgments which undermine the integrity of the judicial system, [and] to protect against vexatious litigation." (Ibid.)
>
> Collateral estoppel traditionally has barred relitigation of an issue if (1) the issue is identical to one necessarily decided in a previous proceeding; "(2) the previous [proceeding] resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior [proceeding]." . . .
>
> . . . Thus, collateral estoppel effect will be granted to an administrative decision made by an agency (1) acting in a judicial capacity, (2) to resolve properly raised disputed issues of fact where (3) the parties had a full opportunity to litigate those issues.

Here, the District argues the issues were the same, the parties were the same, and CSEA had full opportunity to litigate the issue when it filed the first unfair practice charge.

The District argues that a final judgement was reached in this case by CSEA's withdrawal of the charge, with prejudice, under the concept of "Retraxit." Citing Blackstone Commentaries 296, it is, says the District, ". . . an open and voluntary renunciation of his suit in court and by this he for[]ever loses his action."

> A retraxit has always been deemed a judgment on the merits against the plaintiff,

> estopping him from subsequently maintaining an action for the cause renounced. (Freeman, A Treatise of the Law of Judgments (1925) 757, p. 1595.)

The District also relies on Arciniega v. Bank of San Bernardino (1997) 52 Cal.App.4th 213 [60 Cal.Rptr.2d 495], for the proposition that,

> . . . where a dismissal is by the consent or stipulation of both parties after a compromise or settlement of the case, it is intended to operate as a retraxit and the judgment, entered with prejudice, will bar a new action.

In Roybal v. University Ford (1989) 207 Cal.App.3d 1080 [255 Cal.Rptr. 469], the court stated:

> A dismissal with prejudice by plaintiff of its action is a bar to a subsequent action on the same cause; otherwise there would be no meaning to the 'with prejudice' feature.

In addition, the District cites two California appellate cases extending the concept of settlement agreements foreclosing further litigation on the same issues.[5] Here, contends the District, the 1997 settlement agreement by which CSEA withdrew its unfair practice charge, with prejudice, results in the issue having been fully litigated and collateral estoppel is satisfied.

The District may be correct that the issue of CSEA's entitlement to bargaining unit employee's home phone numbers has been resolved by the four corners of the settlement agreement to

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[5]Citizens for Open Access to Sand & Tide v. Seadrift Assn. (1998) 60 Cal.App.4th 1053 [71 Cal.Rptr.2d 77] and Stonewall Ins. Co. v. Palos Verdes Estates (1996) 46 Cal.App.4th 1810 [54 Cal.Rptr.2d 176].

the earlier unfair practice charge, and that issue may not be relitigated. However, unresolved by the settlement agreement is the District's authority to withhold employee's home telephone from CSEA on the basis of a general form stating that an employee chose not to include his/her telephone number in the District's employee home directory publication.

Clearly, the language in the agreement "in any case where the unit member has requested such information not be disclosed by the District" creates an ambiguity unaddressed by the settlement agreement. As Pullinger believed, where the unit employee advised the District it was not to release the home address specifically to CSEA, then CSEA was not entitled to the home telephone number. This is the logical result of the language in the settlement agreement, which was provided by the District. The District's interpretation that "in any case" means and includes the form associated with publication of information in the District directory is an stretch of the language.

The District offered no evidence in support of its position that the parties understood at the time the agreement was negotiated that the "home directory form" would be the basis for authorizing the District to withhold unit members home telephone numbers from CSEA. Padden's explanation that the District always withheld such information on the basis of the directory form does not defeat CSEA's right to unit member home phone numbers, unless the employee specifically told the District not to release the information to CSEA.

Article 6, Section 5

The District cites Article 6, section 5, of the CBA, which gives the District "the exclusive right to determine the impacts and effects of matters outside the scope of representation as permitted by the Educational Employment Relations Act." Based upon EERA's limitation of scope of representation to "matters relating to wages, hours of employment and other terms and conditions," the District leaps to an assertion that the District rightly has determined to uphold the "privacy interests of their employees" and which is a matter outside the scope of representation. The District concedes that it may have an obligation to negotiate over the impact of such decision, but contends, CSEA, by virtue of Article 6, section 5, has "waived its rights to negotiate over such impacts and effects." By this waiver, urges the District, any impact of the decision to "uphold employee privacy rights caused by the District's decision to use the District Directory Data Entry Form is a decision left exclusively to the District."

Any waiver of the right to bargain must be "clear and unmistakable." (Amador Valley Joint Union High School District (1978) PERB Decision No. 74.) The waiver must indicate an intentional relinquishment of the union's rights under the EERA. (San Francisco Community College District (1979) PERB Decision No. 105.)

The language in Article 6, section 5, does not indicate a "clear and unmistakable" waiver of the right to unit member's

home telephone numbers. Moreover, the settlement agreement post-dated the CBA. The agreement reflects a concession by the District that unit member home telephone numbers are negotiable, and it ceded to CSEA the right to that information.

The District's waiver argument is rejected.

Article 7

The District asserts that CSEA, in agreeing to Article 7 (providing CSEA the right to all information available to the public), and the impact of section 6254.3, empowers the District to redact home telephone numbers of employees who have exercised the section 6254.3 right not to have their home telephone numbers released.

This argument is likewise rejected. The District's contention fails to acknowledge the subsequent agreement by the parties in regard to the unfair practice charge, whereby the CBA was amended by that agreement. The District's argument also erroneously interprets the settlement agreement as authority to withhold the employee home telephone number where the employee has indicated that such information is to be withheld.

As pointed out before, section 6254.3, directs the school district to withhold both the home address and telephone numbers of employees upon written request. If the District's home directory form carries the import the District's position asserts, then the District, to comply with section 6254.3, should have withheld Johnson and Loheide's home addresses as well. However, the District did provide CSEA with the home addresses,

even though both employees had signed the home directory form indicating their home addresses were not to be released. Thus, the home directory form was not used consistently by the District, to comply with section 6254.3.

Article 26

The District argues that Article 26 gives it the right to take "any action" to run the District efficiently. Supported by Padden's testimony about the use of the District directory form, the District contends its practice of using one form, in an efficient manner is authorized by this section.

The argument is rejected. The section does not constitute a substantive waiver of the right to the information under discussion. CSEA, by conceding efficiency to the District, has not made an unmistakable waiver of its statutory right to home telephone numbers of unit members. As discussed above, the settlement agreement post-dated the CBA and Article 26. Finally, if the directory form constituted justification for withholding unit member's home telephone numbers, it should also require withholding home addresses as required by section 6254.3. Here, the District did not withhold home addresses, even though employees had requested such information not be released.

The 1997 Settlement Agreement

The District contends that its conduct in redacting the home telephone numbers of unit members is completely consistent with the settlement agreement in unfair practice case SA-CE-1795.

As noted before, however, the language relied upon by the District (CSEA would get the home telephone number except "in any case where the unit member has requested such information not be disclosed by the District") does not mean CSEA has waived its statutory right to such information. It does mean that the District should not give the home telephone number to CSEA, when the unit member directs the District to not give that information to CSEA. The only information the District relies upon, however, is the directory form, a document used to survey District employees's about release of home information in the District's home directory.

Past Practice

The District argues its practice of withholding home telephone numbers was consistent with its practice for the last fourteen years. However, this is not a unilateral change charge against the District. It is a denial of the statutory right to necessary and relevant information determined by PERB to be presumptively relevant. Also, it was not until 1997 that CSEA requested the home telephone numbers of unit members. The District's practice prior to that time was and is irrelevant to this inquiry. As discussed in the statute of limitations portion of this decision, each year gave rise to CSEA's right to the home telephone number of unit members. The District's past practice does not undermine that right.

The Public Records Act

The District contends its practice is consistent with the Public Records Act. Yet that act requires the employee to make a specific written request to the District to not disclose the information specifically to employee organizations. In this case, the District surveyed employees for their position on placing confidential information in the District directory. Employee responses to the survey is not a written request from the employee to the employer required by the Public Records Act.

Waiver

The District argues that Article 6 (waiver clause) of the CBA, along with the specific right to materials and data available to the public (Article 7), precludes CSEA from claiming the right to receive member home telephone numbers.

I reject this argument as well. Article 7 expressly provides for written amendment to the CBA. The October 8, 1997, settlement agreement was an amendment to the CBA. It added unit member's home telephone numbers to information the District was obliged to provide CSEA on request.[6]

Not noted by either side is section 3 of Article 6, which provides that:

> All federal and state laws or rules, mandatorily affecting classified employees and not included in this contract will have

[6]Within this argument the District cites the settlement agreement having "buttressed" the waiver argument advanced by the District. Again, it focuses on its interpretation of the phrase "in any case," in the agreement to mean and include the directory data form. I have previously rejected that interpretation.

> the same force and effect as those spelled out in full.

The Public Records Act gives to CSEA the right to unit member home telephone numbers except where the employee has given the employer written direction to not give such information to the union. This specific right was not abridged by the waiver language of Article 6. Nor was it abridged by the settlement agreement of 1997.

I conclude that the District has violated CSEA's right to bargaining unit members' home telephone numbers by its refusal to provide such information based upon a form expressly designed to inform the District of the employee's desire that their home information not be printed in the District's home directory.

REMEDY

EERA section 3541.5(c) gives PERB:

> . . . the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

It has been found that the District violated its duty to bargain in good faith by wrongfully withholding bargaining unit member's home telephone numbers based upon a directory data form, whose purpose was to request the District to not place home telephone or home addresses in the District's home directory. This conduct violated section 3543.5(a), (b) and (c). It is appropriate to order the District to cease and desist in this conduct. It is also appropriate to order the District to provide

CSEA with the home telephone numbers of bargaining unit members who have not requested in writing that the District not provide CSEA with such information.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record, it is found that the State Center Community College District (District) violated the Educational Employment Relations Act (Act), Government Code section 3543.5(a), (b) and (c). The District violated the Act when it refused to give the California School Employees Association, State Center Chapter 379 (CSEA), upon request, the home telephone number of bargaining unit members based upon a survey to preclude release of such information in the District home directory.

Pursuant to section 3541.5 of the Government Code, it is hereby ORDERED that the District and its representatives shall:

A. CEASE AND DESIST FROM:

1. Denying CSEA its right to home telephone numbers of bargaining unit members, unless such members have requested the District to not release such information to CSEA.

2. Denying bargaining unit members their right to be represented by CSEA.

3. Interfering with CSEA's right to bargaining unit home telephone numbers.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

1. Within ten (10) workdays of service of a final decision in this matter, give to CSEA the home telephone numbers

of bargaining unit members, except for those members who have requested that such information be not given to CSEA.

2. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to employees customarily are posted in the District, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that the District will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

3. Upon issuance of a final decision, make written notification of the actions taken to comply with the Order to the Sacramento Regional Director of the Public Employment Relations Board in accord with the director's instruction.

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).)

Gary M. Gallery
Administrative Law Judge