STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

PATRICIA ANN O'NEIL, Charging Party, v. SANTA ANA UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-4931-E PERB Decision No. 1951 March 28, 2008

Appearance: Patricia Ann O'Neil, on her own behalf.

Before Neuwald, Chair; McKeag and Wesley, Members.

DECISION

NEUWALD, Chair: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by Patricia Ann O'Neil (O'Neil) of a Board agent's dismissal of her unfair practice charge. The charge alleged that the Santa Ana Unified School District (District) violated the Educational Employment Relations Act (EERA or Act)[1] by discriminating against O'Neil when it transferred her to another school site, interfered with her protected rights and unilaterally changed the transfer policy. O'Neil alleged this conduct constituted a violation of EERA section 3543.5(a), (b) and (c).

The Board reviewed the entire record in this matter, including the unfair practice charge, the amended charge, the warning and dismissal letters, and O'Neil's appeal. The Board affirms the dismissal of the charge subject to the discussion below.

BACKGROUND

The District employs O'Neil as a third grade teacher. O'Neil is a member of the Santa Ana Educators' Association (Association), which is the exclusive representative of

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

certificated employees at the District. O'Neil participated in the Association as a site representative, elementary segment board member, treasurer, and state council representative.

In her unfair practice charge, O'Neil alleged that she participated extensively in protected activity:

> [T]he transfer was in response to my (protected activity in) raising concerns about such matters as involvement of elected classroom teachers in decision-making on the School Site Councils, the conflicting reports of distribution of funds at the site, altering of minutes of School Site Council meetings, and advocating for involvement of teachers in developing the restructuring plan required for Year 5 Program Improvement schools.

Additionally, O'Neil alleged:

> I was involved in extensive protected activity during the period immediately preceding the involuntary transfer. I have organized activity to save Class Size Reduction in our District, including presentation to the Board of financial calculations demonstrating that they would not be saving as much money as they had been led to believe by the District's financial officer. I was an outspoken opponent of the last contract ratification in which we received a four percent pay cut. Much of this activity is documented in case #LA-CO-1170-E (currently pending). I was a candidate for office in the last election for Vice-President, running in opposition to the incumbents. I have been a vocal advocate for implementation of Education Code sections pertaining to School Site Councils since at least the 1994-1995 school year.
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> During the 2004-2005 school year in particular I was outspoken regarding Education Code violations regarding School Site Councils, not only at my site but district-wide. I had also made unanswered inquiries into the allocation of funds and publicly questioned discrepancies in funding amounts and alteration of minutes of School Site Council meetings. During the 2004-2005 school year, I also invoked my contractual rights in the evaluation process and advocated on behalf of other teachers faced with potential contractual violations. I also became very active during the 04-05 year in discussions related to restructuring as required by NCLB for Year 5 Program Improvement Schools.

Early in March 2005, O'Neil submitted a three-page statement to Freda Odum, the principal at Hoover Elementary School, entitled "Ideas for Year 5 School Improvement (Restructuring) Plan." O'Neil's format was similar to the format in which other teachers were submitting their ideas. On March 17, 2005, the principal presented three "restructuring proposals" to the staff from which the staff were to pick one. O'Neil disagreed with the proposal chosen and responded by sending a letter to the superintendent on May 16, 2005, that stated in part, "Many teachers at Hoover believe that there are other restructuring plans that would lead to greater student achievement at our school than the one presented to the Board . . . ." The letter provided suggestions for modifying the chosen proposal to give teachers a greater role in decision making.

On August 10, 2005, the District informed O'Neil that she was being transferred to a third grade teaching position at Manuel Esqueda Elementary School. The next day, the District met with O'Neil and gave her a choice of two alternative teaching positions. O'Neil was told that the transfer was necessary to implement a Program Improvement Plan to comply with federal law.

On August 24, 2005, O'Neil filed a grievance alleging that the transfer violated three provisions of the 2004-2007 collective bargaining agreement (CBA) Section 11.7.11,[2]

[2]CBA section 11.7.11 states:

> District-initiated transfers caused by curricular modifications and/or other educationally-related needs of the District and/or affected schools may be recommended at any time. Such transfers shall not be arbitrary or capricious, and in making such transfers the District shall refer to the criteria in 11.7.3.

Section 11.8.2[3] and Section 22.5.1.[4] O'Neil filed an unfair practice charge on February 10, 2006 "to comply with PERB's six-month filing requirement."

On June 8 and June 27, 2006, the parties took the grievance to binding arbitration before Walter N. Kaufman (Kaufman). On December 28, 2006, Kaufman determined that the District violated two of the CBA provisions. Kaufman concluded that:

> [T]he [O'Neil's] transfer was not based on a contractual or statutory standard, but merely on administrative preference, and that the District, therefore, initiated the transfer of the Grievant 'arbitrarily or capriciously' in violation of Section 11.7.11 of the agreement and consequently Section 11.8.2 as well. (Emphasis added.)

Kaufman, however, did not find a violation of Section 22.5.1. Kaufman ruled that the District did not transfer O'Neil because she participated in Association activities or advocated positions on behalf of the Association. As a remedy, the arbitrator ordered the District to offer O'Neil the option of either returning to her position at Hoover Elementary or allowing her to remain at her current position. The arbitrator further ordered recovery of any lost compensation or benefits resulting from the transfer and that a copy of the arbitrator's order be placed in O'Neil's personnel file.

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[3]CBA section 11.8.2 states:

> All transfers and reassignments shall occur in accordance with the provisions of this Article.

[4]CBA section 22.5.1 states:

> The District and the Association shall apply the provisions of this Agreement (CBA) to all unit members without regard to race, color, creed, age, national origin, gender, disability, sexual orientation, political affiliation, marital status, primary language, exercise of rights provided by this Agreement, and/or membership and/or participation in activities of the Association unless authorized by a provision of this Agreement (CBA).

WARNING AND DISMISSAL LETTERS

The Board agent dismissed the retaliation and interference allegations deferring to the arbitrator's award. The Board agent found that O'Neil failed to establish that the arbitrator did not address the issues raised in the charge or that the arbitrator's decision was repugnant to the purposes of EERA. The Board agent also dismissed the unilateral change allegation because O'Neil lacked standing. The Board agent noted that only the exclusive representative, not individual employees, have standing to raise allegations of bad faith bargaining.

O'NEIL'S APPEAL

O'Neil argues that the Board agent erred in finding that the issue of retaliation "was already addressed in arbitration." O'Neil states that "while the arbitrator ruled that the transfer was arbitrary and capricious, he ruled that there was *no violation* of the contractual article specifically dealing with discrimination and retaliation." O'Neil argues that PERB provides a broader range of protection such that what might not be a violation under the contract would be a violation under EERA. Specifically, the contract "narrowly" defines Association activity. O'Neil further argues "that it does seem 'repugnant' to deny that portion of the grievance dealing with retaliation solely because a case was not made that [she] was acting in [her] capacity as site union representative."[5]

DISCUSSION

EERA section 3541.5(a)(2) states, in relevant part:

> The board shall have discretionary jurisdiction to review the settlement or arbitration award reached pursuant to the grievance machinery solely for the purpose of determining whether it is repugnant to the purposes of this chapter. If the board finds the settlement or arbitration award is repugnant to the purposes of this chapter, it shall issue a complaint on the basis of a timely

[5]O'Neil did not appeal the dismissal of the interference and unilateral change allegations. As such, we do not address them here.

> filed charge, and hear and decide the case on the merits. Otherwise, it shall dismiss the charge.

In Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81a (Dry Creek), the Board adopted the post arbitration deferral standard enunciated by the National Labor Relations Board (NLRB) in Spielberg Manufacturing Company (1955) 112 NLRB 1080 [36 LRRM 1152] (Spielberg). Under this standard, the Board will exercise its discretionary jurisdiction to dismiss and defer a complaint to the arbitrator's award if: (1) the unfair practice issues were presented to and considered by the arbitrator; (2) the arbitral proceeding was fair and regular; (3) the parties agreed to be bound; and (4) the decision of the arbitrator must not have been "clearly repugnant to the purposes and policies of the Act."

In Olin Corp. (1984) 268 NLRB 573, 574 [115 LRRM 1056], the NLRB further described its standard for deferral to an arbitrator's award:

> . . . we adopt the following standard for deferral to arbitration awards. We would find that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. [Fn. omitted.] In this respect, differences, if any, between the contractual and statutory standards of review should be weighed by the Board as part of its determination under the Spielberg standards of whether an award is 'clearly repugnant' to the Act . . . Unless the award is 'palpably wrong,' [Fn. omitted.] i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, we will defer.

The NLRB further stated that it:

> . . . would require that the party seeking to have the Board [NLRB] reject deferral and consider the merits of a given case show that the above standards for deferral have not been met. Thus, the party seeking to have the Board [NLRB] ignore the determination of an arbitrator has the burden of affirmatively demonstrating the defects in the arbitral process or award. [Fn. omitted.]

In Dry Creek, the Board stated:

> PERB is surely not obligated to ignore an unfair practice charge under its deferral obligation if the issues in that charge are not encompassed by the arbitration proceeding and included in the arbitrator's disposition of the case. This conclusion is buttressed by subsection (b) of section 3541.5 which clearly empowers this Board to hear an unfair practice charge even though the facts contained therein may constitute a violation of a collectively negotiated agreement. . .
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> Indeed, in the Board's view an arbitration award which has failed to observe any of the foregoing criteria would be inherently repugnant to the purposes of the EERA. Clearly, the legislative purpose in including section 3541.5(a) was the encouragement of voluntary (negotiated) settlement of disputes between the parties. We simply do not see how resort to voluntary dispute settlement would be encouraged if this Board were to give effect to an arbitral award which does not consider the underlying unfair practice, or in which a party was denied due process in the presentation of its case.

In Dry Creek, the Board rejected the association's argument that the arbitrator failed to consider the issues raised in the unfair practice charge. The unfair practice charge alleged a refusal to negotiate in good faith by unilaterally reducing the salaries of certificated employees and freezing step and column increases without negotiating such changes with the charging party. The issue presented to the arbitrator was:

> 'Did the District violate its collective bargaining agreement as alleged in the grievance isgned [sic] by Mrs. Rigby. If the answer is in the affirmative, what is the appropriate remedy under the terms of the contract, including, but not limited to, the possibility of remanding negotiations to the parties while retaining jurisdiction over application of the award to insure compliance.' (Dry Creek, fn. 7.)

The Board stated:

> While the issue itself as stated does not spell out the alleged unilateral reduction of teachers' salaries or the freezing of step and column increases, the transcript of the arbitration proceedings demonstrates unequivocally that the facts were presented to the arbitrator. Indeed his decision acknowledges that such acts by the District constituted a violation of the collective agreement between the parties.

In Dry Creek, the Board found the arbitrator's award repugnant to the purposes of EERA because the remedy provided by the arbitrator was deficient. The Board noted that "[w]hile the Board will not necessarily find an award repugnant because it would have provided a different remedy than that afforded by the arbitrator, it may well so consider an award which fails to protect the essential and fundamental principles of good faith negotiations."

In Los Angeles Unified School District (1982) PERB Decision No. 218, the Board examined whether the unfair practice issues were presented and considered by the arbitrator. In reaching the conclusion that the arbitral and statutory issues were parallel in that they both turned on whether the District had the right to unilaterally change the bus parking locations, the Board stated:

> The NRLB has recently ruled that it will defer to arbitration awards where there is 'parallelism' between the unfair practice issue and the contractual issue, provided the arbitrator has considered all of the evidence relevant to the unfair. [Citation omitted.]
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> In Bay Shipbuilding, supra, the employer unilaterally changed insurance carriers during the term of the collective bargaining agreement. After considering the bargaining history and plain meaning of the contract, the arbitrator found that the contract permitted the employer to change insurance carriers. In deferring to this award, the NLRB observed that although the arbitrator specifically stated that he was not deciding whether the employer had violated the National Labor Relations Act, he nevertheless made factual finding in the course of resolving the contractual issues which resolve the unfair practice issues. The board continued:
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> 'The pivotal unfair labor practice issue herein is whether Respondent's change of insurance carriers constituted a modification of the contract or was simply an action permitted by the contract. Here the arbitrator found that the contract permitted the Company to change carriers, a determination he clearly had the authority to make. As the action was permitted by the contract, it does not constitute a modification of the contract and is not unilateral action in violation of the Act. Thus, the arbitrator's factual determination of the meaning of the contract has resolved the unfair labor practice issues herein.'

> . . . The arbitrator clearly found that the contract authorized the changes when necessary for the best interest of the District. Necessarily, the union had waived its right to negotiate over the change. [Fn. omitted.]
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> It is also clear that the arbitrator was presented with and considered all of the evidence relevant to the unfair. The union relies on the bargaining history to argue that the implied waiver clause, Section 1.10, was intended by the parties to operate more narrowly than it appeared on its face. The arbitrator heard witnesses from both the union and the District negotiators on this point and had the opportunity to weigh their testimony. It is appropriate therefore that the Board defer to his credibility determinations in this instance.

In Oakland Unified School District (1985) PERB Decision No. 538, the Board found that the arbitrator addressed the issue alleged in the unfair practice charge. The association alleged that the:

> decision left unanswered its charge that the District instituted an unlawful unilateral change when the District declined to permit post-termination arbitration of the merits of disciplinary disputes.

The Board stated:

> In our view, this is the issue which the arbitrator concluded that Article 28 of the parties' contractual agreement did not contemplate post-termination arbitration. By deciding that the contract permitted the District's conduct, the arbitrator necessarily concluded that the District made no unlawful change and thus fully discharged its bargaining obligation. [Emphasis in original.]

The Board also addressed deferral in San Diego County Office of Education (1991) PERB Decision No. 880. The Board stated:

> In the arbitration award, the arbitrator stated the issue, in part, to be whether the County imposed reprisals and discriminated against the custodians for attempting to gain a night shift differential. The arbitrator found that the County's actions did not constitute a reprisal, but, rather, were in keeping with its rights and obligations under the parties' CBA.

The Board found that the issue decided in the arbitration award was factually parallel to the unfair labor practice issue in that the arbitrator "took into consideration the same factual issues which the Board would consider under a Novato[6] analysis." The Board went on to state:

> The Board further finds that the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice charge. The evidence relevant to the contract violation alleged in the arbitration, including evidence of the County's justification for its action, is the same evidence which would be relevant to a claim of discrimination/reprisal before PERB.
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> Furthermore, the Board cannot find, based upon the entire record before us, that the award is 'palpably wrong' i.e., that the arbitrator's decision is 'not susceptible to an interpretation consistent with the Act.'

In Yuba City Unified School District (1995) PERB Decision No. 1095, the Board found that the matters raised in the unfair practice charge were presented to and considered by the arbitrator:

> In both contexts, the issue involves whether the District acted properly in changing the nature of the study hall/activity period, and in making related schedule modifications for the 1992-93 school year. Furthermore, the facts considered by the arbitrator in resolving the issue are identical to those relevant to resolving the unfair practice charge. [Emphasis added]

We now apply the Dry Creek analysis to the retaliation allegation contained in the present unfair practice charge.

Under the first element enunciated in Dry Creek, we find the unfair practice issues were presented to and considered by the arbitrator. O'Neil alleged, in part, before the arbitrator that the District involuntarily transferred her because of her Association activity. O'Neil put on evidence of her active participation in Association activities including, among other activities, serving as a union officer, a union site representative, advocating positions of importance to the union and challenging violations of the CBA. O'Neil also described activities in which she

[6]Novato Unified School District (1982) PERB Decision No. 210 (Novato).

challenged the District's actions regarding the school site council and advocated on matters such as class size, federal education requirements and the program improvement plan. At the arbitration hearing, O'Neil alleged she was transferred because of this conduct.

The arbitrator considered the evidence and determined the District did not transfer O'Neil because of her union activity. The Board will not find an arbitrator's award repugnant simply because it might have reached a different conclusion. (Id.) What the arbitrator did find was that the District breached Article 11 because the District's decision to transfer O'Neil was based on "administrative preference" not the specific criteria set forth in the contract's transfer provisions. Although the arbitrator did not find retaliation for protected activity he considered the same facts as alleged in the unfair practice charge.

There is no dispute that the arbitral proceedings were not fair or regular, or that the parties have not agreed to be bound by the decision. As such, the second and third elements in Dry Creek are met.

We now turn to the fourth element, that the decision of the arbitrator must not have been "clearly repugnant to the purposes and policies of the Act." O'Neil argues that the arbitrator's award is clearly repugnant because the "decision was based on interpreting the contract to prohibit only discrimination based on activity officially sanctioned by the Union." This argument fails under the Dry Creek standard. First, O'Neil overstates the arbitrator's finding as the award did not state that the contract prohibited only discrimination based on activity officially sanctioned by the Association. Rather, the arbitrator determined, based on the record before him, that the District did not violate Section 22.5.1 of the CBA. Second, notwithstanding O'Neil's attempt to distinguish the arbitrator's analysis from that of the Board when considering retaliation cases, we find that the arbitrator's determinations as to the contractual violations are clearly parallel to O'Neil's claims of retaliation under EERA.

Accordingly, we find that O'Neil has not demonstrated that the arbitrator's award is palpably wrong.

Based on the discussion above, the Board defers to the arbitrator's award.

ORDER

The unfair practice charge in Case No. LA-CE-4931-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Wesley joined in this Decision.