STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

LAS VIRGENES UNIFIED SCHOOL DISTRICT, Charging Party, Petitioner,	)	
v.	)	Case No. LA-CO-86-78/79
LAS VIRGENES EDUCATORS ASSOCIATION, Respondent.	)	PERB Order No. IR-8
	)	Administrative Appeal
	)	June 12, 1979

Appearances; Rosalyn F. Barrie, Attorney (Biddle, Walters & Bukey) for Las Virgenes Unified School District; William Gordon, Executive Director for Las Virgenes Educators Association.

Before Gluck, Chairperson; Moore and Gonzales, Members.[1]

DECISION AND ORDER

On May 17, 1979, the Las Virgenes Unified School District (hereafter District) requested injunctive relief from a work stoppage alleged as being conducted by the Las Virgenes Educators Association (hereafter Association) among certificated employees of the District. The District's request was based on an unfair practice charge filed against the Association alleging that the Association was conducting a work stoppage prior to the exhaustion of impasse procedures mandated by sections 3548 through 3548.4, inclusive, of the Educational Employment Relations Act[2] (hereafter EERA). Pursuant

[1]Member Gonzales did not participate in the Board's deliberation but submitted his vote on the basis of the General Counsel's written report.

[2]The Educational Employment Relations Act is codified at Government Code section 3540 et seq.

to rule 381103 of the Public Employment Relations Board, the general counsel conducted an investigatory proceeding and subsequently submitted a report to the Board itself.

Certain facts emerge from the general counsel's investigation:

1. The District and the Association reached impasse in the course of negotiations, proceeding to mediation and eventually to factfinding.

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[3]California Administrative Code, title 8, section 38110, provides:

> (a) Upon receipt of a request, the general counsel shall conduct an investigative proceeding into the circumstances of the alleged lockout or work stoppage. To expedite the investigation, the executive director shall make available to the general counsel the services of the regional director and the regional director's staff.
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> (b) The regional director shall make a reasonable effort to notify the parties that an investigative proceeding will be conducted, indicating the time and place thereof. The proceeding will be scheduled at such time as provides the parties with reasonable opportunity to appear. Failure of a respondent to appear shall not preclude the board agent from conducting the investigative proceeding.
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> (c) The board agent may call and question such witnesses as the agent deems necessary to effectuate the investigation.
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> (d) The board agent shall observe the time limitations contained in section 38115. A report shall be submitted to the general counsel at the conclusion of the investigative proceeding.

2. On May 4, 1979, the District circulated a memorandum among certificated employees which reproduced a District press release dated May 3 which revealed significant portions of the factfinders' report, though in paraphrased form. The May 4 memorandum requested the certificated employees to keep confidential the factfinders[1] recommendations reported in the May 3 press release. The reason given for the request for confidentiality was that the factfinders[1] report would not be released to the public for another week.

3. There is some evidence that the May 3 press release and May 4 letter (which incorporated the May 3 press release) were prompted by the Association's circulation of purported details of the factfinders[1] report.

4. On May 14 the factfinders[1] final report, signed by the panel chairman, was served on the parties. On the same date, members of the Association voted for a work stoppage which actually commenced on May 15.

Section 3548.34 of the EERA requires the employer to release a factfinders' report to the public within 10 days of its receipt by the parties. Board rule 381005 expresses a

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[4]Government Code section 3548.3 states:

> If the dispute is not settled within 30 days after the appointment of the panel, or, upon agreement by both parties within a longer period, the panel shall make findings of fact and recommend terms of settlement, which recommendations shall be advisory only. Any findings of fact and recommended terms of settlement shall be submitted in writing to the parties privately before they are made public. The public school employer shall make such findings and recommendations public within 10 days after their receipt. The costs for the services of the panel chairman, including per diem fees, if any, and actual and necessary travel and subsistence expenses shall be borne by the board. Any other mutually incurred costs shall be borne equally by the public school employer and the exclusive representative. Any separately incurred costs for the panel member selected by each party, shall be borne by such party.

[5]California Administrative Code, title 8, section 38100, provides:

> In recognition of the fact that in some instances work stoppages by public school employees and lockouts by public school employers can be inimical to the public interest and inconsistent with those provisions of the Educational Employment Relations Act (EERA) requiring the parties to participate in good faith in the impasse procedure, it is the purpose of this rule to provide a process by which the Board can respond quickly to injunctive relief requests involving work stoppages or lockouts.
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> The EERA imposes a duty on employers and exclusive representatives to participate in

policy that the Board considers the enactment of the impasse provisions of the EERA as evidence of a legislative intent to head off work stoppages prior to the exhaustion of those procedures. As of May 15, the District had not released the official, final report of the factfinder and was not required to do so until 10 days from that date. The work stoppage occurred prior to the exhaustion of the statutory procedures, though more than 10 days after the May 3 press release and May 4 letter.

Under the circumstances, it is possible to conclude that the District's premature publications had some influence on the Association's choice of a date on which to commence the work stoppage. It is evident, however, that neither the District nor the Association treated the inherent statutory requirement of confidentiality pending official publication of the factfinders[1] report with the deference that provision deserves, thus impairing the value of the impasse procedures. Release by a party of other than the full final factfinders' report

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> good faith in the impasse procedure and treats that duty so seriously that it specifically makes it unlawful for either an employer or an exclusive representative to refuse to do so. The Board considers those provisions as strong evidence of legislative intent to head off work stoppages and lockouts until completion of the impasse procedure and will, therefore, in each case before it, determine whether injunctive relief will further the purposes of the EERA by fostering constructive employment relations, by facilitating the collective negotiations process and by protecting the public interest in maintaining the continuity and quality of educational services.

circumvents the statutory purpose of encouraging the parties to use that report as a basis for reconsideration of their last negotiating positions in order to reach agreement. Such premature release may also be inconsistent with the parties' duty to participate in good faith in the impasse procedures. Any release must be of the final report, unaltered and in its entirety. While publication of other than the full final factfinders' report may not terminate impasse, PERB will consider such publication in evaluating a request for injunctive relief.

The Board believes that the entire official factfinders[1] report should be released to the public immediately to correct any possible public bias or misunderstanding resulting from the partial release through the May 3 and May 4 documents. Further, the parties should resume negotiations with the assistance of an appointed mediator. Based on information brought to light in the general counsel's investigation, there is reasonable cause to believe that one issue, referred to as a "management's right clause," which includes a provision entitling the District to abrogate portions of the collective agreement in the event of an emergency, has been and continues to be objected to by the Association as outside the scope of negotiations. The District's urging of this provision is the basis of an unfair practice charge filed against the District by the Association. To facilitate the possibility of the

parties reaching agreement, the Board believes that issue should be withdrawn from negotiations pending resolution of the question of negotiability pursuant to normal Board processes.

The Board therefore directs the general counsel to seek a Temporary Restraining Order against the Association, its members and employees in the unit engaging in or advocating a work stoppage. Said TRO is to be for a period of 10 days, subject, however, to the conditions that the employees return to work immediately; that the parties resume negotiations with the assistance of a mediator; that the District immediately publish the official, final factfinders' report; and that the management's right proposal be withdrawn by the District pending resolution of the issue of negotiability through other Board processes.

Informational picketing by the Association and employees should be permitted provided that not more than five pickets be allowed at each building site and that such picketing does not interfere with ingress and egress by students, administrators and other school personnel and by persons doing business with the school district.

Should either or both of the parties refuse to meet the obligations or conditions of the Temporary Restraining

Order, the Board will reevaluate the request for injunctive relief.

By: Harry Gluck, Chairperson

Barbara Moore, Member

Raymond J. Gonzales, Member, concurring and dissenting:

I concur in the majority's decision to direct the general counsel to seek a temporary restraining order prohibiting the Association, its members, and employees in the certificated employees unit from engaging in a work stoppage. I do not agree, however, with the direction that the TRO be conditioned on certain acts to be performed by the parties.

The majority has transformed what should be a relatively simple procedure enjoining a work stoppage that the Board has reasonable cause to believe is unlawful into a complicated attempt to resolve all problems between the parties. In so doing, the majority has reached conclusions unwarranted by the general counsel's investigation, and has involved itself in the relationship between the parties to the extent of conditioning the injunctive relief needed by the

District to keep schools open on the District's taking actions it has no legal obligation to perform.[1]

The majority opinion states that "there is a reasonable cause to believe that one issue, referred to as a 'management's right clause,' which includes a provision entitling the District to abrogate portions of the collective agreement in the event of an emergency, has been and continues to be objected to by the Association as outside the scope of negotiations."[2] Nothing in the record before the Board at the time it made its decision to seek injunctive relief

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[1]In writing this decision, I have, of course, reviewed the record before the Board. At the time the Board voted to seek injunctive relief, however, I had reviewed only the general counsel's recommendations. I based my decision to seek injunctive relief only on those recommendations and on my continued belief that strikes and lockouts before impasse procedures are exhausted constitute unfair practices and should be enjoined. I feel that the Board's involvement in the facts surrounding the strike may jeopardize the Board's neutrality as an appellate administrative body. This is not because members of the Board have, in fact, reached conclusions on the merits of all of the underlying unfair practice charges. Rather, (1) the Board's appearance of neutrality may be damaged by a procedure in which the same persons who must ultimately resolve the unfair practice charges must make a preliminary decision that there is reasonable cause to believe an unfair practice was committed and that the charging party is likely to prevail on the merits, and (2) the Board members may retain an impression of the case based on evidence from the preliminary investigation which is not developed in the official record before the Board on appeal.

[2]The original TRO sought by and granted to PERB did not specifically name the management's right clause. It stated:

> The temporary restraining order shall be conditioned on the following:
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> (a) Both real party in interest and Defendant drop any proposals of bargaining subjects that the other party has continuously claimed is [sic] outside the

justifies this finding. The Association did not make this claim at PERB's investigative proceeding, nor did it allege that the management's right clause was out of scope in its original unfair practice charge.[3] In addition, the factfinders' finding with respect to the management's rights clause indicates that the dispute between the parties concerned only the content of the clause. In fact, the clause proposed by the District is identical to the one included in the previous contract. Factfinders typically do not make recommendations on issues over which there is a scope dispute;

> scope of bargaining as defined by Government Code section 3543.2 pending a decision by PERB relating to such issues.

This provision apparently confused the parties, resulting in a memo from Chairperson Gluck to the general counsel clarifying what "the Board" had intended. The memo was released to the parties. Since I did not participate in the decision to impose conditions on the TRO, I want to refute any impression that I was a party to that memo. I so notified the parties by mailgram on May 31, 1979.

[3]The only element of the charge involving the management's rights clause was that the District failed to meet and negotiate in good faith by:

> Insisting to impasse and beyond upon the inclusion in any written document incorporating agreements reached of a provision for management's rights which includes language which would be unacceptable to any union, namely, language purporting to permit the employer, upon its own determination and not subject to any grievance procedure to suspend the agreement.

This demonstrates that the Association was not concerned about the clause's negotiability, but rather about its content. The original charge was amended to include the argument that the management's rights clause was out of scope after the Board had successfully sought a TRO which intimated that the majority of PERB believed that the parties had a continuing dispute as to the negotiability of certain items.

such a recommendation would involve a question of law rather than one of fact. That the factfinder made a recommendation indicates to me that the Association had not continuously claimed the management's rights clause was out of scope.

It seems to me that the majority of the Board is trying to end an unlawful strike, not by simply enjoining it, but by forcing the employer to make concessions that it has no legal obligation to make. Unless the management's rights clause is, in fact, out of scope, the District has every right to maintain its position on that issue, and the employee organization had, at the time it struck, no right to engage in a work stoppage to force the District to change its position. By requiring the employer to give up what is very possibly a legitimate negotiating position in order to obtain a TRO against the unlawful work stoppage, the majority is involving itself to an unacceptable extent in the content of the negotiations between the parties. It is especially unacceptable when the majority, in order to obtain a District concession, must create a scope issue as a means of forcing the District to give up a negotiating position until that issue is resolved by the Board.

The majority has also required the District to immediately release the factfinders' report as a condition for obtaining injunctive relief. Again, the majority is requiring the District to do something it has no legal obligation to do. Government Code section 3548.3 states that the public school employer shall make the report public within 10 days after its

receipt. Thus, the employer is given discretion as to when, within a 10 day period, the factfinders' report should be released. Unless there is reasonable cause to believe that the District's withholding the release of the factfinders[1] report constitutes an unfair practice, I believe that the Board should not interfere with the employer's behavior.

To me, the issue in all of the injunctive relief cases under our new rules is simple. Unlawful strikes are not a legitimate negotiating tool and should be enjoined. Public school employees have no right to use an illegal tactic to attempt to force concessions from a reluctant employer. The fact that an employer may have engaged in unlawful behavior does not legitimize a strike; two wrongs do not make a right. The employee organization's legitimate remedy is to file an unfair practice charge and, if necessary, request the Board to seek injunctive relief. If an agent of PERB finds that there is reasonable cause to believe that the employer has committed an unfair practice, the PERB can seek a TRO enjoining the allegedly unlawful behavior as well as the strike. But when there is no reasonable cause to believe that the district's behavior is unlawful, the Board should not use its exclusive power to seek injunctive relief to force changes in that behavior.

I believe that the majority of the Board, in its zeal to resolve the admittedly complex situations leading to strikes, has overreached itself. It has taken advantage of its "exclusive initial jurisdiction" to seek injunctive relief to

control behavior that is not unlawful. I believe that PERB's jurisdiction is to enforce the EERA. While PERB has broad powers under Government Code section 3541.3(n),[4] I do not believe that these powers should be interpreted to enable the Board to control or limit behavior that is permitted by the EERA. If PERB has reasonable cause to believe that the conduct of the parties violates the EERA, and if the situation merits extraordinary relief, PERB should act to stop the unlawful conduct. To do more, to condition injunctive relief on a party's ceasing otherwise lawful behavior or to doing something it has no legal obligation to do, is to become too involved, too active in the relationship between the parties, and in fact would appear to be in excess of the Board's jurisdiction.

The majority is using the decision in San Diego Teachers Association et al. v. Superior Court (1979) 24 Cal. 3d 1, which gives PERB some discretion over strike remedies, as a mandate to solve all problems leading up to strikes. In this case, the District refused to make a concession that the Association wanted, so the majority forced the District to withdraw its proposal for an indefinite period. Next time, perhaps the majority will find that the situation will be resolved if the employer will change its position a little bit,

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[4]Government Code section 3541.3(n) provides that PERB shall have the power and duty:

> To take such other action as the board deems necessary to discharge its powers and duties and otherwise to effectuate the purpose of this chapter.

and will therefore condition the TRO on such a change. I find this case to be a dangerous precedent and therefore disassociate myself from the majority's decision to impose conditions on the TRO enjoining the work stoppage.

Raymond J. Gonzales, Member