STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

EUREKA TEACHERS ASSOCIATION, Charging Party, v. EUREKA CITY SCHOOLS/EUREKA HIGH SCHOOL DISTRICT, Respondents.	)	Case Nos. SF-CE-445, 451 PERB Order No. IR-14 May 29, 1980

Appearances: Charles R. Gustafson, Kirsten L. Zerger, Attorneys for Eureka Teachers Association; Richard Smith, Attorney (Harland & Gromala) for the Eureka City Schools and Eureka High School District.

Before Gluck, Chairperson; Gonzales and Moore, Members.

DECISION

This decision sets forth the rationale supporting PERB Order No. IR-14 issued March 26, 1980.

FACTUAL SUMMARY

On February 25, 1980, the Eureka Teachers Association, (hereafter Association) the exclusive representative of the certificated employees in the Eureka City Schools/Eureka High School District (hereafter District), filed an unfair practice charge (Case No. SF-CE-445) against the District alleging violations of sections 3543, 3543.5, and 3548 of the Educational Employment Relations Act (hereafter EERA or the

Act).[1] The Association requested that the Public Employment Relations Board (hereafter PERB or Board) seek injunctive relief to restrain the District from making public a

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[1]The Educational Employment Relations Act is codified at Government Code section 3540 et seq. All future section references are to the Government Code unless otherwise indicated.

Section 3543 provides:

> Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public school employees shall also have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public school employer, except that once the employees in an appropriate unit have selected an exclusive representative and it has been recognized pursuant to Section 3544.1 or certified pursuant to Section 3544.7, no employee in that unit may meet and negotiate with the public school employer.
>
> Any employee may at any time present grievances to his employer, and have such grievances adjusted, without the intervention of the exclusive representative, as long as the adjustment is reached prior to arbitration pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8 and the adjustment is not inconsistent with the terms of a written agreement then in effect; provided that the public school employer shall not agree to a resolution of the grievance until the exclusive representative has received a copy of the grievance and the proposed resolution and

factfinding report. This Board did not seek the requested relief and the factfinding report was made public on or about March 3, 1980.

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has been given the opportunity to file a response.

Section 3543.5 reads as follows:

> It shall be unlawful for a public school employer to:
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> (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.
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> (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.
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> (d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.
>
> (e) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).

Section 3548 provides:

> Either a public school employer or the exclusive representative may declare that an impasse has been reached between the parties in negotiations over matters within the scope of representation and may request the

On March 5, 1980, the Association voted to engage in a strike against the District.

The Association filed an amendment to the above charge on March 7, 1980, and requested the Board, among other things, to seek injunctive relief restraining the District from using the factfinding report as a basis for negotiations.

> board to appoint a mediator for the purpose of assisting them in reconciling their differences and resolving the controversy on terms which are mutually acceptable. If the board determines that an impasse exists, it shall, in no event later than five working days after the receipt of a request, appoint a mediator in accordance with such rules as it shall prescribe. The mediator shall meet forthwith with the parties or their representatives, either jointly or separately, and shall take such other steps as he may deem appropriate in order to persuade the parties to resolve their differences and effect a mutually acceptable agreement. The services of the mediator, including any per diem fees, and actual and necessary travel and subsistence expenses, shall be provided by the board without cost to the parties. Nothing in this section shall be construed to prevent the parties from mutually agreeing upon their own mediation procedure and in the event of such agreement, the board shall not appoint its own mediator, unless failure to do so would be inconsistent with the policies of this chapter. If the parties agree upon their own mediation procedure, the cost of the services of any appointed mediator, unless appointed by the board, including any per diem fees, and actual and necessary travel and subsistence expenses, shall be borne equally by the parties.

The Association commenced a strike against the District on March 20, 1980. On that same date the Association filed additional unfair practice charges (Case No. SF-CE-451) against the District alleging violations of Sections 3543, supra, 3543.1(a) and (b),[2] 3543.3,[3] and 3543.5, supra, of

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[2]Section 3543.1(a) and (b) read as follows:

> (a) Employee organizations shall have the right to represent their members in their employment relations with public school employers, except that once an employee organization is recognized or certified as the exclusive representative of an appropriate unit pursuant to Section 3544.1 or 3544.7, respectively, only that employee organization may represent that unit in their employment relations with the public school employer. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership.
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> (b) Employee organizations shall have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes, and other means of communication, subject to reasonable regulation, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by this chapter.

[3]Section 3543.3 provides:

> A public school employer or such representatives as it may designate who may, but need not be, subject to either certification requirements or requirements for classified employees set forth in the Education Code, shall meet and negotiate

the Act. The Association again requested that the Board seek injunctive relief ordering the District to: (1) bargain in good faith; (2) participate in any bona fide mediation effort; (3) rescind all unilateral changes in terms and conditions of employment; (4) refrain from taking any disciplinary action against employees for engaging in protected activity; and (5) refrain from imposing or threatening to impose reprisals against any employee because of the exercise of rights protected under the EERA.

The cases were consolidated, and the Board itself issued Interim Order No. IR-13 on March 25, 1980, declining to seek injunctive relief. The Board did, however, retain jurisdiction and instructed the general counsel to continue the investigation into the requests for injunctive relief. Based on the results of the general counsel's continuing investigation, a majority of the Board again declined to seek injunctive relief on March 26, 1980 (PERB Order No. IR-14).[4]

> with and only with representatives of employee organizations selected as exclusive representatives of appropriate units upon request with regard to matters within the scope of representation.

[4]On March 27, 1980, the Association filed additional unfair practice charges against the District (SF-CE-453) and requested the Board to again consider seeking injunctive relief. The Board did not deliberate the merits of this request for injunctive relief because the parties reached agreement early in the morning on March 28, 1980.

On April 9, 1980, the charging party withdrew without

DISCUSSION

An injunction is proper in circumstances mandating extraordinary relief.[5] Included within the prerequisites for the issuance of an injunction are reasonable cause to believe that the acts alleged actually occurred and that those acts likely constitute unfair labor practices, the likelihood of irreparable harm and inadequacy of a legal remedy.[6]

With regard to those aspects of the Association's request that the Board seek injunctive relief ordering the District to bargain and participate in mediation in good faith, the general counsel's investigation revealed that, prior to March 18, 1980, the District had conditioned future negotiations on the withdrawal by the Association of its threat to strike but that several unconditional mediation sessions had been held from March 18 to March 26. Therefore the Board had no evidence indicating that it was likely that the District was not mediating in good faith at that time. Thus, negotiations between the parties regarding the terms of a new agreement had not broken down but rather were proceeding according to the

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prejudice all of the unfair practice charges which it had filed against the District (SF-CE 445, 451 and 453).

[5]Wilkins v. Oken (1958) 157 Cal.App.2d 603; West v. Lind (1960) 186 Cal.App.2d 563.

[6]Weingard v. Atlantic Savings and Loan Assn. (1970) 1 Cal.3d 806.

statutory scheme of the EERA. An injunction could have required no more in this respect.

The Association further claimed that it was appropriate to seek injunctive relief requiring the District to rescind an "emergency procedures" policy that was unilaterally adopted by the District and which, if implemented, would have changed several terms and conditions of employment.

This policy was adopted in November 1978, after the execution of the existing agreement between the parties which is still in effect, but the facts indicate that it has not been in effect continuously since its adoption. By its own terms, the Superintendent of the District is only authorized to implement the policy in the event of an employee slowdown, work stoppage, or employee involvement in other concerted activities.

The policy provides, inter alia, that all employee absences within the scope of existing leave policies must be substantiated with a doctor's statement or other authenticated documentation; that no administrator may give approval to any employee's request for permission to take personal leave; and that any certificated employee absent without leave for 5 days or more without satisfactory explanation shall be deemed to have resigned. It further provides that any employee organization that engages in any illegal activity may have its right to payroll deductions, as well as other rights and privileges provided in any existing contract or District

policy, terminated. These aspects of the policy appear on their face to conflict with existing provisions of the agreement,[7] namely Article 10 dealing with leaves[8] and

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[7]Article 5 sets forth the effect of the agreement between the parties and reads, in part:

> It is understood and agreed that the specific provisions contained in this agreement shall prevail over District practices and procedures and over state laws to the extent permitted by State law and that in the absence of specific provisions in this Agreement such District practices and procedures are discretionary.

[8]HEALTH LEAVE

Unpaid leaves of absence may be requested in instances where an employee is physically unable to work. A substantiating statement from a licensed physician may be required.

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PERSONAL LEAVE

For purposes of attending a funeral, wedding or graduation of a close friend or organizational business, teachers may make advance requests for a personal leave.

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PERSONAL NECESSITY LEAVE

Six days of sick leave may be used by a teacher upon a prior confirmation, in cases of personal necessity.

(1) "Personal Necessity" means circumstances that are serious in nature, that the teacher cannot reasonably be expected to disregard, that necessitates immediate attention, that cannot be taken care of after work hours or on weekends, or circumstances of compelling personal importance.

Article 11 which sets forth responsibilities relating to membership dues deductions.[9]

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(2) A teacher shall make his request in advance except in these cases:

a) Death or serious illness of a member of the immediate family.

b) Accident, involving his person or property, or the person or property of a member of his immediate family.

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SICK LEAVE

Every teacher shall be entitled to 12 days of paid sick leave annually.

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e. The Board with probable cause, may require a verification of illness. Generally, five consecutive working days will pass before such verification is required.

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(Emphasis added)

[9]The District will deduct from the pay of Association members and pay to the Association the normal and regular monthly Association membership dues as voluntarily authorized in writing by the teacher on appropriate forms subject to the following conditions:

1. Such deduction shall be made only upon submission of the appropriate form to the designated representative of the District duly completed and executed by the teacher and the Association.

2. The District shall not be obligated to put into effect any new, changed or discontinued deduction until the pay period commencing fifteen (15) days or more after such submission.

Even though the District had cancelled several one-day leaves of absence for reading teachers to attend a conference, there was no evidence indicating that other provisions of the policy had been implemented by the superintendent nor that further implementation was imminent. The alleged harm to the reading teachers caused by cancellation of their leaves of absence could have been remedied through a backpay order. The mere possibility that the superintendent would implement other provisions of the policy is not a sufficient basis for finding the requisite irreparable harm.[10]

The grant of injunctive relief is an extraordinary power. It is to be exercised always with great caution and only in those cases where it fairly appears that the moving party will suffer irreparable harm in the absence of speedy relief (Schwarts v. Arata (1920) 45 C.A. 596, 601) and where there is a likelihood of success on the merits of the underlying unfair practice charge.

Adequate recourse for the alleged violations of the EERA was available to the Association through the normal unfair labor practice mechanism (Gov. Code sec. 3541.5(c); Cal. Admin. Code, tit. 8, sec. 32600, et seq.) or through court action for breach of contract and, thus, one of the required elements, the

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[10]Similarly, the Board itself has directed the general counsel not to seek relief enjoining a mere threat of a work stoppage (Chico USD (1979), S-CO-37).

existence of irreparable harm that must be present before the Board itself is warranted in seeking injunctive relief, was lacking in this case. This was not therefore a proper case for this Board to seek injunctive relief.

Our decision is limited to the state of the facts in existence on March 26, 1980.

ORDER

For these reasons the Public Employment Relations Board declined to direct the general counsel to seek injunctive relief pursuant to section 3541.3(j) in these cases.

By: Barbara D. Moore, Member

Raymond J. Gonzales, Member

Chairperson Harry Gluck's dissent begins on page 13.

Harry Gluck, Chairperson, dissenting:

The Board majority reached its conclusion declining to seek injunctive relief on March 26, following the general counsel's further investigation at the Board's direction.[1] At that time, the Board majority had before it a written submission from the employer conceding that it had officially implemented and partially applied a resolution that even the majority perceives as presenting a prima facie conflict with existing contractual terms. Ante, pp. 9-10.[2]

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[1]Contrary to the implication of the majority (ante, p. 3) this Board did not consider the prior Assocation requests for injunctive relief regarding the factfinder's report until the request at issue here was brought to the Board's attention by its general counsel a few weeks later, when the strike was already underway.

[2]The school board policy was adopted March 6, 1980 and provided, in full:

> EMERGENCY BOARD POLICIES
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> In the event of an employee work slowdown, work stoppage or any other concerted activities, the Superintendent is authorized to implement the following emergency policies:
>
> I. EMPLOYEE ABSENCES
>
> All employees absences within scope of existing leave policies must be substantiated with a doctor's statement or other authenticated documentation acceptable to the Superintendent. All unauthorized absences will result in a deduction of salary for each day of absence for

As demonstrated by the general counsel's investigation, this resolution was first adopted in 1978 in connection with a

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certificated and classified employees. Further, no administrator may give approval to any employee's request for permission to take personal leave even with the loss of pay.

II. SUBSTITUTES

The Superintendent shall be authorized to pay up to $85 per day and reasonable allowance costs for substitute employees replacing regular teachers during the period of time the emergency is in effect and up to $68 per day and reasonable allowance costs--or up to $8.50 per hour and reasonable allowance cost for less than eight (8) hours--for substituting employees replacing supervisors of children during the period of time the emergency is in effect.

III. CLOSING OF SCHOOLS

The Superintendent and/or his designated authority shall be the only employee of the Districts authorized to close any of the Districts' educational facilities. Such facility will be closed only when, in the judgment of the Superintendent or his delegated authority, the physical welfare of the children on that site is questionable.

IV. PHYSICAL AND EDUCATIONAL PROTECTION

The Superintendent and/or his designated authority shall have the

threatened work stoppage. Thereafter, the policy was apparently suspended. Early in March, 1980 the policy was

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> authority to take such immediate emergency steps as he deems necessary to insure the physical and educational well-being of the students of the Eureka City Schools. The Superintendent will also have full authority to take such steps as he deems necessary to insure and protect the physical well-being of all employees of the Eureka City Schools, as well as the properties owned by the Districts and supervised by the Board of Education and its authorized agent.

V. ABSENT WITHOUT LEAVE

> Any certificated employee absent without leave for five (5) days or more without satisfactory explanation shall be deemed to have resigned and the separation shall be entered on the official records. Provided that, if at any time within thirty (30) days after the date of said resignation, the employee so absenting himself/herself shall make satisfactory explanation to the Board of Education, he/she may be reinstated to his/her position.
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> Any classified employee absent without leave for one (1) day or more without a satisfactory explanation shall be deemed to have resigned and the separation shall be entered on the official records.

VI. EMPLOYEE ORGANIZATIONS

> In the event any employee organization engages in any illegal

re-adopted as negotiations bogged down and strike talk increased. However, the resolution was again rescinded later

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activity, its rights and privileges provided in any existing Contracts and/or Board Policies may be terminated, including, but not limited to, payroll deductions.

VII. MANAGEMENT/CONFIDENTIAL EMPLOYEES

It is the responsibility of every management/confidential employee to act as an arm of the Board of Education's administration. Any member of said group failing to comply with the directions of the Board of Education, the Superintendent and/or delegated authority during the emergency shall be considered to have resigned his/her position and responsibilities unless within a twenty-four (24) hour period he/she files with the Superintendent his/her official written explanation for failure to comply with said directives. The individual will then file within thirty-six (36) hours a written request to appear before the Board of Education at a hearing during which he/she shall set forth, in writing, reasons for his/her actions.

The Superintendent shall have the authority to relieve any management/confidential employee immediately of responsibility when, in his opinion, the management/confidential employee has failed to carry out the directives necessary to insure the operation of the school(s).

The decision of the Board of Education shall be final in each case.

in March when the District perceived that negotiations were going forward to its satisfaction. Nevertheless, when negotiations slowed down once more, talk of a strike resumed and the District re-adopted its policy. Immediately, the District partially applied the policy by cancelling certain expected employee leaves of absence. Moreover, the District never denied or repudiated its intent to fully apply the policy after the strike commenced, even when expressly asked by the general counsel during his further investigation.[3]

VIII. AUTHORITY

> These Emergency Board Policies will supersede all existing Board and Administrative Policies, governing the operations of the schools under normal operating conditions.

The employer distributed the policy statement to certificated employees, with a cover letter summarizing the District's view that under California law public employee work stoppages are illegal. The District letter did not include any reference to the recent Supreme Court decision in San Diego Teachers Association v. Superior Court (1979) 24 Cal.3d 1, giving PERB exclusive initial jurisidction to consider unfair practice charges and requests for injunctive relief in connection with school work stoppages.

The cover letter noted that the adopted policy was "in full force and effect." The letter also stated:

> Compliance with these policies is required. Any action to the contrary will be subject to disciplinary measures including, but not limited to, forfeiture of salary and benefits and possible termination.

[3]The general counsel did not submit a written report of his re-investigation to the Board or to me in response to my

Clearly, the majority's understanding of the word "implemented" must be other than the definition commonly used. Here, the District had an anti-concerted activity plan, adopted and re-adopted the plan at will, and put a portion of it into immediate effect to the detriment of employees. The remainder of the policy hung in ready position to punish the exclusive representative and employees engaging in concerted activity. To me, a promise to terminate employees and a promise to withhold organizational income, even as threats, are potentially fatal blows to employee actions which may be protected.[4]

It is PERB's duty to seek a resolution of injunctive relief requests consistent with the statutory purposes of EERA. The

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request. Therefore, this factual statement is made on the basis of my own recollection and notes based on his oral report. Regardless, the District's prior admission that its policy was implemented and partially applied constitutes an adequate ground to base a finding against the District on the effectiveness of the policy.

[4]The majority argues that this case is the mirror-image of a case involving an employee organization strike threat. Ante, p. 11, fn. 10. Three facts distinguish the cases, however. First, there is no suggestion that a mere threat to strike is ever unlawful activity under EERA, constitutional free speech issues aside. Second, the District here had engaged in more than mere threats. Action had been taken and even the majority does not discount that fact. In reality, this case more closely approximates another Board decision to seek injunctive relief. Esparto Unified School District, No. S-CE-322, request for injunctive relief granted April 30, 1980. In that case, a unanimous Board sought an

majority concludes that because negotiations were still taking place at the time relief was sought, damage to the process was not sufficient to justify emergency relief. Ante, pp. 7-8. The point, however, is that the Association was negotiating against a "loaded gun" directed at its membership, as well as its own organizational purse. This is hardly consistent with EERA. Nor would it enhance the statutory design to require employee organizations to accept the majority's implied invitation to break off negotiations in order to get injunctive relief whenever an employer has committed an unfair practice. An employee organization can only be expected to do the best that it can under such circumstances, including pursuit of a negotiated agreement if it so chooses, as well as its unfair practice remedy. It is especially ironic, here, that the exclusive representative suffers because it sought to use the lawful process of this agency; whereas the employer implemented

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injunction to stop threatened but unscheduled disciplinary action by an employer against selected employees. The employees had engaged in an arguably protected refusal to work when their employer had unilaterally changed the contractually agreed upon school calendar. Finally, section 3543.5(a) makes it unlawful for an employer to:

> 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.

a self-help policy and filed no unfair practice charges against the exclusive representative.

Additionally, the majority result is disturbing because it is inconsistent with our statutory goal of maintaining the continuity and quality of educational services. San Diego Teachers Assn. v. Superior Court, supra, 24 Cal.3d at p.11. The Board's decision could easily have prolonged and compounded the strike in Eureka by adding the thorny issue of reprisals to an ultimate contractual settlement. Indeed, it was hardly surprising that, immediately after PERB's decision declining to pursue injunctive relief, the District may have retracted its previous "no reprisals" offer and taken a harder, punitive position.[5] That the parties eventually did reach agreement cannot be construed as proof that the majority's decision was correct.

Finally, the Board's conclusion did not give proper consideration to the probable bad faith bargaining history in this case. First, the District had earlier conditioned its participation in negotations and mediation on the Assocition retracting its strike threat. Granted, the District ultimately withdrew this condition (as did the Association withdraw its threat) and the parties resumed their talks, but the condition

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[5]These allegations were the basis for the unfair practice charge referred to by the majority at p. 6, fn. 4, ante.

had initially been proposed at the time the District's anti-concerted activity policy was in effect. Second, the District's policy was adopted without notice to or negotiations with the exclusive representative, in apparent derogation of existing contract terms. In my view, these actions would be inherently destructive of the statutory rights of the exclusive representative and its members and would probably constitute unfair practices in violation of EERA. For this reason I would also conclude that the strike here, in fact, was arguably protected activity by the employee organization under the terms of our decision in Modesto City Schools (3/12/80) PERB Order No. IR-12. As such, the continuing and irreparable harm of the District's conduct, both as applied and as threatened, should have been enjoined.

In sum, the majority's conclusion that normal unfair practice procedures and breach of contract remedies provide "adequate recourse" for any injury suffered (ante, p. 11) derogates the collective organizational and employee rights at stake and ignores the practical realities of the bargaining relationship under stress. Further, putting aside the character of the work stoppage here, this Board has previously indicated that a strike can be a protected activity under the EERA. By its "too little, too late" approach in this case, the majority has made it possible for an employer, acting

unlawfully, to nullify that protection for an indefinite period of time with impunity. No final order eventually issued in an unfair practice case can restore that protection or rectify the harm done.

Harry Gluck, Chairperson