

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



OAKLAND SCHOOL EMPLOYEES ASSOCIATION,)
)
Charging Party,) Case No. SF-CE-922
)
v.) PERB Decision No. 538
)
OAKLAND UNIFIED SCHOOL DISTRICT,) December 4, 1985
)
Respondent.)
_____)

Appearances: Andrew Thomas Sinclair for Oakland School Employees Association; Nancy Lowenthal for Oakland Unified School District.

Before Hesse, Chairperson; Jaeger and Morgenstern, Members.

DECISION

HESSE, Chairperson: This case is before the Public Employment Relations Board (PERB or Board) on an appeal filed by the Oakland School Employees Association (Association) challenging the dismissal of its unfair practice charge against the Oakland Unified School District (District). Having fully considered the Association's contentions, we find that the Board agent's dismissal, attached hereto, aptly found that, because the arbitrator's award was not repugnant to the Educational Employment Relations Act (EERA or Act), section 3541.5(a)(2) precluded issuance of a complaint.¹¹

¹EERA is codified at Government Code section 3540 et seq. In relevant part, section 3541.5 permits an employee organization to file an unfair practice charge:

In the instant appeal, the Association claims that the arbitrator's decision is repugnant to the Act because that 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. In our view, this is the issue which the arbitrator decided. In his decision dated November 14, 1983, 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.

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. . . except that the board shall not do either of the following: . . . (2) issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration. . . . The board shall have discretionary jurisdiction to review such 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 that such settlement or arbitration award is repugnant to the purposes of this chapter, it shall issue a complaint on the basis of a timely filed charge, and hear and decide the case on the merits; otherwise, it shall dismiss the charge.

We note that the arbitrator's decision does not dispose of the Association's contention that the District failed to negotiate prior to adoption of Bulletin 8010 in 1978. That allegation, however, is untimely,² as this unfair practice charge was not filed until five years later. Moreover, characterizing its charge as a challenge to the unilateral adoption of Bulletin 8010 is deceptive. The gravamen of the Association's dispute is the District's refusal to permit post-termination arbitration. Enactment of Bulletin 8010 simply gave District employees the right to a pre-termination non-binding procedure. Ignoring that fact, the Association attempts to bootstrap the arbitrator's reliance on Bulletin 8010 in his contract interpretation to the assertion that it is herein challenging the initial adoption of 8010. Plainly, it is not true that, by virtue of the arbitrator's decision, the adoption of Bulletin 8010 became a unilateral change.

Finally, while we might well have interpreted the parties' agreement in a manner at odds with that of the arbitrator, we

²The Association submitted a document it contends is a reply to the District's assertion that any unfair practice charge alleging unilateral adoption of the pre-termination procedure established by Bulletin 8010 in 1978 is untimely filed. The Board reviewed the Association's submission under its discretionary authority to do so. (Los Angeles Unified School District and Los Angeles Community College District (1984) PERB Decision No. 408.) Inasmuch as the Association itself raised the timeliness issue in its initial unfair practice charge, we find no merit in the Association's claim that the District waived its right to challenge the timeliness of the charge. (See section 3541.5(a).)

decline to second-guess the arbitrator's decision and, thereby, substitute our judgment for that of the arbitrator.³

ORDER

The unfair practice charge in Case No. SF-CE-922 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Member Morgenstern joined in this Decision. Member Jaeger's dissent begins on page 5.

³The possibility that the Board may have reached a different conclusion in interpreting the parties' agreement and the evidence, does not render the award unreasonable or repugnant. (Los Angeles Unified School District (1982) PERB Decision No. 218.)

Jaeger, Member, dissenting: According to my colleagues, the "gravamen of the charge" is the District's refusal to arbitrate. The May 11 charge states:

This [adoption of 8010] constitutes unlawful unilateral action by the employer.

.....

No bargaining took place with respect to the adoption of Administrative Bulletin 8010, nor was OSEA even informed that it was going to be adopted. At a later point in time when a revision was being considered, bargaining was requested, but the District refused to bargain over the changes.

.....

If it is true that the adoption of Administrative Bulletin 8010 resulted in disciplinary matters no longer coming under the grievance procedure, then this constituted unlawful unilateral action by the District.

In its August 14 amendment, OSEA alleges:

... [T]he District unilaterally adopted Administrative Bulletin 8010 without notice to, or bargaining with OSEA [W]hen the District proposed to revise this Bulletin, OSEA requested bargaining, but the District failed and refused to bargain.

Of course, it was the District's refusal to arbitrate that ultimately brings this case before the Board. But the issue before the Board is neither the District's refusal to arbitrate nor its refusal to bargain. It is whether the arbitrator's decision is repugnant to the Act's purposes because by rewriting the parties' agreement, he permitted the District to unilaterally abandon the contract.

It is not my intent to look behind an arbitrator's finding and refuse deference simply because in my judgment the evidence

is susceptible to other inferences, or to second guess his reading of the record. However, the very nature of a repugnancy claim does necessitate a review of the arbitrator's decision in terms of its effectuation of the Act's purposes.¹

In respect to the repugnancy issue, I find the single grievance procedure in Article 28 to be straightforward and commonplace: a written statement of the grievance directed to the designated management representative; appeal to the District superintendent; and, finally, a written demand for binding arbitration. Only one restriction on the availability of this

¹I note that two other arbitrators who heard cases involving virtually identical contract language, the same charging party, and the same District arguments (one contract included the Education Code reference deleted from the one at hand, and there were different grievants in different representation units) specifically disagreed with the arbitrator here. Arbitrator John Kagel, in response to the District's argument that the decision of the arbitrator in this case be res judicata, wrote:

There is no ambiguity about this language - it is exclusive and mandatory, showing no alternative for disciplinary grievances except Article XXII's procedures. The Arbitrator has no authority to ignore nor change this language It is to be enforced as it is clearly written. (Emphasis in original.)

And Arbitrator Gerald R. McKay wrote:

. . . [T]he language of the Contract is not confusing or ambiguous. . . . It is the function of the arbitrator in arbitration to apply the language of the Contract as it is written. It is not the function of an arbitrator to rewrite the Contract in a manner which the arbitrator believes the parties intended had they been aware that a dispute

process is mentioned; it may not be used to challenge the suspension, demotion, or discharge of a probationary employee.² There is no mention of 8010 in Article 28 or in any other provision of the contract.

The arbitrator acknowledged that after adoption of 8010, Article 28 was amended through negotiation to include certain Education Code-related disputes, but that the disciplinary grievance language was left intact. More significantly, he acknowledged that in the 1982 negotiations, "the District was determined to eliminate" that language but failed to do so. Instead, he found a "trade-off" in OSEA's acceptance of the District's proposal to delete the Education Code reference in exchange for binding arbitration (in lieu of the previous advisory process). And again the disciplinary grievance language remained intact.

would arise under the provision of the Contract. . . .

Referring directly to the instant arbitral decision, McKay continued:

. . . It is not the function of the arbitrator to second-guess the parties and state that they could not have meant what they said because they were not serious enough when they reached that agreement. . . . The speed or casualness with which they reached an agreement has absolutely no bearing whatsoever on the words to which they agreed.

²The arbitrator did not comment on this last provision which, in my view, can only be read to mean that arbitration of disciplinary action is available to nonprobationary employees.

It is important to note how the arbitrator then arrived at a conclusion which, according to the majority, somehow resolved an unfair practice charge which was first filed six months after the issuance of his decision.³ He first found that the adoption of 8010, the alleged unilateral act, permitted the inference that the District did not understand that disciplinary grievances were subject to the contract arbitration process. He then looked to past practice and the parties' bargaining history and, despite his findings concerning the District's futile efforts to remove the disciplinary grievance language, found neither to be helpful.

Then, finding it incredible that the parties resolved this issue in "an almost casual manner, without discussion of its consequences or implications,"⁴ the arbitrator proceeded to give Article 28 his own reading which would "breathe life into all parts of the contract." Acknowledging that a claim of unjust discharge was a "grievable claim" under the contract, he then read the word "or" as indicating that in disciplinary cases a different procedure was to be used from that used in other grievances described in the Article.⁵ Finally, he

³The arbitration decision was issued in November 1983; the unfair practice charge was filed in May 1984.

⁴How this characterization was arrived at is unclear.

⁵The first paragraph of Article 28 reads:

An employee has the right to file a grievance when he or she believes that there has been a violation of this Agreement which adversely

concluded, without further explanation, that the 8010 procedure was incorporated by the parties into Article 28 and was to be used in such disciplinary cases.

To me, it is beyond dispute that the word "or" simply denotes the different types of grievances that may be filed. Thus, an employee may file a grievance alleging a contract violation . . . or an employee may file a grievance over his or her discharge, or his or her suspension, or his or her demotion. To conclude that this innocent word contemplates a separate, and unspecified, grievance procedure, seems to overstep interpretation to the point of rewriting the agreement. When considered together with the fact that the word "or" appeared in the parties' contract at least one year before the District adopted 8010, the arbitrator's conclusion is simply incomprehensible.

The Board will defer to an arbitrator's interpretation of contract language where extrinsic evidence is used to determine the meaning of contract language that is reasonably susceptible to different interpretations. But where contract language that is clear and meaningful and not absurd⁶ is not followed,

affects the employee, or when he or she has been suspended, demoted, or discharged. A grievance shall be defined as a written claim by an employee covered by this Agreement that there has been such a violation.

⁶See Witkin, Summary of California Law, Contracts, pp. 526, 527

resulting in the arguable denial of the charging party's statutory right to access to this Board's processes, deferral is inappropriate and amounts to virtual abdication of the Board's obligation to effectuate the purposes of the Act.

The majority finds untimely that part of the charge alleging that the adoption of 8010 violated the Act. This conclusion is irrelevant to the issue at hand whether the arbitrator addressed the underlying unfair practice charge at all - he certainly did not find it to be untimely - and may also be incorrect. OSEA claims that it was not informed of the Bulletin at the time it was adopted, and later believed it to be only a supplementary procedure. OSEA further claims that it first learned of the District's intention to replace the contract provision with 8010 when it requested and was denied arbitration. These allegations, if true, present an arguable claim that the statute of limitations did not begin to run until the District refused to arbitrate.

I make no judgment of that claim here. If one is to be made, it should be at a hearing after considering both OSEA's argument and the District's affirmative defense. It should not be made here as a throw-away.

Because I believe that the unfair practice charge states facts that, if true, present a prima facie allegation of unlawful employer conduct,⁷ and because I do not believe the

⁷See San Juan Unified School District (1977) EERB Decision No. 12.

standards articulated in Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81⁸ have been met in this instance, I would not defer to the arbitrator's decision and would direct the General Counsel to issue a complaint.

⁸ The matters alleged in the unfair practice charge must have been presented to and considered by the arbitrator; the arbitral proceedings must have been fair and regular; all parties must have agreed to be bound; and the decision of the arbitrator is not repugnant to the purposes and policies of the Act.

PUBLIC EMPLOYMENT RELATIONS BOARD

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September 6, 1984

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Re: Oakland School Employees Association v.
Oakland Unified School District, Unfair Labor
Practice Charge No. SF-CE-922; DISMISSAL OF
UNFAIR PRACTICE CHARGE AND REFUSAL TO ISSUE
COMPLAINT

Dear Parties:

Pursuant to Public Employment Relations Board (PERB or Board) Regulation section 32630, the above-entitled matter is hereby dismissed because it fails to allege facts sufficient to state a prima facie violation of the Educational Employment Relations Act (EERA or Act).¹ The reasoning which underlies this dismissal follows.

The EERA is codified at Government Code section 3540, et seq., and is administered by the PERB. Unless otherwise indicated, all statutory references in this decision are to the Government Code. Sections 3543.5(a), (b), and (c) provide that it shall be unlawful for a public school employer to:

- (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise interfere with, restrain, or coerce

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Procedural Background

On May 11, 1984, the Oakland School Employees Association (OSEA or Association) filed an unfair practice charge against the Oakland Unified School District (District). In brief, the Association alleges that the District unilaterally adopted an administrative policy providing for pre-disciplinary hearings which effectively wiped out (superceded) the Association's collective-bargained right to have grievances involving disciplinary matters heard by neutral triers of fact.. This action, according to the charging party, violated sections 3543.5(a), (b), and (c) of the EERA. In addition, the Association claims that PERB should issue a complaint because an arbitrator's decision related to the underlying facts did not consider the statutory issue and was repugnant to the Act.²

employees because of their exercise of rights guaranteed by this chapter.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

²Both pre-arbitration deferral and post-arbitration review of a repugnancy claim are governed by a portion of EERA section 3541.5:

(a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following:

.....

(2) . . . issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the

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On August 8, 1984, the General Counsel's Office of PERB wrote a letter to Charging Party pointing out the deficiencies of the unfair practice charge filed against the District. More specifically, I informed the charging party that if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, charging party should amend the charge accordingly. (This letter is labeled Exhibit 1 and is attached hereto.)

Thereafter, the Association filed a First Amended Charge on August 15, 1984 which essentially incorporated the facts and allegations contained in the original unfair practice charge and included some new facts, allegations and conclusory assertions.

Facts

My investigation revealed the following facts:

Relevant Contract Language;

In 1977, the District and Association agreed that the collective bargaining agreement with respect to the

matter at issue, has been exhausted, either by settlement or binding arbitration. However, when the charging party demonstrates that resort to contract grievance procedure would be futile, exhaustion shall not be necessary. The board shall have discretionary jurisdiction to review such 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 that such settlement or arbitration award is repugnant to the purposes of this chapter, it shall issue a complaint on the basis of a timely filed charge, and hear and decide the case on the merits? otherwise, it shall dismiss the charge

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white-collar bargaining unit would contain a grievance procedure providing for advisory arbitration³ with the final decision left to the Board of Education. (See Article XIV.) This agreement ran from July 1, 1977, to June 30, 1978. The grievance language was carried over into the second contract (Article XXI) (1979-80) and the third contract (1982-84) with some modifications, but the "suspension, demotion, discharge" language (see fn. 3, ante) remained the same.

On December 19, 1979, OSEA and the District entered into their first collective bargaining agreement for the paraprofessional ~~bargaining~~ unit, and it was to run until June 30, 1981. This agreement contained much of the same language with regard to grievances as the earlier white-collar agreement (Article XXVIII of paraprofessional contract); however, it added the phrase ". . . or when a provision of the Education Code has been violated."⁴

In 1981, the parties entered into another collective bargaining agreement for paraprofessional employees which ran from March 31, 1982 to June 30, 1984. This agreement contained the same contract language, except that references to grieving District policies and the Education Code were deleted. This

³The grievance provision in the 1977 contract for the white-collar bargaining unit read as follows:

A grievance may be filed when an employee feels that there has been a violation of any specific provision of this Agreement, or when an employee is suspended, demoted or discharged, or when an employee believes that an existing District policy has been misapplied in such a way as to adversely affect that employee. (Article XIV).

⁴The grievance provision in this first contract for the paraprofessional bargaining unit read as follows:

An employee has the right to file a grievance when he or she believes that there has been a violation of this Agreement, or when he or she has been suspended, demoted,

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second contract provided for binding arbitration for the first time⁵ for the paraprofessional employees.

Relevant Governing Board Policies;

In 1978, while the parties were negotiating their first contract for the paraprofessional bargaining unit, the Board of Education adopted a policy known as Administrative Bulletin 8010 (Personnel Procedures), which contained provisions pertaining to disciplinary grounds and procedures. It provided for a disciplinary hearing before a panel composed of three management employees appointed by the superintendent. Findings and a recommended decision were to be rendered by the panel, and a final decision was to be made by the Board of Education.⁶ No bargaining took place with respect to the

or discharged, or when he or she believes that an existing District policy has been misapplied in such a way as to adversely affect the employee, or when a provision of the Education Code has been violated.

⁵It was on the basis of the language in this second contract that the grievance in the Joyce Taylor arbitration was filed.

⁶Bulletin 8010, in addition to delineating the grounds for suspension and/or dismissal, prescribed the following procedure:

If the superintendent accepts the recommendation of a supervisor that an employee be suspended or discharged, he must - at the request of the grievant - convene a panel of three employees to hear the charges. None of the panel members can be employed in the unit or department of the grievant. The procedure requires notice to the grievant, with particularity, of the charges against him or her; it protects the employee's right to be represented by a person of his or her choice; it calls for the presentation of testimonial evidence,

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adoption of Administrative Bulletin 8010, nor was OSEA even informed that it was going to be adopted. The evidence reveals that once OSEA learned of the adoption of Administrative Bulletin 8010 it did not file an unfair labor practice charge, with PERB. At a later point in time, when a revision was being considered, bargaining was requested, but the District refused to bargain over the changes.

Prior Requests to Arbitrate and Superior Court Action;

During the terms of the 1979-81 agreements, the District discharged Lloyd Harper, a member of the white-collar bargaining unit, after giving him an AB 8010 hearing. OSEA then filed a grievance under the collective bargaining agreement and requested arbitration. The District refused to take the matter to arbitration on the grounds that Harper had already received a hearing, and OSEA then filed a petition to compel arbitration in the Alameda County Superior Court. The District resisted the petition on the grounds that Harper was not entitled to two hearings. The court ordered the matter to arbitration but did not determine any findings of fact or conclusions of law.

On March 22, 1983, the parties went to arbitration in the Joyce Taylor grievance. Joyce Taylor, the grievant, was an instructional assistant in the paraprofessional bargaining unit before she was terminated in April 1982 for excessive absenteeism. Prior to her dismissal, Ms. Taylor was given a

with the grievant having the right to present witnesses and, by implication, to cross-examine adverse witnesses; a record is to be made by tape recording, with a copy to be made available to the grievant.

The panel is required to submit its findings and recommendations to the superintendent or his designee who adopts, rejects, or modifies them. The decision of the superintendent or his designee is appealable to the Board of Education, which reviews the decision on the record made before the three-person panel.

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hearing under District Administrative Bulletin 8010 which determined that she should be dismissed. Thereafter, the Union sought an arbitration hearing for Ms. Taylor, arguing that Article XXVIII of the contract⁷ gave an employee a contractual right to a post-termination hearing in a case of suspension, discharge or termination - i.e., a de novo hearing before a neutral arbitrator with the authority to make a binding award.

The threshold question posed by the grievance was one of arbitrability.⁸ Contrary to the Association, the District maintained before the Arbitrator that it had always been its position that the merits of a disciplinary action were not subject to the grievance process in the contract, but that only the procedural rights pertaining to disciplinary actions were grievable pursuant to the contract.

Accordingly, the only issue in the proceeding was as follows:

Are the issues raised in the Joyce Taylor grievance subject to the grievance procedure of Article 28, including submission to final and binding arbitration? If yes, what is the appropriate remedy?

The record of the case before Arbitrator Wollett was voluminous. In addition to three days of taped transcript,

⁷Article XXVIII of the Contract provides that:

An employee has the right to file a grievance when he or she believes that there has been a violation of this Agreement which adversely affects the employee, or when he or she has been suspended, demoted, or discharged. A grievance shall be defined as a written claim by an employee covered by this Agreement that there has been such a violation.

⁸The District moved at the arbitration hearing that the arbitrator should stay a hearing on the merits of Ms. Taylor's grievance and should deal exclusively with the question of arbitrability raised by the jurisdictional issue. The arbitrator granted this motion.

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there were 20 union exhibits, 17 District exhibits, and eight joint exhibits. According to Arbitrator Wollett's opinion at page 7, many of the exhibits related to negotiating history - proposals and counter proposals.

The Arbitrator's Decision

The arbitrator ruled on November 24, 1983 that the issue pressed by the union on behalf of Ms. Taylor was not arbitrable under the language of the collective bargaining agreement. In reaching his conclusion that the grievance-arbitration language did not allow for a de novo hearing by an arbitrator on a disciplinary action, Arbitrator Wollett considered all relevant, bargaining history and the past practices presented to him by the parties, and he applied traditional rules of contract construction. The arbitrator noted as a preliminary matter that:

The patent ambiguity of Article 28 makes it appropriate, if not essential, to look at extrinsic evidence. (Arbitrator Wollett's Decision at p. 6.)

Arbitrator Wollett concluded that the testimony relative to the negotiating history of the grievance language in the contract was inconclusive.

Since neither the negotiating history nor past practice, such as it was, is helpful, the arbitrator must resolve this dispute by looking at the words of the agreement and giving them a reading which breathes life into all parts of the contract, reconciling conflicts where they exist. (Arbitrator Wollett's Decision at p. 10.)

Further, Arbitrator Wollett determined that the Union, who had the burden of proof, had presented insufficient evidence to persuade him that the parties agreed in 1982, that an arbitrator would have jurisdiction to hold a fresh, full-blown evidentiary hearing, and thereby re-examine the merits of the disciplinary claim (as if A.B. 8010 did not exist). The arbitrator proceeded with his analysis:

One of the difficulties that I have with the union's position is the nature of this

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controversy. The Board of Education not only denies that it ever agreed to binding arbitration of disciplinary matters, it also claims that for it to make such an agreement would be unlawful under the Education Code. I pass no judgment on that assertion, but it does underlie the importance with which the Board viewed this matter. The union, on the other hand, also regarded it as an issue of first magnitude; its success in gaining agreement to binding arbitration would have been a major breakthrough.

That the parties resolved such a profoundly significant issue in an almost casual manner, without discussion of its consequences and implications, is not credible.

Arbitrator Wollett reasoned that:

It does not follow that the merits of a claim of discipline without just cause are subject to binding arbitration under Article 28. This is so because the use of the word "or" in the first sentence of Article 28 implies that the procedure to be followed in the event of suspension demotion, or discharge is different than the one to be followed when there is a claim of other kinds of violations of the agreement adversely affecting the employee.
(Arbitrator Wollett's Decision at p. 11.)

Thus, after interpreting the contract, applying conventional rules of contract construction and considering the bargaining history, Arbitrator Wollett concluded that the substance of a disciplinary dispute was not arbitrable. (Arbitrator Wollett's Decision at pp. 2, 6-9, 12-14.) Nevertheless, Arbitrator Wollett sympathized with the argument that an A.B. 8010 hearing was deficient in not providing for an impartial decisionmaker. (Arbitrator Wollett's Decision at p. 13.)

However, it is not the function of an arbitrator to re-write the parties'

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agreement to conform to his notions of due process. It is* rather, his function to identify the dimensions of that agreement as best he can and apply it to the facts of the case before him.

This interpretation of the agreement necessarily incorporates Administrative Bulletin 8010 by reference. Accordingly, it cannot be modified during the life of the basic agreement between the parties without mutual consent. {Arbitrator Wollett's Decision at p. 13.)

The Association's charge is premised on the argument that the Arbitrator's decision was repugnant to the Act. As discussed below, OSEA's argument is based in substantial part on the assertion that had the District's negotiator, James Wilson, testified in the case, the arbitrator would have reached a different result. It is undisputed that the arbitrator was not presented with, nor did he discuss, the testimony of James Wilson, District negotiator, whom the Association asserts, in its First Amended Charge, would have clarified matters in this case.⁹

⁹James Wilson testified in a subsequent arbitration involving the discharge of Nellie Cordova before Arbitrator Gerald McKay concerning a different contract for white-collar employees. Wilson testified in the Cordova hearing that the District had not intended to incorporate any of the Administrative Bulletins into that collective bargaining agreement. (McKay Decision at p. 6.) Arbitrator McKay determined that pursuant to Article XXI of the white-collar contract, Cordova was entitled to a hearing on the merits by a neutral arbitrator.

The white-collar contract is different from the paraprofessional contract. (Arbitrator McKay's Decision at pp. 12-13.) One difference is that the paraprofessional contract provides for binding arbitration while the 1979-81 white-collar contract provides for advisory arbitration. It is unclear to what extent the arbitrator may have been influenced in ordering

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Contrary to the Association's assertion, Arbitrator McKay was of the opinion that Arbitrator Wollett's decision was not binding on him because Arbitrator McKay's case involved a different contract. Arbitrator McKay stated in his discussion of the Nellie Cordova case that:

Arbitrator Wollett's Decision comes very close to dealing with the question which is presently before this arbitrator. However, Arbitrator Wollett was called on to interpret the 1982-84 Contract which is different in some respects from the 1979-81 Contract which is before this arbitrator. Arbitrator Wollett's Decision relative to the meaning of the 1982-84 Contract cannot be considered binding on this arbitrator in his responsibility to interpret the 1979-81 Contract. In the first place, prior arbitration decisions are not normally considered "res judicata." The basic

arbitration by the fact that, no matter what the arbitrator said, the school board would still have the power to impose discipline. Indeed, Arbitrator McKay noted that:

The arbitration provisions in the 1979-81 Contract provide for advisory arbitration decisions. In this respect, regardless of the result of the arbitrator's Award, the ultimate determiner of the result will be the Board of Education. The arbitrator fails to understand why, even if he accepted the Employer's assertion relative to the present state of the law, having the arbitrator hear the merits of the dispute would violate the law. When the arbitrator hears the grievance on the basis of just cause and listens to the merits of the dispute, his Decision is reviewable by the Board of Education under the 1979-81 Contract. The Board of Education has given nothing to the arbitrator. (Arbitrator McKay's Decision at p. 15.)

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concept of arbitration calls on each arbitrator to interpret the facts in the Contract "de novo" and merely use other arbitration decisions as guidance and not as binding precedent. However, as a matter of arbitration practice, arbitrators generally consider a decision involving the same Contract between the same parties to be binding and let the parties change that result through negotiations if they choose to do so. In the second place, the Contract before *this arbitrator* is different than the one which was before Arbitrator Wollett. (Arbitrator McKay's Decision at pp. 12-13.)

Finally, in terms of the present unfair practice charge, a review of the arbitrator's decision indicates that inherent in Arbitrator Wollett's analysis is a determination of the unfair practice issue in this case. In determining this issue, he had before him the arguments of the District relying on its history and interpretation of the contract. Most important, he had the Association's own past negotiations evidence to consider. His interpretation of the contract and consideration of the evidence presented to him is not unreasonable.

The First Amended Charge

The first amended charge filed by OSEA on August 15, 1984 alleges in essence the following principal arguments:

1) The Taylor Decision by Arbitrator Wollett is not supported by the record. The Association alleges that the parties could not have intended the word "or" to mean that a different procedure was to be used for disciplinary matters. The Association alleges that it was not clear to the parties that the issue of arbitrability would be resolved on the basis of the use of the word "or" and critical evidence regarding the parties' intent in using the word was not presented or considered by the arbitrator.

2) The proceedings were not fair and regular because Arbitrator Wollett failed to consider all relevant bargaining history since certain highly relevant evidence was not presented. The Association alleges that Arbitrator Wollett's decision was based on supposition as to the intent of the parties. As noted above, the only evidence pertaining to the

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intent of the parties, which the arbitrator allegedly failed to consider was testimony of James Wilson, who was not called to testify in the proceeding. Charging Party's only expressed reason for failing to call Wilson, is that the representative of Charging Party who presented the case was a non-lawyer who did not recognize "the intent of the parties" as being a critical issue.

3) Arbitrator Wollett's decision departed from commonly accepted rules of contract construction because according to the Association the contract is not confusing or ambiguous. Thus, Arbitrator Wollett should have given effect to the meaning of the language without any further considerations. The Association alleges that Arbitrator Wollett's decision was based on "supposition and speculation which are unsupported by evidence in the record." (First Amended Charge at p. 5.)

4) The issue of whether the adoption of A.B. 8010 was an unfair labor practice because it constituted a unilateral implementation of a policy within the scope of bargaining was not raised in the arbitration or considered by the arbitrator. The Association asserts that "[n]o findings were made with regard to this issue or with regard to any parallel issue which would involve the same analysis and evidence." (First Amended Charge at p. 4.)

Discussion

The PERB has set forth standards for determining whether a post-arbitration complaint should issue under EERA section 3541.5(a). (See Dry Creek Joint Elementary School District (6/21/80) PERB Order No. Ad-81a; Los Angeles Unified School District (6/30/82) PERB Decision No. 218.)

In Dry Creek the Board found an arbitrator's award repugnant to the Act because it failed to restore the status quo and award back pay following an employer's unilateral salary reduction. The PERB applied federal precedent of the National Labor Relations Board (NLRB) adopting the discretionary standards set forth in Speilberg Manufacturing Co. (1955) 112 NLRB 1080 [36 LRRM 1152J.0¹⁰ Under Speilberg and its progeny there are four standards which must be satisfied before deferral to an

¹⁰Federal practice, although discretionary under the

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arbitrator's award is appropriate: (1) the matter raised in the unfair practice charge must have been presented to and considered by the arbitrator; (2) the arbitral proceedings must "appear to have been fair and regular"; (3) all parties to the arbitral proceedings must have "agreed to be bound"; and (4) the decision of the arbitrator must not be "clearly repugnant to the purposes and policies of the Act." (Dry Creek Joint Elementary School District, supra, at p. 4.)

Construing the repugnancy standard of review in section 3541.5(a), the Board also reasoned that:

. . . ~~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 (Id. at p. 5.)

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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. (Id. at p. 6.)

Although the Board will not reject an arbitrator's award,

. . . because it would have provided a different remedy than that offered by the arbitrator, it may well so consider an award which fails to protect the essential and fundamental principles of good faith negotiations (Id. at p. 7, emphasis in original.)

National Labor Relations Act (NLRA) (29 U.S.C. 151 et seq.), may be used to guide interpretation of similar or identical provisions under the EERA. (See e.g., San Diego Teachers Assn. v. Superior Court (1979) 24 Cal.3d 1, 12-13; Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 616; Public Employment Relations Board v. Modesto City School District (1982) 136 Cal.App.3d 881, 895-897.)

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The Los Angeles case illuminated the Board's application of the Dry Creek standards. In Los Angeles the PERB declined to issue a complaint on a charge of unlawful unilateral action by an employer. An arbitrator had determined that the employer's change in bus driver reporting locations was consistent with management's right under the parties' contract. Although the arbitrator did not dispose of the charging party's bargaining claim under the EERA, the PERB found that there was a parallel between the unfair practice and contract issues, and that,

. . . the arbitrator was presented with and considered all of the evidence relevant to the unfair. (Los Angeles Unified School District, supra, PERB Decision No. 218 at p. 7.)

The PERB's "parallelism" standard relied upon Bay Shipbuilding Corp. (1980) 25 NLRB 809 [105 LRRM 1376] and Atlantic Steel Co. (1979) 245 NLRB 107 [102 LRRM 1247].

In this case, the Association contends that the arbitrator's award was deficient in two respects; first, that it failed to consider the statutory issue raised in the charge (i.e., unilateral change by District); and second, that the arbitrator's decision was repugnant to the Act because he determined that A.B. 8010 superceded a collectively-bargained right to grieve suspensions, demotions and discharges.

For the reasons that follow, it is concluded that the charging party has failed to establish that the four-prong test set forth in Spielberg was not satisfied in this case.

First, the arbitral and statutory issues are clearly parallel; both turn essentially on whether the issues raised in the Joyce Taylor grievance are subject to the grievance procedure of Article 28, including submission to final and binding arbitration. The facts presented to Arbitrator Wollett are parallel to those that would be presented to PERB. Arbitrator Wollett's analysis was thorough in that he considered all relevant bargaining history and the past practice of the parties and finally he relied on conventional rules of contract construction. PERB would have followed this same analysis for a unilateral change violation. (See Marysville Joint Unified School District (5/27/83) PERB Decision No. 314 at pp. 8-9.) The arbitrator found that Ms. Taylor was not permitted under the contract to seek arbitration of her claim on the merits

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with a second hearing which ignored the prior hearing on the ground that it was inherently unjust. Arbitrator Wollett concluded that this was not an arbitral issue under the contractual language.¹¹ His interpretation of the contract and consideration of the evidence presented to him is not unreasonable.

In keeping with the precedent established in Los Angeles Unified School District (6/30/82) PERB Decision No. 218, even if PERB were to disagree with the arbitrator's assessment of the evidence supporting the Association's argument, the PERB is bound to defer where the facts necessary to the arbitrator's holding are parallel to those that would be presented to this agency.¹²

Second, the Association asserts that the proceedings were not fair and regular because Arbitrator Wollett's Decision failed to consider highly critical evidence pertaining to the intent of the parties. The arbitrator's conclusion about what the parties intended was plainly a fundamental step in his overall analysis of the contract, and he thoroughly considered all of the evidence presented to him. Thus, the Association should be barred from arguing, at this date, that it did not present all of the relevant evidence and argument on the basic unfair

¹¹On the other hand, Arbitrator Wollett concluded that if Ms. Taylor had challenged the A.B. 8010 proceeding on the ground that it did not conform to the requirements of the Bulletin, then that issue would have been arbitrable. But this is not what she did.

¹²The PERB's "parallelism" standard in Los Angeles Unified School District, supra, PERB Decision No. 218 relied upon Bay Shipbuilding Corp. (1980) 25 NLRB 809 [105 LRRM 1376] and Atlantic Steel Co. (1979) 245 NLRB 107 [102 LRRM 1247]. Thus, PERB has rejected for some circumstances the NLRB determination in Procopo, Inc. (1982) 263 NLRB No. 34 [110 LRRM 1496], that deferral is unwarranted where the grievant consciously chose not to present the unfair practice issue to the arbitrator. PERB's holding also is consistent with the distinction between the discretionary jurisdictional process of the NLRB and the statutory mandate of EERA section 3541.5(a) requiring deferral where the grievance machinery "covers the matter at issue."

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practice issue. If perhaps, the Association declined to fully bear its burden of producing evidence on a necessarily included finding, it would defeat the purpose of arbitral deferral and contract stability to allow the Association the proverbial "second bite of the apple." (See generally, Carey v. Westinghouse Corp. (1964) 375 U.S. 261, 270-271 [55 LRRM 2042]; Associated Press v. NLRB (1974) 492 F.2d 662, 667 [85 LRRM 24403]; Spielberg Manufacturing Co., supra, 112 NLRB 1080, 1082 [36 LRRM 1152].)

Third, the parties plainly agreed to be bound by the award.

Fourth, the union claims that the arbitrator's award is repugnant to EERA because his decision effectively wiped out (superceded) a collectively-bargained right by the union to have disciplinary matters considered by a neutral party. The standard for Board review of the repugnancy factor in deferral cases has been articulated by the NLRB as follows:

The majority reviews the record evidence, sees no irregularities in the proceedings and no facial errors in the arbitrator's factual findings, and then examines the arbitrator's legal conclusion to see if, on the facts he has found, it is consistent with Board law. Finding that it is, and that the arbitrator actually considered Board law in ruling on all of the discharges . . . the majority defers to the arbitrator's decision. This approach is more consistent not only with past Spielberg decisions, but also with the strong labor policy which favors voluntary arbitration.

Kansas City Star (1978) 236
NLRB 866, 869 [98 LRRM 1320].

Without passing on whether the Board would reach the same result as the arbitrator on this issue, it is clear that the arbitrator's decision is not clearly repugnant to the purposes and policies of the Act.¹³ In finding that the substance of

¹³ The possibility that PERB may have reached a different conclusion in interpreting the parties' agreement and the

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a disciplinary dispute was not arbitrable, Arbitrator Wollett not only considered the meaning of the contract, by specifically examining the "just cause" and grievance-arbitration provisions, but he thoroughly reviewed evidence concerning the parties' bargaining history and past practices. Thus, a prima facie case of repugnancy under EERA has not been established. (See Dry Creek Joint Elementary School District, supra, PERB Order No. Ad-81a; Los Angeles Unified School District, supra, PERB Decision No. 2187)

Pursuant to Public Employment Relations Board regulation section 32635 (California Administrative Code, title 8, part III), you may appeal the refusal to issue a complaint (dismissal) to the Board itself.

Right to Appeal

You may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal (section 32635(a)). To be timely filed, the original and five (5) copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) on September 26, 1984, or sent by telegraph or certified United States mail postmarked not later than September 26, 1984 (section 32135). The Board's address is:

evidence does not render the award unreasonable or repugnant. The Ninth Circuit has stated:

If the reasoning behind an award is susceptible of two interpretations, one permissible and one impermissible, it is simply not true that the award was clearly repugnant to the Act. . . . The reasoning if ambiguous, could have been interpreted in a non-repugnant way, and should have been in order to give arbitration the "hospitable acceptance" necessary if "complete effectuation of the Federal policy is to be achieved."

Douglas Aircraft Co. v. NLRB
(9th Cir. 1979) 609 F.2d 352
[102 LRRM 2811, 2813.]

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Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five (5) copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal (section 32635(b)).

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany the document filed with the Board itself (see section 32140 for the required contents and a sample form). The document will be considered properly "served" when personally delivered or deposited in the first-class mail postage paid and properly addressed.

Extension of Time

A request for an extension of time in which to file a document with the Board itself must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party (section 32132).

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Very truly yours,

DENNIS M. SULLIVAN
General Counsel

By

Emily E. Vasquez
Staff Attorney