

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**

NEWARK TEACHERS ASSOCIATION,

Charging Party,

v.

NEWARK UNIFIED SCHOOL DISTRICT,

Respondent.

Case No. SF-CE-2167-E

PERB Decision No. 1595

February 9, 2004

Appearances: California Teachers Association by Ramon E. Romero, Attorney, for Newark Teachers Association; Miller Brown & Dannis by Daniel A. Ojeda, Attorney, for Newark Unified School District.

Before Baker, Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case is before the Public Employment Relations Board (Board) on exceptions filed by the Newark Teachers Association (Association) to a proposed decision (attached) of an administrative law judge (ALJ). The issue before the ALJ was whether an arbitration decision resolving a dispute between the Association and Newark Unified School District (District) was repugnant to the Educational Employment Relations Act (EERA)¹. The ALJ found that the arbitration decision was not repugnant to EERA and dismissed the complaint.

The Board has reviewed the entire record in this matter, including the ALJ's proposed decision, the Association's exceptions, and the District's response. The Board finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and adopts the proposed decision as the decision of the Board itself.

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

ORDER

The unfair practice charge in Case No. SF-CE-2167-E is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Members Baker and Whitehead joined in this Decision.



STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

NEWARK TEACHERS ASSOCIATION,

Charging Party,

v.

NEWARK UNIFIED SCHOOL DISTRICT,

Respondent.

UNFAIR PRACTICE
CASE NO. SF-CE-2167-E

PROPOSED DECISION
(4/19/02)

Appearances: Ramon Romero, Attorney, for Newark Teachers Association; Miller, Brown and Dannis, by Daniel Ojeda, Attorney, for Newark Unified School District.

Before , .

PROCEDURAL HISTORY

An employee organization contends here that a school district unilaterally changed a collective bargaining agreement to preclude appealing written reprimands to arbitration, and an arbitrator's decision that reprimands are not appealable to arbitration is repugnant to the collective bargaining statute covering teachers. The school district responds that it has made no unilateral change, and the decision of the arbitrator is neither contrary to the terms of the agreement nor repugnant to the statute.

The Newark Teachers Association (NTA or Association) commenced this action on February 7, 2001, by filing an unfair practice charge against the Newark Unified School District (District). The Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint on March 22, 2001. The complaint contains two allegations. First, the complaint alleges that the District unilaterally excluded written reprimands from appeal under the negotiated grievance and arbitration procedures, in violation

of Educational Employment Relations Act (EERA or Act) section 3543.5(a), (b) and (c).¹

Second, the complaint alleges that an arbitrator's decision finding that written reprimands are not grievable or arbitrable under the collective bargaining agreement is repugnant to the Act because the issue was not fully and fairly litigated in the arbitration proceeding.² Also on

¹ EERA is codified at Government Code section 3540 et seq. In relevant part, section 3543.5 provides as follows.

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

- (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
- (b) Deny to employee organizations rights guaranteed to them by this chapter.
- (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

² Section 3541.5(a)(2) provides in relevant part:

- (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 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 the settlement or arbitration award reached pursuant to the grievance machinery solely for the purpose of determining whether it is repugnant to the purposes of this chapter. If the board finds that the settlement or arbitration award is repugnant to the purposes of this chapter, it shall issue a

March 22, 2001, the regional attorney denied the District's request to defer to the arbitration award.

The District answered the complaint on April 23, 2001, generally denying all allegations and asserting a number of affirmative defenses. Denials and defenses will be addressed below, as necessary.

A settlement conference was conducted by a PERB agent on May 4, 2001, but the dispute was not resolved.

Prehearing conferences were conducted on September 24 and October 15, 2001, and a formal hearing was held by the undersigned in Oakland on October 18, 2001. With the receipt of the final brief on February 28, 2002, the matter was submitted for decision.

FINDINGS OF FACT

The Association is an employee organization, as defined in section 3540.1(d), and the exclusive representative of a unit of the District's certificated employees, as defined in section 3540.1(e). The District is a public school employer under section 3540.1(k). At the time of the events at issue here, the Association and the District were parties to a collective bargaining agreement (CBA) which contains a grievance procedure that culminates in binding arbitration.

At all relevant times, Mary Lotz (Lotz) was a teacher at the District's Bunker Elementary School. On or about June 2, 1999, Principal Kimberly Ortiz (Ortiz) issued her a "Notice of Unprofessional Conduct" criticizing her performance. In brief, Lotz was criticized for medically diagnosing a student as having a learning disability, refusing to allow students to participate in a field trip, and engaging in confrontational behavior with colleagues, students

complaint on the basis of a timely filed charge, and hear and decide the case on the merits. Otherwise, it shall dismiss the charge.

and others. The notice was issued pursuant to Education Code section 44938, which provides that a Notice of Unprofessional Conduct is a preliminary requirement that must be completed before a district can initiate dismissal proceedings against a teacher. The notice itself is not considered discipline under section 44938, but rather is a statutory prerequisite for dismissal. A dispute quickly arose about whether the notice is a statutory Notice of Unprofessional Conduct or discipline under the CBA.

Article 17 of the CBA is titled “intermediate discipline.” In brief, it contains a “just cause” provision, defines the various types of intermediate discipline, incorporates the concept of progressive discipline, and sets forth appeal procedures for intermediate discipline.

Section 17.1.1 states that Article 17 is not the exclusive procedure for intermediate discipline:

Intermediate discipline under these provisions shall not be exclusive but shall be in addition to those disciplinary actions permitted under the California Education Code.

Lotz filed a timely grievance contesting the Notice of Unprofessional Conduct under the "just cause" provision of the CBA, which states in section 17.2 that “disciplinary action shall be for just cause.” The grievance was filed under Article 5 section 5.1.1 of the CBA, which defines a grievance "as a formal written statement by a unit member or the Association alleging that the District has violated an express term of this Agreement." The grievance alleged, among other things, that the Notice of Unprofessional Conduct constituted a “written reprimand,” a type of intermediate discipline expressly provided for in section 17.4.1 of the CBA. Further, section 17.5.1.2 provides that a written reprimand may be issued

. . . . for repeated minor infractions or more severe violations describing the behavior and mentioning any previous warnings, advising that future similar actions could result in further disciplinary action.

Article 17, section 17.2.1 lists eight categories of offenses for which an employee may be disciplined. Among the listed offenses is “unprofessional conduct.”

Article 17 also contains appeal procedures for intermediate discipline. In relevant part, section 17.6 provides as follows:

17.6 Appeal

17.6.1 In the event a unit member appeals a suspension, the suspension shall be served immediately, but the pay shall not be withheld unless the District prevails in the appeal.

17.6.2. Intermediate disciplinary action may be appealed as follows:

17.6.2.1 Oral warning or written reprimand: no appeal.
(Underlining in original.)

The remainder of section 17.6 sets forth appeal procedures for suspensions for up to 15 days.

The District rejected Lotz's grievance at the lower levels of the grievance procedure. The District claimed the Notice of Unprofessional Conduct was a statutory action issued under Education Code section 44938, and therefore it was not grievable under the CBA. Specifically, the District's Level II response states: "Article 17 of the Certificated Contract states 'Intermediate discipline under these provisions shall not be exclusive but shall be in addition to those disciplinary actions permitted under the California Education Code.' The Notice of Unprofessional Conduct was issued pursuant to Education Code section 44938." At no time during the various levels of the grievance procedure did the District assert that a written reprimand, as opposed to Notice of Unprofessional Conduct, was not grievable under the CBA. The Association appealed the grievance to arbitration.

At the outset of the arbitration hearing, the District moved to dismiss the grievance on grounds of substantive non-arbitrability. The District again argued that the Notice of

Unprofessional Conduct is an Education Code procedure, it is expressly excluded from the CBA, and it is not subject to bargaining under EERA. Therefore, the District claimed the arbitrator lacked jurisdiction.

The District also argued that a Notice of Professional Conduct is a statutory action that may be challenged only before the Office of Administrative Hearings as part of a dismissal proceeding before that agency. The District contended, moreover, that Article 17, section 7.1, covers forms of discipline that are "in addition to" disciplinary actions permitted by the Education Code. The actions covered by the CBA are oral warnings, written reprimands, and suspensions without pay for up to 15 days. There is no mention in the CBA of a Notice of Unprofessional Conduct, the District concluded. The District's motion to dismiss did not expressly contend that written reprimands are not grievable under the CBA.

In response, the Association argued the notice given Lotz was a written reprimand covered by the CBA. The arbitrator took the motion under submission.

At the beginning of the arbitration hearing, the District submitted the following arbitrability issue to the arbitrator:

Is a Notice of Unprofessional Conduct prepared pursuant to Education Code Section 44938 arbitrable?

The parties agreed to submission of the following substantive issue:

Did the District violate Article 17, Intermediate Discipline, of the parties collective bargaining agreement when it issued a Notice of Unprofessional Conduct to Mary Lotz on June 2, 1999? If so, what is the remedy?

It was agreed that the arbitrator would receive evidence on the arbitrability issue and the substantive issue. If it was determined that the matter was not arbitrable, the arbitrator would

not reach the merits of the underlying substantive issue. If the arbitrator determined the matter was arbitrable, she would reach the merits of the underlying issue.

At the arbitration hearing, the parties presented evidence and argument in support of their respective positions about the nature of the notice received by Lotz. Evidence of bargaining history as it relates to whether the intermediate discipline article in the agreement was “in addition” to Education Code procedures was introduced. There was no argument at the hearing about whether a written reprimand may be appealed under the CBA.

In its post-arbitration brief, the District contended that the grievance was not arbitrable because the Education Code procedure is outside the scope of representation under EERA and is expressly excluded from the CBA. Therefore, the District argued, the arbitrator lacked jurisdiction to order destruction of the Notice of Unprofessional Conduct. The District argued further that, under section 17.1, the intermediate discipline expressly covered by the CBA -- oral warning, written reprimand, suspensions without pay for up to 15 days -- is "in addition to" disciplinary actions permitted by the Education Code. The District asserted that there is no mention of a Notice of Unprofessional Conduct in the CBA because it is not discipline; rather, it is a notice to an employee of performance problems which could lead to dismissal if not corrected.

In addition, the District argued for the first time that even if the Notice of Unprofessional Conduct is considered a written reprimand, no contract violation exists because the Association may not appeal a written reprimand under section 17.6.2.1 of the CBA. In relevant part, the District's arbitration brief states:

The District has not previously raised this issue because it has consistently maintained the position that the Notice is what it is: a Notice of Unprofessional Conduct, and not a reprimand. . . . However, even if the Notice were a reprimand, the arbitrator

could not make a determination as to whether Article 17 were violated, because the Association has no appeal rights. . . . Since the parties agreed that oral and written reprimands cannot be appealed, they cannot be taken to the next step: arbitration.

The Association's brief addressed whether written reprimands are subject to appeal under the CBA only in a footnote. The footnote, in its entirety, reads as follows.

Section 17.6 concerning "appeals" describes a system for appealing suspensions to the personnel director and the option of expedited arbitration. Subsection 17.6.2.1 contains the statement "Oral warning or written reprimand: no appeal." When read in the context of Section 17.6 it appears to suggest that oral warnings and written reprimands may not be submitted to the appeal system leading to expedited arbitration. There is no prohibition against submitting oral warnings or written reprimands to the regular grievance procedure as NTA has done in the instant case. Indeed, the District has not even asserted that Subsection 17.6.2.1 is relevant to the instant case at any time in the processing of this grievance.

Prior to addressing the submitted issues, the arbitrator summarized the positions of the parties. As more fully explained below, her characterization of the issues is useful in resolving this dispute. The summaries are as follows.

The District argued to the arbitrator that the Notice of Unprofessional Conduct issued to Lotz is not a form of "intermediate discipline" under Article 17. Rather, it is an integral part of the dismissal procedures under Education Code section 44938. EERA does not include dismissal procedures as an enumerated topic within the scope of representation, but only allows public school employers and exclusive representatives to negotiate on disciplinary matters "other than dismissal." (Section 3543.2(b).) Because the Notice of Unprofessional Conduct is a required step in the dismissal proceedings under the Education Code, the District argued, it is part of a statutory dismissal procedure that cannot be subject to negotiations. Any flaws in a Notice of Unprofessional Conduct may be reviewed only by a hearing officer from

the Commission of Professional Competence, which has exclusive jurisdiction over dismissal proceedings under Education Code section 44944(b). Thus, the District argued to the arbitrator that she had no jurisdiction to determine the sufficiency of the Notice of Unprofessional Conduct. An alternative argument presented by the District to the arbitrator is that, even if the Notice of Unprofessional Conduct is determined to be a written reprimand and deemed a form of intermediate discipline under the CBA, it may not be appealed under Article 17.6.2.1.

The arbitrator summarized the Association's position as follows. The Notice of Unprofessional Conduct fits the definition of a written reprimand under Article 17, section 17.5.1.2. The District cannot label an obvious written reprimand a Notice of Unprofessional Conduct and then assert it is outside the scope of the agreement as part of a statutory appeal procedure. Further, the Association argued before the arbitrator, the CBA expressly provides that the disciplinary procedures therein are "in addition" to those provided for in the Education Code, thus establishing that the parties wanted both procedures available. The District's failure to pursue dismissal against Lotz is further evidence that the notice is clearly a disciplinary matter covered by the CBA, not the Education Code.

The arbitrator's decision framed the arbitrability dispute as follows.

The parties' arbitrability dispute turns on whether the written "Notice of Unprofessional Conduct" issued on June 2, 1999, to the Grievant is a 'written reprimand' and therefore subject to the terms of the their collective bargaining agreement, or is instead a statutory notice issued under the Education Code and outside the scope of the agreement and therefore outside the jurisdiction of the arbitrator.

The arbitrator concluded that the notice issued to Lotz was a "written reprimand" for "unprofessional conduct" within the meaning of Article 17, even though it was labeled a Notice of Unprofessional Conduct. She concluded the notice was a "written statement"

alleging “repeated minor infractions” (confrontational behavior) as well as “more severe violations” (medically diagnosing a student and refusing to allow students to attend a field trip). She noted that the notice advised Lotz that “future similar actions could result in further disciplinary action.” Thus, she concluded the notice was a written reprimand as defined in section 17.5.1.2.

The arbitrator further concluded that the District is bound by its agreement to administer "intermediate discipline" in accordance with the CBA, which permits disciplinary action only for “just cause.” The District cannot avoid the terms of its bargain by claiming that disciplinary action is imposed under the Education Code rather than under the CBA, the arbitrator said, for such an interpretation would render the discipline clause meaningless. “When taking any of the disciplinary actions outlined in Article 17,” the arbitrator concluded, “the District is contractually bound to abide by the definitions and procedures in Article 17.” She concluded, moreover, that “the District is entitled at the time it issues a written reprimand to designate the reprimand as also constituting a Notice of Unprofessional Conduct, so that it would be in a position to proceed with dismissal if it deems such action appropriate in the event the reprimand does not have the desired corrective effect.”

The arbitrator next recognized what she described as a problem with the "bifurcated discipline system" in the agreement; that is, an arbitration award that deemed a "Notice of Unprofessional Conduct" a "written reprimand" issued without just cause under the CBA and ordered destroyed would encroach on the exclusive jurisdiction of the Commission on Professional Competence under Education Code dismissal procedures. Such an arbitral decision would negate the District's attempt to initiate dismissal proceedings under the Education Code, because an employer cannot proceed with dismissal without having issued a

Notice of Unprofessional Conduct. To allow an arbitrator to assert jurisdiction over this required preliminary step could interfere with the statutory dismissal proceeding and create a conflict. The arbitrator continued:

Presumably, the preemption language in EERA would provide the answer to such a conundrum. However, under this contract, no such conflict exists between the two avenues of discipline because the contract does not grant an arbitrator authority to review written reprimands. Therefore, no arbitrator would have authority to decide that a reprimand, regardless of whether it is also designated as a Notice of Unprofessional Conduct under the [Education Code] Sec. 44938, was issued without just cause or order that a reprimand be removed for failing to comply with Article 17.

The arbitrator then stated her reasons for reaching this conclusion. First, section 17.6 sets out the right of bargaining unit employees to appeal the discipline authorized by Article 17. Section 17.6.2.1 states: "Oral warning or written reprimand: no appeal." According to the arbitrator, "this language makes a written reprimand not arbitrable because it is not appealable."

Second, the arbitrator rejected the Association's argument that a grievance challenging a written reprimand as lacking "just cause" (section 17.2.1) may be filed under the Article 5 grievance procedure as a violation of "an express term of the Agreement," as provided for in section 5.1.1. Such an argument the arbitrator concluded, would render the "no appeal" language in section 17.6.2.1 meaningless. Furthermore, the arbitrator reasoned, Article 17 permits appeal of a suspension, and makes it clear that an appeal of a suspension can lead to arbitration: it provides that the decision regarding a suspension at the "Level II grievance appeal" can be submitted to expedited arbitration. Under this language, the arbitrator concluded, "it is plain that an 'appeal' and a 'grievance' are one and the same. The scheme allowing appeal to arbitration clearly and unambiguously is limited to suspensions."

Nor can the grievance procedure itself, in Article 5, be read to grant the right to grieve a violation of Article 17, the arbitrator continued, "since the more specific language in [section 17.2.6.1] regarding appeals of actions taken under this one section must prevail over the more general language [in section 5.1.1] defining a grievance as an allegation that the District has violated an express term of this Agreement."

The arbitrator next pointed out that the Association noted in its brief that the District had not raised section 17.6.2.1 as a defense at any point in the grievance procedure, and the District acknowledged as much in its brief. However, the arbitrator did not consider the District's failure to raise section 17.6.2.1 earlier a waiver of this particular arbitrability defense. The arbitrator stated:

Failure to raise an arbitrability defense in a timely manner may be construed as a waiver of that defense, particularly if it is raised at the post-hearing brief stage for the first time. But here, there is no waiver because the District did not fail to raise an arbitrability defense. Rather, the District has consistently asserted that the grievance is not arbitrable, albeit for other reasons than the "no appeal" proviso. Because it has consistently held the position that no "reprimand" was issued and that Article 17 was not involved, it did not address in its prehearing motion to dismiss the provisions of Article 17 covering appeals. Instead it focused on the preemption of disciplinary action by the Education Code and its claim that the Notice of Unprofessional Conduct was a notice arising under the Code, not a reprimand under the contract. Only in its post-hearing brief did it address various "alternative" arguments, in the event the undersigned Arbitrator should reject its arguments and conclude that the Notice of Unprofessional Conduct was in fact a "written reprimand" within the meaning of Article 17. One of those alternatives brought it to the "no appeal" language in the contract. [Fn. omitted.]

The arbitrator held that the District was not barred from raising the section 17.6.2.1 defense in its brief. She reasoned that an additional legal argument in support of an arbitrability claim is permissible under the terms of the CBA. In this instance, the arbitrator continued, "the parties

have themselves recognized that arguments may be presented either at the hearing or in post-hearing briefs." Section 5.4.5 of the CBA covers "Limitations Upon the Arbitrator." In relevant part, it provides:

Section 5.4.5.1: The decision of the arbitrator shall be based solely upon the evidence and arguments presented to [her] by the respective parties in the presence of each other, and upon arguments presented in briefs. The arbitrator shall have no power to alter, amend, change, add to, or subtract from any of the terms of this Agreement, but shall determine only whether or not there has been a violation of any express term of this agreement in the respect alleged in the grievance.

Section 5.4.5.2: This Agreement constitutes a written agreement under Section 3540.1(h) of the Educational Employment Relations Act, Labor Code Section 1126 and other laws of the State of California. The arbitrator shall not have authority to decide any issue not within the submission, and shall determine the intent of the parties by applying generally accepted rules of contract interpretation. Past practice may be considered, but shall not modify clear terms of the agreement. The arbitrator shall be without power or authority to add to, delete from, or modify the terms of this Agreement.

Relying on the first sentence in section 5.4.5.1, the arbitrator concluded that she had the authority to consider "arguments presented in briefs." Thus, the arbitrator concluded that failure to include section 17.6.2.1 as a reason to dismiss the grievance at the outset of the arbitration proceeding did not waive that defense or preclude the District from raising that provision in its post-hearing brief.

Further, according to the arbitrator, "a waiver of a jurisdictional defense is not readily inferred. When, as here, the contract clearly enunciates that written reprimands are not appealable, it would be in excess of the arbitrator's jurisdiction to find that an appeal of a written reprimand is nonetheless arbitrable and then arbitrate the contention that the reprimand was without just cause." Finally, the arbitrator noted that the Association had every reason to

be aware of the "no appeal" proviso in the CBA, and it did address the clause in its post-hearing brief, anticipating that the District would raise it as an additional arbitrability defense.

In sum, the arbitrator concluded that although the Notice of Unprofessional Conduct issued to Lotz was in fact a written reprimand, the question of whether it was issued for just cause is not arbitrable because section 17.6.2.1 precludes its appeal to arbitration.

At the end of the arbitration hearing, the arbitrator instructed the parties to submit two copies of their briefs to her no later than July 24, 2000. The arbitrator would then forward a copy of each party's brief to opposing counsel. This process was completed as ordered by the arbitrator. The Association's attorney, Ramon Romero (Romero), received a copy of the District's brief on or about July 28. The arbitrator issued her decision on August 7.

Because the parties had exchanged simultaneous briefs through the arbitrator, there were only five business days between the Association's receipt of the District's brief and the arbitrator's decision. Romero testified that he mailed the Association's brief on July 24 and went on vacation for four days. After returning from vacation, he worked on other matters from July 31 to August 4, and did not read the District's brief until after he received the arbitrator's award, which was issued on August 7.

On August 29, 2000, the Association asked the arbitrator to reconsider her decision and/or reopen the record for additional evidence concerning bargaining history and past practice. The Association argued that the arbitrator erred when she concluded that written reprimands were not arbitrable under the CBA and such evidence would shed light on the issue. The request stated that written reprimands have always been arbitrable, and the "no appeal" language in section 17.6.2.1 does not mean a written reprimand may not be challenged through the grievance and arbitration procedure in Article 5. According to the Association's

request, section 17.6 contains a procedure for expedited arbitration for suspensions that is distinct from the normal grievance procedures in Article 5 for written reprimands.

The Association's letter also states:

The evidence will show that during the *entire* history of bargaining and practice under Section 17, the District has not even once taken the position that written reprimands are not grievable or arbitrable. When Section 17 was negotiated, the parties did *not* agree to exclude written reprimands from arbitration. At page 16 of your decision, you state that NTA was aware of Section 17.6.2.1 and addressed it in its post-hearing brief, "anticipating" that the District would raise it as an additional arbitrability defense. Precisely the opposite was true. NTA anticipated that the District would *not* raise it as an additional arbitrability defense and the text of the *footnote* in which NTA mentions it so shows. The District has never raised such a defense in the history of Section 17 or in the history of this case. NTA anticipated that the District would *not* do so in its post-hearing brief as well. [Italics in original.]

In addition, the Association advanced several reasons in support of its assertion that the arbitrator exceeded her authority under the first sentence in section 5.4.5.1, as set forth above. First, the Association offered a different construction of that section: "The comma after "other" and the word "and" show plainly and unambiguously that you cannot base your decision *solely* upon a surprise argument presented exclusively in a post-hearing brief. This part of section 5.4.5.1 wording is clearly intended to avoid the type of ambush that the District has perpetrated here." (Italics in original.) Second, the Association argued that section 5.4.5.1 also prohibits an arbitrator from amending or adding to the CBA, and the Lotz decision violated that prohibition by changing the parties' agreement concerning the arbitrability of written reprimands. Third, the Association pointed out that section 5.4.5.2 provides that the arbitrator "shall not have authority to decide any issue not within the submission." As far as arbitrability is concerned, the submission in this case was, "Is a Notice of Unprofessional Conduct prepared

pursuant to Education Code Section 44338 arbitrable?" The Association argued that the arbitrator decided an issue outside this submission.

On August 30, 2000, the District opposed the Association's request. The District noted that the arbitrator expressly stated in her decision that the parties had agreed she would retain jurisdiction solely for the purpose of "resolving any dispute over implementation of the remedy, **but not to reconsider the merits of this decision, which is final and binding.**" (Bold type in original.) Thus, the District claimed the arbitrator had no jurisdiction to reconsider her decision or reopen the record. The District explained that it had not raised a section 17.6.2.1 arbitrability defense prior to the post-hearing brief because it had taken the position that the notice issued to Lotz was a Notice of Unprofessional Conduct, "and it did not wish to concede in any way that the notice was a written reprimand." Consistent with the arbitrator's decision, the District stressed that both parties addressed the arbitrability issue throughout the hearing and, under section 5.4.5.1, it had every right to raise the section 17.6.2.1 argument in its post-hearing brief.

In addition, the District argued, the arbitrator has the authority unilaterally to decline jurisdiction over an issue based on her interpretation of the CBA, even if a jurisdictional claim is not raised by the parties. In this case, the arbitrator's decision fell within this authority.

Finally, the District argued that the Association, in its claim that the arbitrator had gone beyond the submitted issue, had interpreted that issue too narrowly.

In your decision you determined that the document labeled "Notice of Unprofessional Conduct" could also be a written reprimand. It is still, however, a Notice of Unprofessional Conduct. Thus, the question of whether that document is arbitrable was at issue and your decision addressed that question in full.

In her response the arbitrator noted that, based on the stipulation of the parties, she may reopen the record only to resolve a dispute about the remedy. Absent mutual agreement, she said, no authority exists to reconsider the decision. In addition, she noted that the California Arbitration Act limits her authority to correct a decision to circumstances not present here, concluding that mere disagreement as to the interpretation of the CBA is not grounds for reconsideration.

After citing her underlying rationale for the decision, the arbitrator stated that the Association should have raised its arguments when it received the District's brief, not when it received the decision.

The Association made no such request at that time. Rather, the Association appeared to have rested on the concise argument contained in its own brief on the meaning of Sec. 17.6.2.1 and regarding the failure of the District to mention this issue in its prehearing arbitrability motion, apparently in anticipation that the District might make this argument. As reflected in the award, the Association's contentions were considered and the decision was not reached without benefit of argument from both parties. The Association cannot request that the question be revisited now, after issuance of the final and binding award which adopted the District's, rather than the Association's, position on this point.

Therefore, the arbitrator denied the Association's request that she reconsider her decision or reopen the record.

On October 5, 2000, the Association filed this unfair practice charge. At the hearing on October 18, 2001, the entire arbitration record was received into evidence for the purpose of resolving the repugnancy issue. In addition, evidence of bargaining history and past practice was presented regarding the meaning of Article 17 and the "no appeal" language for the purpose of resolving the underlying unilateral change allegation in the event the undersigned decided the arbitrator's decision is repugnant to the EERA. As more fully addressed below, it

determined that the arbitrator's decision is not repugnant to the EERA. Therefore, it is unnecessary to address the evidence of bargaining history and past practice presented at hearing.

ISSUE

1. Is the arbitrator's decision repugnant to the purposes of the EERA?
2. If the arbitrator's decision is repugnant to the purposes of the EERA, did the District unilaterally change the CBA to preclude the appeal of written reprimands?

CONCLUSIONS OF LAW

The Association argues that the arbitrator's decision is repugnant to the Act because the matters raised in the unfair practice charge were not presented to the arbitrator and the arbitration procedure was not fair and regular. The Association contends that the District's defense, to the extent it is based on section 17.6.2.1 of the CBA, was not presented to the arbitrator until it filed its post-hearing brief; in fact, the District had never claimed written reprimands are not grievable or arbitrable. Because this defense was presented to the arbitrator in a post-hearing brief, the Association argues, it had no opportunity to present evidence concerning bargaining history and past practice. The Association contends, therefore, that the arbitration proceedings were not fair and regular because the arbitrator exceeded her authority under the grievance procedure when she based her award on a "surprise argument" raised for the first time in the District's post-hearing brief.

In addition, the Association points to several CBA provisions that prevent the arbitrator from amending or modifying the CBA. In a related claim, the Association contends the arbitrator exceeded her authority under the CBA when she decided a substantive arbitrability issue that was outside the scope of the submission.

Finally, the Association argues, the arbitral proceedings were not fair and regular because the arbitrator did not allow rebuttal evidence and arguments to establish that the District at no time prior to its post-hearing brief asserted that written reprimands were not grievable or arbitrable. The Association contends the footnote in its post-hearing brief does not suggest that it anticipated the District would argue that written reprimands may not be appealed under the CBA. If anything, the Association insists, precisely the opposite is true; that is, the footnote suggests it anticipated the District would not raise the defense.

The District argues in response that the issue presented in the complaint has already been considered by the arbitrator and discussed at great length in her decision. According to the District, the arbitrator's decision that written reprimands may not be appealed is based on clear and unambiguous language in the CBA. Where contract language is clear and unambiguous, the District contends, there is no need to consider past practice or bargaining history to ascertain its meaning, and the CBA expressly incorporates this rule.

The District contends further that the Association's argument here is little more than an attempt to have PERB stand in the shoes of the arbitrator. Even if PERB disagrees with the arbitrator's interpretation of the CBA, the decision should not be overturned, the District asserts. The issue here is not whether the CBA lends itself to a different interpretation; rather, PERB must defer to an arbitrator's decision unless it is not susceptible to an interpretation consistent with the EERA. Under this standard, the District concludes, the arbitrator's award should stand.

In addition, the District contends both parties had the opportunity to present their respective cases before the arbitrator, including arguments regarding arbitrability. Contrary to

the position advanced by the Association, the District contends the arbitrator acted within her authority under the CBA in resolving the claims.

The District next argues that the arbitrator was correct in concluding that the CBA permitted it to raise the Article 17.6.2.1 “no appeal” provision for the first time in its brief. Under the relevant provision of the CBA, it was free to raise evidence and arguments presented at the hearing, as well as post-hearing arguments. In the District’s view, the arbitrator correctly interpreted this provision. In any event, the District disputes the Association’s claim that it was surprised when the Article 17 appeal language appeared in the District’s brief. Pointing to the footnote in the Association’s post-hearing brief, the District contends the appeal issue clearly was anticipated by the Association.

Finally, the District contends, the Association is attempting an end-run around a final and binding arbitration procedure in order to modify an arbitrator’s decision that is appropriate and reasonable based on the relevant contract provisions. In the District’s view, the Association has failed to demonstrate that the arbitrator’s decision is palpably wrong or not susceptible to an interpretation consistent with EERA.

Section 3541.5(a)(2), in relevant part, provides:

(2) . . . The board shall have discretionary jurisdiction to review the settlement or arbitration award reached pursuant to the grievance machinery solely for the purpose of determining whether it is repugnant to the purposes of this chapter. If the board finds that the 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.

In fashioning a test to determining whether an arbitrator's award is repugnant to the EERA, PERB has looked to decisions under the National Labor Relations Act (NLRA)³ for guidance. Adopting the standards first set out in Speilberg Manufacturing Co. (1955) 112 NLRB 1080 [36 LRRM 1152], PERB has applied several factors in resolving repugnancy claims. An award is repugnant to the EERA unless the following criteria are satisfied: (1) the matters raised in the unfair practice charge must have been presented to and considered by the arbitrator; (2) the arbitral proceedings must have been fair and regular; (3) all parties to the arbitration proceedings must have agreed to be bound by the arbitral award; and (4) the award must not be repugnant to the EERA, as interpreted by the Board. (Dry Creek Joint Elementary School (1980) PERB Order No. AD-81a (Dry Creek).

In determining whether matters raised in the unfair practice complaint have been presented to the arbitrator, PERB has adopted the following standard.

. . . We would find that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. [Fn. omitted.] In this respect, differences, if any, between the contractual and statutory standards of review should be weighed by the Board as part of its determination under the Spielberg standards of whether an award is “clearly repugnant” to the Act. . . . Unless the award is “palpably wrong,” [Fn. omitted.] i.e., unless the arbitrator’s decision is not susceptible to an interpretation consistent with the Act, we will defer. [Fremont Unified School District (1994) PERB Decision No. 1036, p. 4 (Fremont), relying on Olin Corporation (1984) 268 NLRB 573 [115 LRRM 1056].]

In applying these factors, the Board has declined to substitute its judgment for that of the arbitrator. Thus, "the 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

³ The NLRA is codified at 29 U.S.C. section 141 et seq.

repugnant." (Oakland Unified School District (1985) PERB Decision No. 538, p. 4, fn. 3 (Oakland); Los Angeles Unified School District (1982) PERB Decision No. 218, p. 8, fn. 6 (Los Angeles).)

In this case, I find that the issue in the unfair practice charge was reasonably encompassed within the arbitrability issue before the arbitrator. The arbitrability issue before the arbitrator was framed as follows: "Is a Notice of Unprofessional Conduct prepared pursuant to Education Code Section 44938 arbitrable?" According to the arbitrator, the arbitrability dispute "turns on whether the 'Notice of Unprofessional Conduct' issued on June 2, 1999, to the Grievant is a 'written reprimand' and therefore subject to the terms of the collective bargaining agreement, or is instead a statutory notice issued under the Education Code and outside the scope of the agreement." The Association had argued that the notice is a written reprimand under Article 17, and the District had argued that it was a statutory notice under the Education Code. Thus, one of the contractual issues before the arbitrator was whether the notice is a written reprimand and subject to the terms of the CBA. This issue is factually parallel to the issue in the unfair practice complaint, which is whether the District unilaterally changed the CBA when it declared that written reprimands are not appealable under the CBA. Although these issues are not identical, they are parallel in that they both involve the question of whether written reprimands are subject to the terms of the CBA. In addressing the submitted arbitrability issue, the arbitrator effectively considered the issue in the unfair practice charge.

Adopting the Association's argument, the arbitrator concluded that the notice is a written reprimand under the "intermediate discipline" provision of Article 17; as such, it could be issued only for "just cause." She further concluded that the District could not avoid the

terms of the CBA by claiming the notice was issued under the Education Code rather than the CBA.⁴ “When taking any of the actions outlined in Article 17, the District is contractually bound to abide by the definitions and procedures in Article 17,” the arbitrator concluded. Thus, the arbitrator adopted the argument advanced by the Association, but she went on to conclude that the written reprimand was not subject to appeal under the CBA. It is this finding which the Association contests as repugnant to the Act.

The arbitrator reasoned that the written reprimand given Lotz is not subject to appeal under the CBA is based on what she viewed as clear contract language prohibiting appeals. Article 17 is entitled “Intermediate Discipline.” Section 17.6.2 sets out the appeal procedures for “intermediate discipline.” It states that “intermediate disciplinary action may be appealed as follows.” Immediately following this language, section 17.6.2.1 provides, “Oral warning or written reprimand: no appeal.” The arbitrator interpreted this language to mean “a written reprimand [is] not arbitrable because it is not appealable.”

The arbitrator also rejected the Association’s argument that the CBA permits a grievance to challenge a written reprimand under a “just cause” standard. It is true that Article 5, section 5.1.1 permits a grievance “alleging that the District has violated an express term of this Agreement.” And Article 17, section 17.2.1, provides that “disciplinary action shall be for just cause.” However, the arbitrator concluded that to permit a grievance challenging a written reprimand would render the “no appeal” language in section 17.6.2.1 meaningless. She

⁴ The arbitrator noted that bargaining history testimony introduced at hearing indicates that the parties were concerned with making clear that the disciplinary procedures in the CBA were “in addition to” the statutory procedures, and the District did not relinquish its right to use the statutory procedures. She noted further that nothing in the testimony indicates that the District could ignore the procedures in the CBA in favor of the statutory procedures. Thus, the arbitrator concluded, the clear and ambiguous language in the CBA is in no way modified by the evidence of bargaining history introduced at the arbitration hearing.

concluded, moreover, that the more specific “no appeal” language in section 17.6.2.1 prevails over the broad language in section 5.1.1 granting a right to file a grievance.

Even if there is room for disagreement with the conclusions reached by the arbitrator, they are not unreasonable or repugnant to the purposes of EERA, nor are they “palpably wrong.” (Fremont at p. 4.). The arbitrator based her decision on clear contract language. As the District points out, it is generally accepted that “where contract language is clear and unambiguous, it is unnecessary to go beyond the plain language of the contract itself to ascertain its meaning.” (Marysville Joint Unified School District (1983) PERB Decision No. 314, p. 9.)

The Association argues, however, that the arbitrator’s agreement with the District’s belated argument that section 17.6.2.1 precluded the arbitration of the written reprimand prevented a fair and regular hearing. The Association contends that it was ambushed by the District’s post-hearing claim and was precluded from presenting evidence of bargaining history and past practice to rebut the argument.

Even if the arbitrator relied on an argument advanced by the District in its post-hearing brief, her decision to do so does not render the award repugnant to the Act under this CBA. Noting that the failure to raise an arbitrability defense in a timely manner may be construed as a waiver of that defense, the arbitrator nevertheless rejected the Association’s claim. She concluded that the parties themselves recognized in the CBA that the arbitrator may consider arguments raised at the briefing stage.

To support her decision, the arbitrator relied on section 5.4.5.1 of the CBA as authority to consider the District’s argument. That section provides in relevant part that “the decision of the arbitrator shall be based solely upon the evidence and arguments presented to [her] by the

respective parties in the presence of each other, and upon arguments presented in briefs.” The arbitrator also noted that the Association anticipated the argument in its brief. She wrote: “the Association had every reason to be aware of this provision in the contract, and it did address [section 17.6.2.1] in its post-hearing brief, anticipating that the District would raise it as an additional arbitrability defense.”

The Association argues that the arbitrator has wrongly interpreted section 5.4.5.1. According to the Association, “the comma after ‘other’ and the use of the word ‘and’ immediately thereafter shows that the Arbitrator could not base her decision *solely* upon a surprise argument presented exclusively in a post-hearing brief. The language in Section 5.4.5.1 is clearly intended to avoid the type of ambush that the District perpetrated here.” (Italics in original.) The Association argues further that the footnote in its post-hearing brief cannot be read as an anticipation of the District’s defense: “Precisely the opposite was true. NTA anticipated that the District would *not* raise it as an additional arbitrability defense and that is obvious from the text of the *footnote* in which NTA mentioned it.” (Italics in original.)

Granted, the arbitrator’s application of section 5.4.5.1 and her interpretation of the footnote in the Association’s brief are not beyond dispute. In addressing the Association’s arguments, however, it is important to note that an arbitrator’s award is not rendered unreasonable or repugnant to the purposes of the Act under the Dry Creek standards merely because the Board disagrees with the decision or would have interpreted the contract differently. (Oakland at p. 4, fn. 3; Los Angeles at p. 8, fn. 6.) A decision is repugnant to the Act only when it is “palpably wrong” or “not susceptible to an interpretation consistent with the Act.” (Fremont at p. 4.) Under these standards, it must be concluded that the arbitrator’s decision is not repugnant to the Act.

While the Association has offered a reasonable interpretation of section 5.4.5.1, it cannot be concluded that the arbitrator's interpretation is unreasonable. Although there clearly is room for disagreement, it was not unreasonable for the arbitrator to conclude that section 5.4.5.1 gave her the authority to consider the section 17.6.2.1 argument raised in the District's brief. As section 5.4.5.1 states, the arbitrator may consider evidence and arguments presented at hearing, "and arguments presented in briefs."

The same can be said about the different interpretations placed on the footnote in the Association's brief to the arbitrator. The Association may not have intended the footnote as an indication that it anticipated the District to raise a section 17.6.2.1 defense, but the arbitrator's interpretation of the footnote was not unreasonable. The footnote refers to the "no appeal" language in section 17.6.2.1 and asserts that "there is no prohibition against submitting oral warnings or written reprimands to the regular grievance procedure as NTA has done in the instant case."

Even if the right to respond more fully to the section 17.6.2.1 argument raised in the District's brief is implied in section 5.4.5.1, the outcome here would be the same. As the arbitrator pointed out, the time to request to reopen the record was before she issued her decision. Due to unavoidable circumstances, the Association could not do so prior to the time the decision was issued. By the time the request was made, the arbitrator's hands were tied because the parties had stipulated that she would retain jurisdiction only to resolve a dispute about remedy. Therefore, absent mutual agreement, the arbitrator had no authority to reopen the record or reconsider her decision.

The Association has argued that the arbitration proceeding is repugnant to the purposes of the Act because it was not given the opportunity to present evidence of bargaining history or

past practice regarding the meaning of Articles 5 and 17. However, to withstand a challenge on repugnancy grounds, an arbitration award need not be based on all evidence deemed relevant by the grievant. Under Fremont, an arbitrator must be “presented generally” with facts that are “relevant” to resolving the unfair practice charge. (Fremont at p. 4.) This requirement has been met here. The arbitrator based her decision on clear and unambiguous contract language covering the appeal of intermediate discipline, concluding that the specific language in Article 17 prevails over the more general language in Article 5. The absence of evidence regarding bargaining history or past practice to resolve this contract dispute does not render the award repugnant. In fact, under the circumstances presented here, the award plainly is susceptible to an interpretation consistent with the purposes of the Act. As the Board has long held, where contract language is clear and unambiguous, it is unnecessary to go beyond the plain language to ascertain its meaning. (See e.g., Marysville at p. 9; Morgan Hill Unified School District (1999) PERB Decision No. 1362, p. 3 (Morgan Hill).) Evidence of bargaining history is examined only if the language of the agreement is found to be ambiguous. (Morgan Hill at p. 3.) And the parties have recognized in section 5.4.5.2 of the CBA that past practice may not be used to modify the clear terms of the agreement.

While there may be reasons to disagree with the arbitrator, mere disagreement is not the test here. For the reasons stated above, the arbitration award is not unreasonable or “palpably wrong;” rather, it is susceptible to an interpretation consistent with PERB decisions and the overall purposes of the Act. It is concluded, therefore, that the arbitration decision is not repugnant under the Dry Creek standards.

PROPOSED ORDER

Based on the foregoing findings of fact, conclusions of law and the entire record herein, the complaint and underlying unfair practice charge in Case No. SF-CE-2167-E, Newark Teachers Association v. Newark Unified School District, is hereby dismissed.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, sec. 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, secs. 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required

number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

Fred D'Orazio
Administrative Law Judge