

BACKGROUND

On July 25, 2007, the Federation filed an unfair practice charge against the District alleging a unilateral change/transfer of work outside the bargaining unit, in violation of EERA section 3543.5(a), (b) and (c). The matter was deferred to the parties' grievance and arbitration process. In May 2008, an arbitration decision was issued in favor of the Federation.

On August 15, 2008, the District filed the present unfair practice charge against the Federation, alleging the arbitration decision is repugnant to EERA, and asking PERB to review the decision pursuant to EERA section 3541.5(a)(2). The Board agent dismissed the charge, finding that a charge based solely on a claim that a third party arbitration decision is repugnant cannot stand on its own and is insufficient to state a prima facie case for violation of EERA by the Federation. The Board agent held that the District's charge did not allege any conduct by the Respondent/Federation that violated EERA and therefore did not establish a prima facie case.

DISTRICT'S APPEAL

The District argues that the entirety of the Board's analysis should be whether or not the arbitration decision is repugnant to EERA, and that the District should not be required to allege wrongful conduct by the Federation in order to establish a prima facie case. The District relies on that part of Section 3541.5(a)(2) that states:

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.

The District contends that nothing in the relevant statute limits the right to challenge an arbitration award as being repugnant to only the party that initially filed the unfair practice

charge, and that the plain meaning of the language in the statute gives both parties to an arbitration the opportunity to assert that the arbitration decision is repugnant to EERA.

DISCUSSION

One of the primary functions of EERA section 3541.5 is to set forth PERB's exclusive, initial jurisdiction and authority for investigating unfair practice claims and determining "whether the charges of unfair practice are justified." Specifically, Section 3541.5(a)(2) addresses PERB's authority relative to matters also covered by collective bargaining agreements (CBA) between parties. In relevant part, Section 3541.5 establishes that:

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

(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 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.

(b) The board shall not have the authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of any agreement that would not also constitute an unfair practice under this chapter.

Accordingly, where an unfair labor practice charge alleges conduct by a respondent that would also violate the CBA between the parties, and is subject to binding arbitration, PERB will defer to the grievance and arbitration process. EERA grants PERB the authority to review the resulting arbitration award to determine whether it is repugnant to the purposes of EERA.

However, even upon such a review, PERB's authority remains limited to the issuance of a complaint that alleges the respondent engaged in conduct that violates EERA.

In the case at hand, the District has filed an unfair practice charge against the Federation, based solely on a claim that a third party arbitration decision is repugnant to EERA under Section 3541.5(a)(2). Although the named respondent in the District's claim is the Federation, the charge does not allege wrongful conduct by the Federation in violation of EERA. Rather, the District references a previous unfair practice charge that was filed by the Federation *against the District*, and deferred to arbitration, and asks the Board to conduct further proceedings on the merits of the Federation's charge. The Federation, however, has abandoned pursuit of its unfair practice charge in front of PERB. The relevant statutory scheme does not provide a means for a respondent to initiate further proceedings on an unfair practice charge which has been abandoned by the charging party. Essentially, the District is seeking an independent review of the arbitrator's decision so as to re-litigate before PERB the matters dealt with in the arbitration. This is beyond the purpose and scope of the statute.

The District argues that Section 3541.5(a)(2) establishes an independent mechanism for "either party" to challenge an arbitrator's decision through a repugnancy review. In support of this argument the District looks to *Yuba City Unified School District (1995) PERB Decision No. 1095 (Yuba City)*, wherein the Board conducted a post-arbitration repugnancy review pursuant to a motion for deferral made by the employer/respondent. However, reliance on *Yuba City* for this purpose is misplaced. As discussed in *Yuba City*, the union simultaneously pursued both arbitration and a PERB unfair practice charge against the school district concerning the same matter. The case came before the Board on exceptions filed by the union to a PERB administrative law judge's proposed decision. Although the Board considered arguments by both parties, including the school district's argument for deferral to the

arbitrator's decision, the matter was at all times pursued within the context of PERB's evaluation of the underlying unfair practice charge. Neither party attempted to support an independent unfair practice claim solely out of a request for repugnancy review of a third party arbitration. Nothing in the *Yuba City* decision suggests that Section 3541.5(a)(2) is subject to the expansive application put forth by the District in the present matter.

As discussed herein, the District's analysis essentially starts in the middle of the statute and overlooks the fact that the foundation of the Board's jurisdiction in Section 3541.5(a)(2) is the "determination of whether the charges of unfair practices are justified," not a de novo review of the arbitration decision. EERA section 3541.5(a)(2) does not provide a traditional appeal procedure, but sets forth PERB's limited jurisdiction to review arbitration decisions within the context of alleged conduct that violates the statute. Therefore, because the District's charge against the Federation, at issue here, does not allege unlawful conduct by the Federation, the District's charge against the Federation fails to establish a prima facie case for violation of EERA.

ORDER

The unfair practice charge in Case No. LA-CO-1355-E is hereby **DISMISSED** WITHOUT LEAVE TO AMEND.

Members McKeag and Neuwald joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
Telephone: (818) 551-2809
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April 2, 2009

Edward B. Reitkopp, Attorney
Atkinson, Andelson, Loya, Ruud & Romo
17871 Park Plaza Drive, Suite 200
Cerritos, CA 90703-8597

Re: *Ventura County Community College District v. Ventura County, AFT Local 1828*
Unfair Practice Charge No. LA-CO-1355-E
DISMISSAL LETTER

Dear Mr. Reitkopp:

On August 15, 2008, the Ventura County Community College District (District) filed the above-referenced unfair practice charge against the Ventura County Federation of College Teachers, AFT Local 1828 (Local 1828). The charge alleges that an arbitration decision (decision) issued by Arbitrator Robert Steinberg in favor of Local 1828 violates section 3541.5(a)(2) of the Educational Employment Relations Act (EERA or Act).¹

The District was informed in the attached Warning Letter dated March 17, 2009, that the above-referenced charge did not state a prima facie case. The District was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in the Warning Letter, it should amend the charge. The District was further advised that, unless it amended the charge to state a prima facie case or withdrew the charge prior to March 25, 2009, the charge would be dismissed.

On March 20, 2009, the District's attorney Edward Reitkopp confirmed that he had received the Warning Letter. Mr. Reitkopp requested an extension of time until April 1, 2009 to either withdraw the charge or file an amended charge.

As of today's date, PERB has not received either an amended charge or a request for withdrawal. Therefore, the charge is hereby dismissed based on the facts and reasons set forth in the March 17, 2009 Warning Letter.

¹ EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

Right to Appeal

Pursuant to PERB Regulations,² the District 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. (Cal. Code Regs, tit. 8, sec. 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs, tit. 8, secs. 32135(a) and 32130; see also Gov. Code, sec. 11020(a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 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, secs. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

If the District files a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code Regs, tit. 8, sec. 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 each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, sec. 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs, tit. 8, sec. 32135(c).)

² PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

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. (Cal. Code Regs, tit. 8, sec. 32132.)

Final Date

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

Sincerely,

TAMI R. BOGERT
General Counsel

By

Sean McKee
Regional Attorney

Attachment

cc: Lawrence Rosenzweig, Attorney

PUBLIC EMPLOYMENT RELATIONS BOARD

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March 17, 2009

Edward B. Reitkopp, Attorney
Atkinson, Andelson, Loya, Ruud & Romo
17871 Park Plaza Drive, Suite 200
Cerritos, CA 90703-8597

Re: Ventura County Community College District v. Ventura County Federation of College Teachers, AFT Local 1828
Unfair Practice Charge No. LA-CO-1355-E
WARNING LETTER

Dear Mr. Reitkopp:

On August 15, 2008, the Ventura County Community College District (District) filed the above-referenced unfair practice charge against the Ventura County Federation of College Teachers, AFT Local 1828 (Local 1828). The charge alleges that an arbitration decision (decision) issued by Arbitrator Robert Steinberg in favor of Local 1828 violates section 3541.5(a)(2) of the Educational Employment Relations Act (EERA or Act).¹

Background

The charge provides in its entirety:

On or about July 24, 2007, [Local 1828] filed an unfair practice charge alleging, inter alia, that the [District] had violated [EERA] [s]ections 3543.5(a), (b), and (c) when the District created the positions of Director of Disabled Students Programs and Services ("Director DSPS") and Assistant Dean of Distance Education, and had, as a result, transferred work outside the bargaining unit. This matter was deferred to arbitration.

On May 19, 2008, Arbitrator Robert Steinberg issued an opinion and award in case number CSMCS ARB 06-0692. The District files this unfair practice charge pursuant to [EERA] [s]ection 3541.5(a)(2) (hereafter, "Act") alleging that Arbitrator Steinberg's decision concerning the Director DSPS is repugnant to the Act.

¹ EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

More specifically, the District alleges as follows: The District created the position of Director DSPS at Moorpark College when a position of Coordinator, Disabled Students, became vacant. It was and is the District's contention that the Director DSPS is a management and/or supervisory employee within the meaning of [s]ections 3540.1(g) and (m) of the Act and should be excluded from the bargaining unit represented by Local 1828, consistent with the terms of the collective bargaining agreement between the District and Local 1828. Notwithstanding the Arbitrator's own admission that the duties of the Director include "several indicia of supervisory authority," he nevertheless concluded that the Director position had not changed in scope and type of duties assigned to its predecessor, Coordinator, Disabled Students, to support removal of the Director position from the bargaining unit.

In so ruling, the Arbitrator's decision ignored well-established case law and policy considerations excluding management and supervisory employees from the bargaining unit and is, accordingly, repugnant to the purposes of the Act.

The District did not attach a copy of the decision to the charge. On September 4, 2008, Local 1828 filed a response to the charge. Attached to Local 1828's response is a copy of the decision.²

Discussion

As noted above, the District asserts that the decision is repugnant to the Act and asks PERB to issue a complaint against Local 1828. (See Cal. Code Regs., tit 8, § 32661.)

As a general rule, PERB does not have "the authority" to enforce a collective bargaining agreement between the parties. (Gov. Code, § 3541.5(b).) The exception is this: PERB can issue a complaint when the "conduct" at issue is "prohibited" by both the agreement and the Act. (Gov. Code, § 3541.5(a)(2).) However, where (1) the conduct at issue is prohibited by both the agreement and the Act; (2) the parties have submitted the dispute to "binding arbitration"; and (3) the employer has either waived or not asserted contract-based procedural defenses, then PERB will wait until after the parties have exhausted the "grievance machinery" before it issues a complaint. (Gov. Code, § 3541.5(a)(2); Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81a, p. 4 (Dry Creek); see also State of California (Department of Food and Agriculture) (2002) PERB Decision No. 1473-S, pp. 5-7.) In those circumstances, PERB will limit its review "solely" to the question of whether the arbitration

² Nothing in PERB case law requires a Board agent to ignore facts provided by the respondent and consider only the facts provided by the charging party. (Service Employees International Union #790 (Adza) (2004) PERB Decision No. 1632-M.)

decision is “repugnant” to the Act. (Dry Creek, supra, PERB Order No. Ad-81a, p. 4; Yuba City Unified School District (1995) PERB Decision No. 1095, p. 13 (Yuba City).

In Dry Creek, supra, PERB Order No. Ad-81a, p. 4, the Board adopted the post-arbitration deferral standard enunciated by the National Labor Relations Board (NLRB). (See Spielberg Manufacturing Company (1955) 112 NLRB 1080; Collyer Insulated Wire (1971) 192 NLRB 837.)³ Under that standard, the Board will exercise its discretionary jurisdiction to defer to the arbitrator’s award if: (1) the matters raised in the unfair practice charge were presented to and considered by the arbitrator; (2) the arbitral proceedings were fair and regular; (3) the parties agreed to be bound by the arbitral award; and (4) the award is not repugnant to the purposes of the EERA.

With regard to repugnancy, the Board has stated that unless the award is “palpably wrong” and not susceptible to an interpretation consistent with the Act, the Board will defer to the arbitrator’s award. (Yuba City, supra, PERB Decision No. 1095, p. 14.) The possibility that the Board may have reached a different conclusion does not render the award unreasonable or repugnant. (Los Angeles Unified School District (1982) PERB Decision No. 218, p. 8, fn. 6 (Los Angeles).

PERB cannot, however, issue a complaint against an arbitrator; it can only issue a complaint against an employer (Gov. Code, § 3543.5) or an employee organization (Gov. Code, § 3543.6). Thus, before PERB can determine whether an arbitration decision is “repugnant” to the Act, the charging party must first establish that the *respondent* engaged in some unlawful conduct. (Gov. Code, § 3543.6; see also Gov. Code, § 3543.5; United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision No. 944; Cal. Code Regs., tit. 8, § 32615(a)(5).)

For example, the charging parties in Dry Creek, Los Angeles and Yuba City each alleged facts to show that the employer had violated section 3543.5(c) of the Act by changing working conditions without first negotiating in good faith. (Dry Creek, supra, PERB Order No. Ad-81a, p. 8; Los Angeles, supra, PERB Decision No. 218, pp. 3, 7, fn. 5; Yuba City, supra, PERB Decision No. 1095, pp. 1, 16.) Because the charges in those cases alleged identifiable violations of the Act, PERB was then able to examine whether the issues raised in the post-arbitration unfair practice charge had been presented to and considered by the arbitrator. (Dry Creek, supra, PERB Order No. Ad-81a, p. 4; Yuba City, supra, PERB Decision No. 1095, p. 14.)

Section 3543.6 lists the unlawful acts on which PERB can base a complaint. Specifically, PERB can issue a complaint against Local 1828 for the following reasons: (1) causing the employer to violate section 3543.5, (2) threatening employees with reprisals, (3) refusing to bargain in good faith, and/or (4) refusing to participate in impasse procedures. (Gov. Code, §

³ When interpreting the Act, it is appropriate to take guidance from cases interpreting the National Labor Relations Act. (Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608.)

3543.6.) The charge in this case fails to allege which, if any, of these unlawful acts Local 1828 has committed and which, if any, of these acts were addressed by the Arbitrator. Accordingly, the above-referenced charge must be dismissed.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, the District may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations the District wishes to make, and be signed under penalty of perjury by an authorized agent of the District. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on Local 1828's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before March 25, 2009, the charge shall be dismissed. Questions concerning this matter should be directed to me at the above telephone number.

Sincerely,

Sean McKee
Regional Attorney

SM