

After careful review of the entire record in this matter, including the District's appeal and the Association's response, the Board AFFIRMS the ALJ's order denying the motion to dismiss the complaint, and REMANDS this case to the Chief Administrative Law Judge to be processed in accordance with PERB regulations.

Members Hesse and Caffrey joined in this Decision.

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.



STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

ASSOCIATION OF PIEDMONT TEACHERS,)	
CTA/NEA,)	
)	
Charging Party,)	Unfair Practice
)	Case No. SF-CE-1562
v.)	
)	RULING ON MOTION
PIEDMONT CITY UNIFIED SCHOOL)	TO DISMISS
DISTRICT,)	(12/18/92)
)	
Respondent.)	

Appearances: A. Eugene Huguenin, Jr., Staff Counsel, for Association of Piedmont Teachers, CTA/NEA; Lozano Smith Smith Woliver & Behrens, by Sang-Jin Nam and Diana K. Smith, for Piedmont City Unified School District.

Before JAMES W. TAMM, Administrative Law Judge.

PROCEDURAL HISTORY

On May 15, 1992, the Association of Piedmont Teachers, CTA/NEA (Charging Party) filed this charge alleging that Ms. Fran Dean had been involuntarily transferred from a 50 percent counseling position by the Piedmont City Unified School District (District) as retaliation for her having filed a grievance regarding an earlier transfer. The charge alleged violations of section 3543.5(a) and (b) of the Educational Employment Relations Act (EERA).¹ During the investigation conducted by the Office of

¹The EERA is codified at Government Code section 3540 et seq. The pertinent portion of section 3543.5 reads:

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 to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. . . .

the General Counsel of the Public Employment Relations Board (PERB or Board) the District raised the affirmative defense that the charge should be deferred to binding arbitration.

When the complaint was issued on August 27, 1992, the general counsel's office denied the District's request that the charge be dismissed and deferred to arbitration. The deputy general counsel based his decision upon a finding that only individual employees within the bargaining unit and not the Charging Party, could file a grievance. Thus, since the Charging Party had no contractual right to file a grievance in its own name, the charge could not be deferred.

After the denial of the request to dismiss and defer to arbitration, the parties treated the denial as an interlocutory ruling, appealable only if the Board agent certified the matter to the Board (PERB Regulation 32200).² When the general

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²PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. Section 32200 states:

A party may object to a Board agent's interlocutory order or ruling on a motion and request a ruling by the Board itself. The request shall be in writing to the Board agent and a copy shall be sent to the Board itself. Service and proof of service pursuant to Section 32140 are required. The Board agent may refuse the request, or may join in the request and certify the matter to the Board. The Board itself will not accept the request unless the Board agent joins in the request. The Board agent may join in the request only where all of the following apply:

(a) The issue involved is one of law;

counsel's office declined the District's request to certify the appeal to the Board, the District filed a new motion to dismiss the complaint with the undersigned. The parties then filed briefs and the matter was submitted.

FINDINGS AND DISCUSSION

PERB has no jurisdiction to hear a matter which is arguably prohibited by the collective bargaining agreement of the parties when that agreement contains a binding arbitration provision. Section 3541.5(a)(2) of the EERA states, in pertinent part, that PERB shall not:

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. . . .

In Lake Elsinore School District (1987) PERB Decision No. 646 (affd. non. pub. opn. Elsinore Valley Education Association, CTA/NEA v. PERB/Lake Elsinore School District (July 28, 1988) E005 078, 4th District Court of Appeal) (Lake Elsinore), PERB held that this section established a jurisdictional rule requiring that a charge be dismissed and deferred if: (1) the grievance machinery of the agreement covers the matter at issue and culminates in binding arbitration; and (2) the conduct complained of in the unfair practice charge is prohibited by the provisions of the agreement between the

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- (b) The issue involved is controlling in the case;
 - (c) An immediate appeal will materially advance the resolution of the case.

parties. PERB Regulation 32620(b)(5) also requires the investigating Board agent to dismiss a charge where the allegations are properly deferred to binding arbitration.

While the collective bargaining agreement in Piedmont City Unified School District provides for binding arbitration of grievances, that provision is not independently available to the Charging Party in this case. Article XXI of the collective bargaining agreement provides that a grievance may be filed by an employee covered by the agreement or by an officer of the association upon the request of an employee within the bargaining unit.³ Since the Charging Party does not have a right to file a grievance on its own behalf, the requirements of Lake Elsinore are not satisfied. (Temple City Unified School District (1989) PERB Order No. Ad-190.)

The District argues that South Bay Union School District v. Public Employment Relations Board (1991) 228 Cal.App.3d 502 [279

³The collective bargaining agreement provides as follows:

ARTICLE XXI - Grievance Procedure

A. Definitions

1. A "grievance" is a claim by an employee covered by this Agreement that there has been a violation, misinterpretation or misapplication of a provision of this Agreement. Grievance procedures are not applicable to the contents of an employee evaluation, as described in Article XX B.2.
2. Any officer of the Association may file a grievance upon request of an employee of the bargaining unit.
3. There shall be no reprisals or discrimination against any employee who elects to use this grievance procedure.

Cal.Rptr. 135], provides the Charging Party with a right to file grievances in its own name. In that case, the district had declared an impasse in negotiations over a proposal which would have prevented the exclusive representative from filing grievances in its own name. PERB held that since such a provision was not a mandatory subject of bargaining, it was bad faith for the district to refuse to enter into the agreement because the parties had reached impasse on that subject. The court upheld PERB. Therefore, according to the District, the Charging Party in this case should be treated as though it had a right to file a grievance in its own name, despite clear contractual provisions to the contrary.

In Inglewood Unified School District (1991) PERB Order No. Ad-222, the Board, however, rejected that argument stating:

. . . an arbitrator derives his authority from the provisions of the parties' Agreement, and the award is legitimate only to the extent it draws its essence from the CBA. The arbitrator does not have the authority to look outside of the CBA to grant the Association the right to grieve this matter. (Citations omitted.) As the CBA in this case does not give the Association standing to grieve the subject matter at issue, an arbitration award determining this issue would be an award in excess of the scope of submission, and may be unenforceable.

As a result, the Association's only forum for this matter is PERB. Denying the Association its right to allege a violation of EERA would be against EERA's purpose and policy to promote the improvement of personnel management and employer-employee relations within the public school systems and the State of California (EERA section 3540) and guarantee employee organizations the right to

represent their members in their employment relations with public school employers (EERA section 3541.5(a)).

PERB is therefore the appropriate forum for this dispute.

ORDER

For the above listed reason, the Piedmont City Unified School District's request to defer this matter to arbitration and dismiss the complaint is denied.

RIGHT TO APPEAL

PERB Regulation 32646(b) provides that a denial of a motion to dismiss the complaint and defer to binding arbitration may be appealed to the Board itself in accordance with section 32635.

Pursuant to section 32635, the respondent may obtain a review of this denial of its motion to dismiss by filing an appeal with the Board itself within twenty (20) calendar days following service of this decision. To be timely filed, the original and five copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing. (Cal. Code of Regs. tit. 8, sec. 32135.) Code of Civil Procedure section 1013 shall apply. Any appeal 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 of Regs., tit. 8, secs. 32635 and 32140.)

James W. Tamm
Administrative Law Judge