STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, STATE CENTER CHAPTER 379,	
Charging Party,	Case No. S-CE-1565
v.	Administrative Appeal
STATE CENTER COMMUNITY COLLEGE DISTRICT,	PERB Order No. Ad-255
Respondent.	May 19, 1994

Appearances: California School Employees Association by Madalyn J. Frazzini, Attorney, for California School Employees Association, State Center Chapter 379; Zampi and Associates by Danielle M. Goeppner and N. Joseph Trofemuk, Jr., Attorneys, for State Center Community College District.

Before Caffrey, Carlyle and Garcia, Members.

DECISION

CAFFREY, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the State Center Community College District (District) of a PERB administrative law judge's (ALJ) denial of the District's motion to dismiss and defer to arbitration an unfair practice charge which was filed by the California School Employees Association, State Center Chapter 379 (CSEA).

BACKGROUND

On or about May 18, 1993,[1] CSEA became aware that the District was contracting out various custodial, groundskeeping and courier services which would otherwise be performed by

[1]All dates refer to 1993 unless specified otherwise.

members of a bargaining unit exclusively represented by CSEA. CSEA confirmed with District representatives that the District had taken this action without prior notice to CSEA and without providing the opportunity to meet and confer with regard to it. CSEA demanded that the District stop the contracting out and commence negotiations or be subject to an unfair practice charge and/or litigation. On or about June 11, the District rejected CSEA's demand asserting, among other things, that the parties collective bargaining agreement (CBA) did not prohibit the contracting out in question.

On June 28, a CSEA Labor Relations Representative (LRR) filed a grievance on behalf of CSEA citing various articles of the CBA which it alleged the District had violated by contracting out the services.

On July 16, the CSEA LRR filed an unfair practice charge with PERB alleging that the District violated sections 3543.5(b) and (c) of the Educational Employment Relations Act (EERA)[2] when it contracted out certain custodial, groundskeeping, courier and mail-handling services without giving CSEA an opportunity to meet

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[2]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references are to the Government Code. Section 3543.5 states, in pertinent part:

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

and confer over the new policy and/or its effects. A complaint was issued on August 30, by a PERB regional attorney, as was a letter refusing to dismiss and defer the charge to arbitration. The refusal to defer was based on the dual grounds that the CBA in effect between the parties did not prohibit the complained of conduct, and that the CBA did not allow CSEA to file a grievance in its own name.

On or about August 12, the District Chancellor denied the CSEA grievance. On or about September 9, the CSEA LRR indicated to the District the intention to pursue the grievance to final and binding arbitration.

On September 27, the District filed its answer to the PERB complaint and a motion to dismiss and defer the complaint. Among the District's affirmative defenses to the complaint was the argument that the CBA called for final and binding arbitration of the dispute.

On October 5, the CSEA LRR notified PERB that after consultation with CSEA's legal department, CSEA was withdrawing the grievance "since there was no contractual prohibition to contract out bargaining unit work."

The parties held an informal conference on October 28, at which time the ALJ denied the District's motion to dismiss and defer the charge based on the determination that the conduct complained of is not prohibited by the parties' CBA. The ALJ concluded, however, that the CBA gives CSEA the right to file a grievance in its own name in accordance with the Board's ruling

in Inglewood Unified School District (1990) PERB Decision No. 821 (Inglewood). The ALJ's order denying the District's motion was issued November 4.

POSITIONS OF THE PARTIES

In accordance with PERB Regulation 32646,[3] the District appealed the ALJ's order on November 29. The appeal repeats the arguments included in the District's original motion to dismiss and defer. The District argues that the ALJ improperly applied the standard for determining whether a charge must be deferred in concluding that the complained of conduct is not prohibited by the parties' CBA. The District asserts that CSEA "admitted" that the CBA arguably prohibits the complained of conduct when it filed a grievance alleging that the contracting out violated certain specific CBA provisions. The District reasserts that the complained of conduct is arguably prohibited by portions of Article 2, Article 6, Article 22, Article 23, Article 26, Article 29 and Article 35 of the CBA. The District also supports the ALJ's finding that CSEA arguably had a right to file a grievance in its own name under the CBA.

CSEA filed its reply opposing the District's appeal on December 21. In it, CSEA argues that the District has failed to

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[3]PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB Regulation 32646(b) states, in pertinent part:

> The Board agent's denial of respondent's motion to defer an unfair practice charge to final and binding arbitration may be appealed to the Board itself in accordance with the appeal procedures set forth in section 32635.

demonstrate that the parties' CBA prohibits the complained of conduct, and that the CBA does not give CSEA the right to file a grievance in its own name. CSEA also asserts that "No admissions arise from Charging Party's filing a grievance which was later withdrawn."

On January 14, 1994, the District filed a statement in opposition to CSEA's reply brief. The District argues that by asserting that it had no standing under the CBA to file a grievance in its own name, CSEA was in effect excepting to a finding made by the ALJ, since the ALJ had reached the opposite conclusion. The District, therefore, argues that CSEA's exception to that finding by the ALJ was not timely filed and should not be given consideration by the Board.[4] The District then proceeds to repeat its arguments in support of its appeal.

DISCUSSION

EERA section 3541.5(a)(2) provides, in pertinent part, that PERB shall not:

> Issue a complaint against conduct also prohibited by the provisions of the [collective bargaining agreement in effect] between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been

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[4]The District's argument that the CSEA brief is an untimely filed appeal is rejected. PERB Regulation 32635(c) permits any other party to file a statement in opposition within 20 days of the appeal. CSEA's brief is comprised of statements in opposition to the District's position. The Board does not construe such statements as a separate and untimely appeal in this case. Further, regardless of whether CSEA addresses an issue not appealed by the District, the Board is not constrained from considering such issues.

> exhausted, either by settlement or binding arbitration.

In Lake Elsinore School District (1987) PERB Decision No. 646 (Lake Elsinore), the Board 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 parties.

In Los Angeles Unified School District (1990) PERB Decision No. 860, the Board determined that the exercise of PERB's jurisdiction is precluded if the conduct constituting the alleged unfair practice is arguably prohibited by the parties' agreement. Accordingly, a charge may be dismissed and deferred only if the conduct alleged to be an unfair practice is arguably prohibited by the CBA.

As a threshold matter, we address the District's argument that by filing a grievance alleging that the contracting out violated specified sections of the parties' CBA, CSEA has admitted that the complained of conduct is arguably prohibited by the CBA, thereby requiring PERB's dismissal and deferral of the charge to arbitration. This argument is without merit. The facts of this case reveal that CSEA filed a grievance charging that the contracting out violated provisions of the contract, a grievance which it subsequently withdrew prior to arbitration stating that the conduct was not prohibited by the CBA. The

facts also reveal that the District refused CSEA's initial demands to cease and desist the contracting out stating that it was not prohibited by the CBA. The positions taken by the parties at various stages of a case are not dispositive of PERB's authority to determine whether a charge must be dismissed and deferred to arbitration. In making this determination under Lake Elsinore, the Board must review the contract terms and decide whether the complained of conduct is arguably prohibited by them. (Inglewood.)

Turning to the contract terms, the District, on appeal, repeats its assertion that numerous provisions of the CBA arguably prohibit the conduct complained of in CSEA's charge. As concluded by both the regional attorney and the ALJ, however, none of these provisions arguably prohibits the complained of conduct, which is the District's decision to contract out certain services without meeting and conferring with CSEA.

The District cites CBA Article 2 in its appeal, but that Article is a typical recognition provision and does not arguably prohibit the complained of conduct.

Article 6, the waiver clause of the CBA, is also cited by the District. It contains a provision stating that all state laws not included in the CBA nonetheless are in effect. The District argues that this provision incorporates EERA and all employee organization rights under EERA into the CBA, thereby subjecting them to the grievance and arbitration process included in the CBA and requiring the dismissal and deferral of CSEA's

charge. The Board dealt with a similar argument in Fremont Union High School District (1993) PERB Order No. Ad-248, concluding that general "subject to the provisions of the law" language in a CBA is not sufficient to incorporate into the contract all specific rights guaranteed by EERA and subject alleged violations of those rights to the contract grievance and arbitration machinery. Therefore, the District's assertion that general provisions within Article 6 arguably prohibit the conduct complained of by CSEA is rejected.

The District also cites Article 22 of the CBA, dealing with "Recruitment, Transfer, Promotion, Eligibility Lists," and Article 23 "Transfer - Work Location." These articles concern the detailed processes for filling positions in the District and do not arguably prohibit the conduct complained of in CSEA's charge.

Article 26 "Management Rights and Responsibilities" provides for "the outside purchase of products and services" by the District as long as a reduction in allocated positions does not result. As noted by the regional attorney, the conduct complained of by CSEA is not prohibited by this section since no resulting position reduction is alleged. If anything, this Article arguably permits the District to engage in the complained of conduct, and does not justify dismissal and deferral to arbitration. (Los Angeles Unified School District, supra, PERB Decision No. 860.)

Article 29 is a detailed provision concerning work hours and does not arguably prohibit the conduct complained of by CSEA.

Finally, Article 35 of the CBA includes a specific provision prohibiting contracting out work by the District only when "bargaining unit employees are in a layoff status." CSEA has not alleged that its members were in a layoff status at the time the District contracted out work, so this Article does not arguably prohibit the complained of conduct.

In summary, the District has repeated the arguments it made to the regional attorney and ALJ in support of its motion to dismiss and defer. The District has failed to demonstrate that the complained of conduct is arguably prohibited by the CBA and, therefore, its arguments are rejected.

With regard to the issue of standing to file a grievance, the ALJ cited Inglewood in concluding that CSEA arguably had the right to file a grievance in its own name under the CBA. Inglewood is clearly distinguishable from this case, however. The CBA between the parties in Inglewood defined a grievance as any "complaint of an employee, employees or CSEA." It further specifically provided that "The Association may be the grievant on Association rights . . ." In this case, Article 27 of the CBA, "Grievance Procedure," defines a grievance as "any complaint of members involving interpretation, application or alleged violation of this Agreement." It also provides that "Other matters for which a specific method of review is provided by law . . . are not within the scope of this Article." Finally, the

Article defines a grievant as "any member or members of the bargaining unit covered by the terms of this Agreement." There is no provision in the CBA which arguably permits the employee organization to file a grievance in its own name with regard to its own rights, as was clearly the situation in Inglewood.

The Board concludes that CSEA has no standing to file a grievance in its own name under the terms of the CBA. Therefore, for this additional reason, the District's motion to dismiss and defer must be denied.

ORDER

The Board AFFIRMS the ALJ's order denying the District's motion to dismiss and defer this case to arbitration. Consistent with this ruling, the Board REMANDS this case to the Chief Administrative Law Judge to be processed in accordance with PERB regulations.

Member Carlyle's concurrence begins on page 11.
Member Garcia's concurrence begins on page 13.

CARLYLE, Member, concurring: I would affirm the Public Employment Relations Board (PERB or Board) administrative law judge's (ALJ) order denying the State Center Community College District's (District) motion to dismiss and defer this case to arbitration for the sole reason that the District has failed to demonstrate that the complained of conduct is arguably prohibited by the collective bargaining agreement (CBA). Accordingly, I would remand this case to the Chief Administrative Law Judge for further proceedings consistent with this position.

Section 3541.5(a)(2) of the Educational Employment Relations Act (EERA)[1] states, in relevant part, that the Board 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.

Under Lake Elsinore School District (1987) PERB Decision No. 646, as affirmed by Los Angeles Unified School District (1990) PERB Decision No. 860, a successful motion to dismiss a complaint and defer a matter to arbitration must first demonstrate "that the conduct at issue must be arguably prohibited by the language of the agreement." As correctly noted in the author's opinion in the case at bar:

> [T]he District, on appeal, repeats its assertion that numerous provisions of the CBA arguably prohibit the conduct complained of . . . . As concluded by both the regional attorney and the ALJ, however, none of these provisions arguably prohibits the complained of conduct.

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

As such, the District has merely "repeated the arguments it [unsuccessfully] made to the regional attorney and ALJ in support of its motion to dismiss and defer."

I, too, am unpersuaded on the correctness of the District's position for the same reasons found by the regional attorney and the ALJ on this first part of the "dismiss and deferral test." Having reached this conclusion on this initial threshold issue and thus affirming the ALJ's order on this ground, I find it unnecessary to opine or pontificate on other issues and therefore decline to also join in the dueling dicta.

GARCIA, Member, concurring: I concur in the result but I disagree with the legal analysis of the author and the Public Employment Relations Board's (PERB) administrative law judge (ALJ). Both decisions, although based on different legal analyses, cause PERB to slip farther into a policy on pre-arbitration deferral that results in easy denial of the rights of parties.

FEDERAL PRECEDENT

Although none of California's public sector labor relations statutes are copies of the National Labor Relations Act (NLRA), our statutes select and combine principles established by the National Labor Relations Board (NLRB), with provisions reflecting features and needs of the California public sector.[1] Both PERB and reviewing courts turn for instruction to precedent established under NLRB decisions.[2] A brief overview of the federal precedent on pre-arbitration deferral follows.

Under federal law, including NLRB decisions, regardless of whether it is clear or uncertain that an agreement provides for arbitration of the disputed subject, the case is given to the arbitrator for further decision regarding matters of

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[1]See Zerger, Cal. Public Sector Labor Relations (1989) Chapter 2, section 2.01, page 3, footnote 4, citing Pacific Legal Foundation v. Brown (1981) 29 Cal.3d 168, 173, 176-177, [172 Cal.Rptr. 487].

[2]Id., section 2.02, page 4, footnote 1, citing cases involving use of NLRA precedent.

interpretation.[3] The arbitrator then decides whether the agreement covers the subject matter and who has standing to participate in arbitration. In other words, except in rare or unusual cases, the courts and quasi-judicial agencies such as the NLRB and PERB should first determine whether the contract provides for arbitration, and if so, they turn the matter over to the arbitrator to interpret the scope of the arbitration,[4] unless there is evidence that this was not the result the parties intended.

PERB POLICY ON PRE-ARBITRATION DEFERRAL

The "arguably prohibited" policy that PERB employs was born in Inglewood Unified School District (1990) PERB Decision No. 821 (Inglewood). Review of the Inglewood case shows that PERB policy is synonymous with the ambiguity doctrine in Steelworkers.[5] The

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[3]See United Steelworkers of America v. Warrior & Gulf Navigation Co. (1960) 363 U.S. 574, 582 and 583 [46 LRRM 2416] (Steelworkers):

> An order to arbitrate a particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

See also, Roy Robinson Chevrolet (1977) 228 NLRB 828 [94 LRRM 1474].

[4]See Riverside Community College District (1992) PERB Order No. Ad-229 (Riverside).

[5]See Inglewood, page 6, citing Conejo Valley Unified School District (1984) PERB Decision No. 376 (overruled on other grounds in Lake Elsinore School District (1987) PERB Decision No. 646, p. 31, fn. 13).

policy, when dealing with uncertainty as to whether a contract provides for arbitration, is to resolve doubts in favor of coverage. The Supreme Court did not develop the policy to be used as a standard for interpreting unambiguous contract language. However, recent PERB decisions are unwittingly creating a standard of interpretation that is subjective rather than disciplined. This approach is evident in the main case cited in Member Caffrey's opinion (Los Angeles Unified School District (1990) PERB Decision No. 860 (Los Angeles)) which misconstrues Lake Elsinore School District (1987) PERB Decision No. 646 (Lake Elsinore) by implying that it created a rule that PERB immediately looks to see whether provisions of the agreement "arguably prohibit" the conduct to determine PERB's jurisdiction. The danger in using that policy in all cases is that it invites a subjective approach to contract interpretation by PERB and in some cases appropriates the role of the arbitrator. Furthermore, it vitiates the ability of parties to negotiate grievance agreements, since almost anything can be "arguably" prohibited.

PROBLEM WITH CURRENT POLICY

Relying on Los Angeles, Member Caffrey identifies a view which may become a rule of interpretation unique to PERB. The invalid rule, as stated in Riverside, is:

> In determining whether deferral is appropriate under Lake Elsinore, the Board reviews the contract language on its face to determine whether the alleged conduct is arguably prohibited by the contract terms. (Id. at p. 5.)

A problem arises when the subjective "arguably prohibited" policy is used to interpret "unambiguous" contract provisions. Specifically, the Los Angeles case misstates Lake Elsinore as holding that the conduct must be "arguably prohibited" as a prerequisite to deferral. I do not find that language in the Lake Elsinore case and believe that the policy articulated in Los Angeles is a misinterpretation that compounds errors and creates a subjective tool to defer or retain jurisdiction. The "arguably prohibited" policy and "not susceptible" doctrine should only be used to resolve ambiguities in contract language where legal rules of contract interpretation do not resolve the issue of arbitrability.[6] That is not the case here.

INTENT OF THE PARTIES

In matters of contract interpretation, the goal is to determine the intent of the parties. Legal principles of contract interpretation assist in that endeavor.[7] If a lack of

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[6]See Riverside, supra, at page 4, citing Temple City Unified School District (1989) PERB Decision No. 782 (regarding conflicting interpretations); Inglewood, supra (regarding "not susceptible" standard).

[7]A summary of principles of interpretation of contracts is found in 1 Witkin, Summary of Cal. Law (9th ed. 1987) section 681 et seq. Examples of such principles include: (1) A contract must be interpreted so as to give effect to the mutual intention of the parties (Witkin, sec. 684, p. 617, citing Civil Code section 1636); and (2) Words are understood in their ordinary and popular sense rather than strict legal meaning unless used by the parties in a technical sense (Witkin, sec. 685, p. 618).

See also, State of California (Department of Personnel Administration) (1991) PERB Order No. Ad-221-S, which held that when language in an agreement is clear and unambiguous, parties are bound by its terms.

clarity persists after application of these general principles, then it is proper to employ other aids to interpretation, such as the policies developed in Steelworkers and Inglewood that favor private resolution of disputes.[8]

Under EERA, when parties contract to submit themselves to a grievance procedure, whether or not it involves arbitration, they are agreeing to deny PERB jurisdiction over a dispute and are voluntarily waiving immediate access to PERB.[9] In other types of cases involving waiver, PERB has properly required evidence of a clear intention on the part of the waiving party as reflected by words or conduct.[10] Similarly, we should not be quick to deny

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[8]See, e.g., (1) J. Alexander Securities, Inc. v. Mendez (1993) 17 Cal.App.4th 1083, 1089 [21 Cal.Rptr.2d 826] (referring to a "significant shift in California law towards private dispute resolution."); (2) Moncharsh v. Heily & Blase (1992) 3 Cal.4th 1, 9 [10 Cal.Rptr.2d 183] (citing to Title 9 of the Code of Civil Procedure [the laws regulating private arbitration in California] as "represent[ing] a comprehensive statutory scheme . . . [in which] the Legislature has expressed a 'strong public policy in favor of arbitration . . .'" [Citations.]); (3) Philippine Export & Foreign Loan Guarantee Corp. v. Chuidian (1990) 218 Cal.App.3d 1058, 1076 [267 Cal.Rptr. 457] (referring to the ". . . law of contract, which favors enforcement of valid bargains between private parties, and . . . the law of settlements, which favors private resolution of disputes"); and (4) Lake Elsinore, page 26, which "recognize[d] the strong policy in California in favor of arbitration and that provisions of EERA embody such a policy."

See also, Educational Employment Relations Act (EERA) sections 3548.5 through 3548.8, which provide a process through which the parties can develop and enforce arbitration agreements.

[9]EERA section 3541.5(a).

[10]See San Francisco Community College District (1979) PERB Decision No. 105, holding that PERB:

> . . . will not readily infer that a party has waived its rights under EERA; we will find a waiver only when there is an unintentional

access to PERB without a disciplined review of the parties' intention that comes from using well-established principles of contract interpretation. There is no need to use a policy doctrine to interpret a contract that is clear on its face.

APPLICATION OF PRINCIPLES TO THIS CASE

The plain language of the parties' Collective Bargaining Agreement (CBA) shows that the grievance machinery covers "any complaint of members involving interpretation, application or alleged violation of this Agreement." [CBA, Article 27, Section 1(A); emphasis added.] A grievant has the right to demand arbitration of disputes after prior exhaustion of the grievance process without settlement [CBA, Article 27, Section 5(D)].[11] Furthermore, if arbitration is chosen, the debate over whether the agreement covers the dispute is within the province of the arbitrator and not PERB.[12]

> relinquishment of these rights, expressed in clear and unmistakable terms. [Fns. omitted.]

[11]Section 5(D)(1) provides, in part, that:

> Within fifteen (15) workdays after receipt of the decision of the Chancellor, the grievant may, upon written notice to the CSEA, request the grievance be submitted to arbitration.

Thus, a grievant may not request that a grievance be submitted to arbitration without following the contractual procedure through the various levels, up to and including the Chancellor's decision mentioned above (Level III). Section 3(B) provides that grievances shall be brought "only through this procedure."

[12]This would be the result under the federal cases discussed in the text above. See, e.g., Steelworkers ("Whether contracting-out in the present case violated the agreement is the question. It is a question for the arbiter, not for the courts."

However, while it is apparent that arbitration is available in this case, the contract also provides that arbitration can only be undertaken with the concurrence of CSEA.[13] Here, CSEA withdrew its request for arbitration. In accord with the parties' contract, this dispute was grieved without settlement. Since binding arbitration is not available because of the lack of CSEA concurrence, I find that the process has been exhausted and further pursuit through the grievance process would be futile. PERB's jurisdiction is now permitted under EERA section 3541.5(a)(2), which provides that:

> . . . when the charging party demonstrates that resort to contract grievance procedure would be futile, exhaustion shall not be necessary.

CONCLUSION

Under the statute and the plain language of the parties' agreement, PERB has jurisdiction in this case.

[363 U.S. 574, 585] and Roy Robinson Chevrolet (" . . . the issue of arbitrability 'should itself be submitted to the arbitrator, as has become the near universal practice under collective bargaining.'" [Citations.] [228 NLRB 828]). This is clearly the result here because Section 3(D)2 of the parties' CBA also provides that it shall be the function of the arbitrator to determine the arbitrability of any grievance where arbitrability is questioned by either party.

[13]Section 5(D)(1) reads:

> The grievance may be submitted to arbitration only with the concurrence of the CSEA.