STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MONTEREY BAY TEACHERS ASSOCIATION, CTA/NEA, Charging Party, v. MONTEREY PENINSULA UNIFIED SCHOOL DISTRICT, Respondent.	Case No. SF-CE-1664 Administrative Appeal PERB Order No. Ad-262 November 2, 1994

Appearances: California Teachers Association by Ramon E. Romero, Attorney, for Monterey Bay Teachers Association, CTA/NEA; Breon, O'Donnell, Miller, Brown & Dannis by Claudia P. Madrigal, Attorney, for Monterey Peninsula Unified School District.

Before Blair, Chair; Caffrey, Garcia and Johnson, Members.

DECISION

CAFFREY, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Monterey Peninsula Unified School District (District) to a PERB administrative law judge's (ALJ) denial of the District's motion to dismiss and defer to arbitration an unfair practice charge filed by the Monterey Bay Teachers Association, CTA/NEA (MBTA).

BACKGROUND

In February 1992, MBTA informed the District that it was violating the parties' collective bargaining agreement (CBA) by providing certain secondary school teachers with more than one preparation period. MBTA's concern was that providing additional preparation periods to some teachers was resulting in increased

class size for other teachers who were not given additional preparation time.

As a result of MBTA's complaint, the District reviewed all non-instructional teacher assignments and discovered that some secondary special education teachers were being given a "casework period" over and above their preparation period, during which they did additional preparation work relative to their special education classes. The District then informed MBTA that it was discontinuing the casework period and other non-instructional periods beyond the preparation period, with the exception of some assignments supervising intramural and student government activities.

MBTA filed a grievance in July 1992 seeking the continuation of the past practice of providing the casework period to special education teachers. The District did not eliminate the casework period in the 1992-93 school year.

In May 1993, the District indicated that special education teachers would be given one preparation period and no casework period during the 1993-94 school year. MBTA filed a grievance in June 1993 seeking restoration of the casework period. MBTA alleged that discontinuation of the casework period violated a provision of the CBA (Article X: Workday; Section H: Preparation Time), which states in pertinent part:

> Each regular classroom teacher (grades 6-12) and each special education teacher (grades 6-12) shall be provided a preparation period equivalent to the approved teaching period for each regular school day, excluding minimum days, and days with special school

> events such [as] a field trip, assembly, or pep rallies and schools with slip schedules.

In October 1993, MBTA filed an unfair practice charge alleging that the District violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA)[1] when it "unilaterally rescinded all casework periods for special education teachers" resulting in a significant increase in the workday of those teachers. The PERB General Counsel's office issued a complaint on November 29, 1993. On the same day, a letter was sent to the parties refusing to dismiss and defer the charge to the parties' grievance and arbitration procedure. The refusal to defer was based on the PERB regional attorney's finding that the complained of conduct was not arguably prohibited by the parties' CBA.

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[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein 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:
>
> (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.

On April 20, 1994, the District filed with the ALJ a motion to dismiss and defer the charge to the parties' grievance and arbitration procedure. On May 3, 1994, the ALJ denied the motion for the reasons set forth in the regional attorney's November 29, 1993, letter refusing to dismiss and defer the charge.

DISTRICT'S APPEAL

In accordance with PERB Regulation 32646,[2] the District appealed the ALJ's order on May 23, 1994. The appeal repeats the arguments made by the District to the ALJ in its motion to dismiss and defer. The District argues that MBTA has acknowledged that this matter is subject to the CBA's grievance procedure by filing grievances concerning the elimination of the casework period, citing specific provisions of the CBA.

The District asserts that "If there are two reasonable interpretations of a matter, such that one interpretation falls within the ambits of the collectively negotiated agreement, the PERB and its agents should defer the matter to arbitration." The District argues that MBTA has engaged in "artful pleading" by describing its charge as dealing with the subject of "casework periods" when its grievance over the District's action referred to the CBA provision governing "preparation periods."

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[2]PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. Regulation 32646 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.

The District cites a recent Ninth Circuit U.S. Court of Appeals decision, United Food and Commercial Workers Union, Local 770 v. Geldin Meat Company (1994) 13 F.3d 1365 [145 LRRM 2206] (United Food), which held that "where the contract is susceptible to more than one interpretation, it is up to the arbitrator, not the District Court, to apply principles of contract law in interpreting the CBA." The District urges the Board to adopt the deferral standard enunciated in United Food, arguing that PERB's current standard does not provide "concrete guidelines" and results in regional attorneys acting as "rubberstamps" to complaints at a substantial waste of PERB's resources.

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 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 (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 (Los Angeles USD), 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 is dismissed and deferred only if the conduct alleged to be an unfair practice is arguably prohibited by the CBA.

The District argues that by filing a grievance alleging that the elimination of the casework period violated specified sections of the parties' CBA, MBTA has acknowledged 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 Board has held that the positions taken by the parties at various stages of a grievance or case are not dispositive of PERB's authority to determine whether a charge must be dismissed and deferred to arbitration. (State Center Community College District (1994) PERB Order No. Ad-255.) In making this determination, the Board must review the contract terms in accordance with the jurisdictional rule it established in Lake Elsinore.

On appeal, the District repeats the argument it made to the ALJ that the CBA provision dealing with preparation time arguably prohibits the conduct complained of in MBTA's charge. Since this preparation time provision calls for one preparation period per

day for special education teachers, the District asserts that it permits the elimination of "double preparation periods" such as casework periods. As a result, the District argues that this case presents a dispute over application of a contract provision, which is subject to the CBA grievance and arbitration proceeding and outside of PERB jurisdiction, and not an alleged unilateral change in terms and conditions of employment.

The District's argument is unavailing. As concluded by both the regional attorney and the ALJ, the CBA provision cited by the District does not deal with the subject of casework periods for secondary special education teachers. It is undisputed that these teachers continued to receive preparation periods in accordance with the CBA provision following elimination of the casework period. The District's assertion that the CBA's preparation period provision arguably permits the complained of conduct does not satisfy the element of the Board's jurisdictional rule requiring that the CBA arguably prohibit that conduct. (Los Angeles USD.) The District has failed to cite a contract provision which arguably prohibits the elimination of casework periods.

Contrary to the District's assertion, MBTA's charge and the resulting complaint in this case allege that the District committed an unlawful unilateral change in violation of EERA section 3543.5(a), (b) and (c) when it eliminated casework periods. Nothing in the charge or complaint alleges that the District violated the parties' CBA by its action. The District's

argument that its action is permitted by the terms of the CBA constitutes an affirmative defense to the alleged unilateral change violation. It does not constitute, however, grounds for dismissing and deferring the charge to arbitration under Lake Elsinore.

The District urges the Board to incorporate the standards set forth by the U.S. Court of Appeals in United Food to provide PERB with "concrete guidelines" under which issues of PERB's jurisdiction may be resolved. The District argues that application of the United Food arbitrability standard would result in deferral of the instant case.

First, the District's characterization of United Food as enunciating "concrete guidelines" for PERB's jurisdictional determinations is simply incorrect. In that case, the court reversed a lower court in finding that the matter at issue was subject to arbitration under the parties' CBA. The court indicated that deferral to arbitration should occur when the parties' agreement to arbitrate is "susceptible to an interpretation that covers the dispute." While expressing a general preference in favor of deferral to arbitration, United Food does not provide "concrete guidelines" for use by PERB in making its jurisdictional determinations.

More importantly, the District's reliance on United Food ignores the fact that the Board's jurisdiction is specifically described in the EERA. Thus, PERB's role in resolving questions of arbitrability is derived directly from California law.

Since a decision to dismiss and defer a charge to arbitration represents a finding by PERB that the law prohibits it from exercising jurisdiction over a matter, PERB has reflected the language of EERA section 3541.5(a)(2) in its jurisdictional standard. PERB dismisses and defers charges involving conduct arguably prohibited by the parties' CBA if it also provides a grievance procedure covering the conduct which culminates in binding arbitration. (Lake Elsinore.) The specific EERA limits on PERB's jurisdiction make it essential that PERB base its deferral to arbitration decisions directly on that statute. It is not appropriate for the Board to revise its jurisdictional standard in consideration of a particular Federal court decision on arbitrability which is not based on specific California law governing this issue. Therefore, the District's request that the Board adopt the arbitrability standard set forth by the U.S. Court of Appeals in United Food is rejected.

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.

Chair Blair and Member Johnson joined in this Decision.

Member Garcia's dissent begins on page 10.

GARCIA, Member, dissenting: The Public Employment Relations Board (PERB or Board) does not have jurisdiction over this case because the Educational Employment Relations Act (EERA), PERB precedent, and California policy expressed through Supreme Court decisions clearly mandate that the case be sent to arbitration. Simply stated, the law in California directs a case to arbitration when the collective bargaining agreement (CBA or agreement) between the parties contains a broad arbitration clause which permits the arbitrator to apply and interpret the provisions of the grievance agreement. Only specific clauses can exclude a dispute from a broad arbitration clause.

PERB is compelled to direct this case to arbitration because California policy and law favoring that position is even stronger than the federal policy. A review of the history of federal and California arbitration policy in labor relations cases is helpful to understanding the mandate.

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 designed to accommodate public employment in California.[1] Both PERB and reviewing courts turn for instruction to precedent established

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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].

under NLRB decisions.[2] A brief overview of the federal precedent on pre-arbitration deferral follows.

Under the NLRA, the NLRB was granted broad quasi-legislative and quasi-judicial powers. Employing that authority, the NLRB voluntarily adopted a policy that favored arbitration of disputes. The United States Supreme Court reviewed that voluntary policy in a series of cases that have become known as the Steelworkers Trilogy.[3] In one of those cases, Warrior, the Court adopted a strong policy favoring arbitration of labor disputes whenever arbitrability was in question by stating:

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage. [Warrior, supra, at 582 and 583.]

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 contract interpretation.[4] The arbitrator then decides whether the agreement covers the subject matter and who has standing to

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

[3]Steelworkers v. American Mfg. Co. (1960) 363 U.S. 564 [46 LRRM 2414]; Steelworkers v. Warrior & Gulf Navigation Co. (1960) 363 U.S. 574 [46 LRRM 2416] (Warrior); and Steelworkers v. Enterprise Wheel & Car Corp. (1960) 363 U.S. 593 [46 LRRM 2423].

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

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, unless there is clear evidence that this was not the result the parties intended.

The California Supreme Court shortly thereafter adopted the same policy in enforcement cases brought under California arbitration statutes. For example, in Posner v. Grunwald-Marx, Inc. (1961) 56 Cal.2d 169 [14 Cal.Rptr. 297], a case brought under Code of Civil Procedure section 1282 to compel arbitration of a labor dispute, the California Supreme Court stated that California state policy is not substantially different from federal policy to promote labor peace through arbitration. The court held that, where the grievance procedure is not limited to specific complaints, then all disputes which arise are covered if a broad arbitration clause is in the agreement. Furthermore, it was noted that proceeding to arbitrate is evidence that the dispute is arbitrable. The court stated:

> This being so, the federal rule to the effect that in such cases all disputes as to the meaning, interpretation and application of any clause of the collective bargaining agreement, even those that prima facie appear to be without merit, [footnote omitted] are the subject of arbitration, is adopted by this court. [Id. at 184.]

In another California Supreme Court case, O'Malley v. Wilshire Oil Co. (1963) 59 Cal.2d 482 (O'Malley), the court confirmed California's adoption of the federal rules:

> Although the issue in Posner did not involve interstate commerce and therefore did not necessarily invoke the federal rule as described by the United States Supreme Court, we nevertheless as a matter of policy followed the federal approach. We held that the trial court, instead of confining itself to the issue of whether the dispute was subject to arbitration, improperly passed upon the merits of the issue. [Id. at 487.]

The court went on to state, citing the U.S. Supreme Court case of Warrior that:

> In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad. [O'Malley, supra, citing Warrior at 491.]

Those cases make it clear that federal policy and the law of California are consistent and California has gone further by adopting statutes that mandate deferral to an arbitrator in labor relations cases where the parties to the dispute agreed on arbitration.

In 1978, the California legislature adopted the EERA jurisdictional statute (EERA section 3541.5, which mandates deferral of arbitrable cases) and other EERA provisions which

expressly direct parties to the arbitration statutes under the Code of Civil Procedure.[5]

A close examination of PERB precedent on resolving questions of arbitrability reveals that PERB confirmed and adopted the test of arbitrability identified in the California and federal cases reviewed above. For example, in Inglewood Unified School District (1990) PERB Decision No. 821 (Inglewood), PERB expressly

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[5]See, e.g., EERA section 3548.5, which provides that:

> A public school employer and an exclusive representative who enter into a written agreement covering matters within the scope of representation may include in the agreement procedures for final and binding arbitration of such disputes as may arise involving the interpretation, application, or violation of the agreement.

See also, EERA section 3548.6, which provides that:

> If the written agreement does not include procedures authorized by Section 3548.5, both parties to the agreement may agree to submit any disputes involving the interpretation, application, or violation of the agreement to final and binding arbitration pursuant to the rules of the board.

And see EERA section 3548.7, which provides that:

> Where a party to a written agreement is aggrieved by the failure, neglect, or refusal of the other party to proceed to arbitration pursuant to the procedures provided therefor in the agreement or pursuant to an agreement made pursuant to Section 3548.6, the aggrieved party may bring proceedings pursuant to Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure for a court order directing that the arbitration proceed pursuant to the procedures provided therefor in such agreement or pursuant to Section 3548.6.

adopted the federal "not susceptible" language, making PERB policy synonymous with the standard in Warrior and adopted by the California Supreme Court. After referring to the language employed in Warrior, PERB stated:

> We cannot conclude that Article XX section 20.1 is not susceptible to an interpretation that would allow an arbitrator to resolve this dispute. We find that the District's contracting out during the 3-week layoff period is arguably prohibited by the language in Article XX section 20.1 of the parties['] collective bargaining agreement. (Inglewood at p. 7.)

It is obvious that PERB condensed the standard into the paraphrase "arguably prohibited." This is confirmed in Riverside Community College District (1992) PERB Order No. Ad-229 (Riverside), where PERB stated that:

> Further, the Board has previously noted California's strong policy in favor of arbitration. [Citation omitted.] In [Inglewood], the Board found that arbitration 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.' . . . The Board therefore affirms the ALJ's finding that the CBA's grievance machinery covers the matter at issue. [Riverside at p. 4.]

The author of the majority opinion continues to abuse the paraphrase "arguably prohibited" by employing it as a subjective device to avoid California law which mandates deferral to arbitration.[6]

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[6]This case illustrates the abuse I warned against in my dissent in State Center Community College District (1994) PERB Order No. Ad-255.

There is no need for PERB to specifically adopt United Food and Commercial Workers Union, Local 77 v. Geldin Meat Company (1994) 13 F.3d 1365 [145 LRRM 2206] since that case simply reflects existing state law and policy. However, the majority opinion is wrong in its unintelligible attempt to discredit United Food as inconsistent with California law.

In the case before us, the grievance agreement between the parties provides that all grievances are arbitrable, and a grievance is defined as "an alleged violation, misinterpretation or misapplication of the express terms" of the agreement (Art. VI(B)(1)). The contract further provides that:

> The rules of the American Arbitration Association shall govern the arbitration with the exception stated within this provision . . . The arbitrator shall have no authority to add to, delete, or alter any provisions of this Agreement but shall limit his/her decision to the application and interpretation of its provisions. (CBA effective 1993-1995, Art. VI(G)(5).)

In this case, the parties agree that the grievance agreement culminates in binding arbitration and neither party identifies a provision of the agreement which specifically excludes the dispute from arbitration.

The conclusion is inescapable that this case should be forwarded to an arbitrator for interpretation and application of the contract provisions. PERB has no power to determine the merits of the dispute and the Board majority is not following the law. The Monterey Peninsula Unified School District should proceed to court to obtain a proper result.