STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS COLUSA CHAPTER NO. 574, Charging Party, v. COLUSA UNIFIED SCHOOL DISTRICT, Respondent.	)	Case No. S-CE-400 Request For Reconsideration PERB Decision No. 296 PERB Decision No. 296a July 15, 1983

Appearances; Robert A. Galgani, Attorney (Breon, Galgani, Godino & O'Donnell) for Colusa Unified School District.

Before Gluck, Chairperson; Tovar and Burt, Members.

DECISION

TOVAR, Member: The Public Employment Relations Board (PERB or Board) having duly considered the request for reconsideration and for stay filed by the Colusa Unified School District (District), hereby denies that request.

DISCUSSION

The underlying case in this matter came before the Board upon exceptions filed by the District to an adverse proposed decision issued by a PERB administrative law judge (ALJ). On review, we affirmed the ALJ's determination that the District had violated subsection 3543.5(c) of the Educational Employment Relations Act by unilaterally changing a policy on paid holiday

leave for classified employees which had been previously established by contractual agreement with the California School Employees Association and its Colusa Chapter No. 574 (CSEA).[1] Specifically, the ALJ found that the parties had contractually agreed that when an established non-working holiday fell on a Tuesday or a Thursday, then the Monday preceding the Tuesday holiday, or the Friday following a Thursday holiday, would also be a day of paid leave, thereby creating a four-day weekend for the employees. He found that despite this contractually agreed-upon policy, the District had reverted, during the term of the contract, to its earlier policy of not granting paid leave on those Mondays and Fridays.

In order to resolve CSEA's charge on the merits, the ALJ was required to interpret the contract. Because the contract provision on paid leave was ambiguous, he relied on evidence of negotiating history and the negotiators' intent at the bargaining table. Based upon this evidence, he determined that the District had contractually agreed to the policy of paid holiday leave for those certain Mondays and Fridays at issue.

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[1]The Educational Employment Relations Act is codified at Government Code section 3540 et seq. Section 3543.5 provides in relevant part as follows:

> It shall be unlawful for a public school employer to:
>
> . . . . . .
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> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

In its exceptions to the ALJ's proposed decision, the District argued, inter alia, that the Board should exclude CSEA's evidence as to negotiating history. It asserted that CSEA had failed to present this evidence when the holiday-leave dispute came before the school board in a grievance hearing. To permit the union to present before PERB evidence which it chose to withhold at the grievance hearing, argued the District, would encourage litigants to engage in this undesirable practice in the future; the Board, therefore, should strike this evidence from the record.

We dismissed this exception on the grounds that the District was raising an issue which it had not raised before the ALJ. We noted that it is a well-established rule of administrative appellate procedure that a matter not raised before the trial judge is not properly reviewable by the appellate tribunal.

In the instant request for reconsideration and for stay, the District maintains that it in fact did raise an objection before the ALJ to any reliance on the evidence of negotiating history submitted by CSEA. It cites to the hearing transcript and to its reply brief to the ALJ. Further, the District argues that the Board applied an incorrect rule of law in rejecting its exception. It maintains that the correct rule of law is that where, as in the underlying case, there is a sufficient record upon which to resolve the District's exceptions on their merits, the Board should properly do so.

The cases cited by the Board, Butte View Farms v. ALRB (1979) 95 Cal.App.3d 961 [157 Cal.Rptr. 476] and Fresno Unified School District (4/30/82) PERB Decision No. 208, are asserted to be distinguishable.

The Asserted Error of Fact

The portions of the transcript and the reply brief cited in the District's request for reconsideration fail to demonstrate that it raised any objection before the hearing officer to the admission of the challenged evidence on the grounds now asserted. The first passage of transcript to be cited is at p. 83, lines 14-21, which states:

> [District Counsel]: The hearing testimony reflects – of January 12, only reflects her hearsay statements. There's no evidence put in of any contract interpretation, bargaining history or anything, during the course of that proceeding. There was none – only her statements as to what county councils had said. She was given the opportunity to call witnesses to present evidence but did not do so. Then the decision came out which we now have in evidence.

The second passage is at p. 84, lines 10-28, which states:

> [District Counsel] I'm putting aside any anti-union animus statements, but – and I don't know the technicalities of putting the pleadings in. They're a part of the record but I can point out those sections of her pleadings that bring – and I want to make – so that there is no mistake in the record at all, that we continue to object to any consideration of the unilateral action issue because that is, in essence, a contract interpretation question and when there had been a denial of a grievance, then the unfair labor practice was filed. And in order to reach the unfair labor practice

> issue, if there is one, you have to construe the contract. You have to interpret what the terms mean, whether Article XIII took in local holidays. What did that term mean and what was the bargaining background of that whole section. We've done some of that this morning. But I'm lodging an objection right now to any further testimony this afternoon as to bargaining background because all that was dealt with in the grievance procedure, and resulting in the decision of the Board on that grievance to deny the local holiday issue. Am I making myself clear?

Certainly these passages of transcript show that the District presented to the ALJ an allegation that CSEA had not put on evidence of negotiating history at the grievance proceeding of January 12. The latter passage of transcript also contains an express objection to the introduction of evidence as to bargaining background. However, a complete reading of these passages in context makes clear that the basis for the District's objection was its contention that PERB has no jurisdictional authority to interpret contracts. Importantly, the ALJ specifically expressed this understanding of the District's argument in his response to District counsel. Following the above-quoted statements of District counsel, the ALJ replied as follows:

> HEARING OFFICER: Well, yes. You're stating the issue in this case and that's the issue ultimately that's going to have to be resolved before you can get to the merits as to whether or not there is a unilateral change in past practice or whether or not this is essentially a contract violation case that doesn't come before us. [Emphasis added.]

From District counsel's failure to take issue with the ALJ's characterization of his argument as simply a statement of the jurisdictional issue, we infer that the ALJ had correctly captured his meaning.

In sum, the passages cited from the transcript fail to support the District's assertion that it ever proposed to the ALJ application of the evidentiary rule advocated on exceptions which would bar the introduction of evidence not previously presented at a prior grievance proceeding.

Neither do the cited passages of the District's reply brief to the ALJ indicate that the District ever proposed that evidentiary rule to the ALJ. While the cited passages make mention of CSEA's asserted failure to present evidence of negotiating history at the grievance proceeding, this factual matter is raised only in connection with legal arguments unrelated to the belatedly-advocated evidentiary rule. We thus adhere to our determination that the District's evidentiary argument was raised for the first time on exceptions.

The Asserted Error of Law

The District argues that, even if it failed to present its evidentiary objection before the ALJ, the Board should nevertheless consider its arguments on exceptions. It asserts that the authority we relied on in refusing to consider those arguments can be distinguished, and that the only "real vice to be avoided by a rule such as the one declared by PERB here is that there is no record upon which a determination may be

made." The District argues that there is a sufficient record here and that there is neither reason nor authority supporting the Board's refusal to consider the merits of the exception at issue.

The District's efforts to distinguish the authority on which we relied in our Decision are unpersuasive. As to Fresno Unified School District (4/30/82) PERB Decision No. 208, the District says " . . . . the authority cited is distinguishable. In Fresno, it appears that nothing was done by the District to bring the undecided issue to the attention of the hearing officer." As reviewed above, however, the District has failed to show that it ever raised its evidentiary argument before the ALJ in the instant case.

Neither does the District's claim that a sufficient record exists persuade us that we may properly resolve an issue not raised at the trial level. It is a fundamental principle of due process that parties to an adjudicatory proceeding must be afforded the opportunity to litigate the questions by which their rights may be determined. This is the basis for the rule that an appellate tribunal will not consider a party's de novo claim that evidence should have been excluded at the trial level. See Doers v. Golden Gate Bridge Etc. District (1979) 23 Cal.3d 180, 184 [151 Cal.Rptr. 837, 588 P.2d 1261], citing legal scholar Bernard Witkin as follows:

> An appellate court will ordinarily not consider procedural defects or erroneous rulings, in connection with relief sought or

> defenses asserted, where an objection could have been but was not presented to the lower court by some appropriate method. . . . The circumstances may involve such intentional acts or acquiescence as to be appropriately classified under the heading of estoppel or waiver. . . . Often, however, the explanation is simply that it is unfair to the trial judge and to the adverse party to take advantage of an error on appeal when it could easily have been corrected at the trial. (6 Witkin Cal. Procedure (2d ed. 1971) Appeal, section 218, pp. 4264-4265.)

Here, consideration by the Board of the evidentiary rule proposed by the District on exceptions would violate this principle by denying CSEA the opportunity to present evidence and full argument on the questions of whether the Educational Employment Relations Act should be read to include such a rule in general, and, if so, whether the instant case is one in which the rule should apply.

Finding that the District has failed to identify any error of law or fact in Decision No. 296, the Board denies the request for reconsideration and for stay.[2]

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[2]PERB's rules and regulations are codified at California Administrative Code, title 8, section 31001 et seq. Section 32410 of those rules and regulations provides in pertinent part as follows:

> (a) Any party to a decision of the Board itself may, because of extraordinary circumstances, file a request to reconsider the decision . . . . The grounds for requesting reconsideration are limited to claims that the decision of the Board itself contains prejudicial errors of fact, or newly discovered evidence or law which was not previously available and could not have been discovered with the exercise of reasonable diligence.

ORDER

The request by the Colusa Unified School District that the Public Employment Relations Board grant reconsideration of Colusa Unified School District (3/21/83) PERB Decision No. 296 is DENIED.

Chairperson Gluck and Member Burt joined in this Decision.