STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

TEACHERS ASSOCIATION OF LANCASTER, Charging Party, v. LANCASTER ELEMENTARY SCHOOL DISTRICT, Respondent.	)	Case No. LA-CE-1616 PERB Decision No. 358 November 23, 1983

Appearances: Charles R. Gustafson, Attorney for Teachers Association of Lancaster; Steven C. Babb, Attorney (O'Melveny & Myers) for Lancaster Elementary School District.

Before Tovar, Jaeger and Morgenstern, Members.

DECISION

MORGENSTERN, Member: The Teachers Association of Lancaster (Association) appeals the attached decision of the Los Angeles regional attorney of the Public Employment Relations Board (PERB or Board). In that determination, the regional attorney dismissed the Association's charge that the Lancaster Elementary School District (District) violated subsections 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA) by unilaterally adopting a new policy regarding employees' leaves for jury duty.[1]

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

FACTUAL SUMMARY AND PROCEDURAL HISTORY

On August 3, 1982, the Association filed its first unfair practice charge. That charge concerned alleged changes in the school calendar and changes in the special education program. The District allegedly declined to negotiate as to these topics because it believed them to be outside the scope of representation.

On August 13, 1982, the District asserted that the Association's charge was untimely because the conduct complained of occurred more than six months prior to the filing of the charge.

On October 4, 1982, the Association filed an amended charge which it deemed to supersede the initial charge. The amended charge reiterated the earlier allegations and added that, as of May 1982, it learned that the District had implemented a new evaluation procedure and a new policy regarding jury duty leave.

On November 16, 1982, the Association filed a second amended charge, also said to supersede the previous charge filed in October. In its second amended charge, the Association contended that the District unilaterally altered the policy regarding jury duty leave. Although implemented during the 1980-81 school year, the Association claimed that it first learned of the revised policy near the end of the 1981-82 school year. In paragraph F of its charge, the Association asserted as follows:

> The District and the Association have agreed in writing to submit this matter to PERB. A

> copy of said writing is attached hereto marked Exhibit A.

The attached document, signed by the parties on November 9, 1982, reads as follows:

> Memorandum of Agreement
>
> As a part of the 1982 Amendments to the July 1, 1978 Agreement, the Association agrees to withdraw the Unfair Practice Charge submitted on July 12, 1982, and amended on October 4, 1982, except for the single issue of the District's policy and procedure regarding jury duty leave.
>
> The parties agree to allow PERB to hear and determine if the District committed an Unfair Practice by Herbert D. Bartelt Jr., Ed.D instituting a new memorandum entitled Verification of Jury Duty Procedures to Principals and School Secretaries dated September 1, 1981.

On March 17, 1983, PERB's regional attorney advised the parties that the Association's charge was dismissed. The basis for the dismissal rests on the regional attorney's determination that, because the complained-of conduct is prohibited by provisions of the parties' negotiated agreement, the matter should be deferred to the contractual binding arbitration proceedings.

Two documents are attached to the dismissal letter. The first is a letter from the District, dated November 23, 1982, advising the PERB regional attorney, inter alia, that its position:

> . . . was communicated to the Association at the time that the Memorandum of Agreement attached as Exhibit A to the Second Amended Charge was agreed to by the parties.

> . . . the District is willing to waive any contentions of timeliness if this matter is submitted to arbitration and is willing to proceed to arbitration forthwith.

The second document, dated December 7, 1982, is from the District to the Association confirming the District's willingness to waive

> any and all procedural or other contentions regarding the arbitrability of the above-captioned case, and that the District is willing to proceed forthwith to arbitrate the merits of whether or not its policy . . . violates the collective bargaining agreement between the District and the Teachers Association of Lancaster.

The Association submitted the instant appeal of the dismissal of the unfair practice charge on April 6, 1983. It asserts that the contract does not specifically cover the dispute and that the District stipulated that the instant charge should be submitted to PERB.

In its response to the Association's appeal dated April 22, 1983, the District argues that the dispute involves the interpretation given to the language of the negotiated agreement and that its agreement to submit the matter to PERB was no more than an agreement to submit the matter to PERB's normal complaint processing procedures, including an assessment of the applicability of the deferral to arbitration provision found in EERA. The District alleges that, at the time the memorandum of understanding was signed, it verbally advised the

Association that it would urge PERB to defer the dispute to arbitration.

DISCUSSION

In pertinent part, subsection 3541.5(a) of EERA prohibits the Board from issuing 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 has applied this provision and has deferred to arbitration when the contract covers the matter at issue in the unfair practice charge (Stockton Unified School District (11/3/80) PERB Decision No. 143; John Swett Unified School District (12/21/81) PERB Decision No. 188) and where the negotiated procedure culminates in binding arbitration (Pittsburg Unified School District (3/15/82) PERB Decision No. 199).

In the instant case, the conditions of subsection 3541.5(a) are satisfied. The parties' negotiated agreement culminates in binding arbitration and the Association's dispute concerns the application of the contractual provision regarding leaves of absence for jury duty.[2] With regard to this issue, the

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[2]Article XX, section 4 of the contract provides for personal leaves of absence for employees called to jury duty. Section 4.3 states:

regional attorney appropriately referred to the standards for deferral articulated by the National Labor Relations Board in Collyer Insulated Wire (1971) 192 NLRB 837 [77 LRRM 1931] and adopted by PERB in Dry Creek Joint Elementary School District (7/21/80) PERB Order No. Ad-81a. She correctly concluded that the parties were operating within a stable bargaining relationship and that the contractual language lies at the center of the parties' dispute. With regard to the remaining Collyer condition, the regional attorney found the District ready and willing to proceed to arbitration, waiving all procedural defenses. In support of this conclusion, she cited the documents attached to her decision in which the District indicated its willingness to proceed to arbitration. (See pp. 3-4, supra.)

The issue raised by the instant case concerns the fact that the regional attorney's dismissal does not mention or attach any significance to the document executed by the parties on November 9, 1982, which, on its face, purports "to allow PERB

> It is the responsibility of the member to report to work whenever the member is not required to attend jury duty service.

The Association contends that this language does not require employees to report to work when they have reported for jury duty but have been excused. It urges that the contract covers those situations where an employee is on call for jury duty but does not actually report for jury duty that day. The Association argues that the past practice and bargaining history support its interpretation.

to hear and determine if the District committed an Unfair Practice . . . ."

In the Association's view, the agreement clearly and unambiguously establishes the District's willingness to resort to PERB's unfair practice procedures rather than the grievance machinery to resolve this dispute. The plain meaning of the language, however, does not so provide. To the contrary, the document does not refute the District's contention that the agreement merely expresses its willingness to submit the matter to PERB's normal complaint processing procedure. The document itself neither expressly nor impliedly precludes the District from raising the deferral argument or any other defenses before PERB.

In balance, since the Collyer deferral standards are satisfied by the circumstances in this case, the onus rests with the Association to establish the District's waiver. With the burden so placed, the plain meaning of the document should be respected. Because it does not include language waiving the District's defenses, it should not be read as foreclosing the District from asserting its deferral defense.

ORDER

While the regional attorney failed to consider the parties' memorandum, our analysis of that document does not disturb the result reached. Accordingly, rather than remand the dispute for review in light of the agreement, we AFFIRM the regional attorney's decision to dismiss the charge and defer

the parties' dispute to the contractual binding arbitration procedure.

Members Tovar and Jaeger joined in this Decision.

STATE OF CALIFORNIA

GEORGE DEUKMEJIAN, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD
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March 17, 1983

Mr. Charles Gustafson
California Teachers Association
P. O. Box 92888
Los Angeles, CA 90009

Mr. Steven Babb
O'Melveny & Myers
400 South Hope Street
Los Angeles, CA 90071-2899

RE: DISMISSAL OF UNFAIR PRACTICE CHARGE
Teachers Association of Lancaster v.
Lancaster Elementary School District, LA-CE-1616

Dear Parties:

Pursuant to section 3541.5(a)(2) of the Employer-Employee Relations Act (EERA) and Public Employment Relations Board (PERB) Regulation section 32620(b)(5)[1], the above-captioned charge is hereby dismissed and deferred to arbitration under the collective bargaining agreement in effect between the parties.

The Charging Party, Teachers Association of Lancaster (Association) alleges that Respondent, Lancaster Elementary School District (District) violated sections 3543.5(a), (b) and (c) of the EERA by unilaterally implementing a new policy and procedure regarding jury duty leave. Under the new policy employees who report to jury duty in the morning and shortly thereafter are excused from such duty for the remainder of the day, are required to report back to work. The Association alleges that the implementation of this policy in late Spring 1982 was a departure from past practice, which did not require that employees report back to work after finishing jury duty under such circumstances.

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[1]References to the EERA are to Government Code sections 3540 et seq. PERB Regulations are codified in California Administrative Code, Title 8.

My investigation of the charge revealed the following. The Association and the District are parties to a collective bargaining agreement originally effective July 1, 1978 through June 30, 1981, and thereafter extended through June 30, 1983. Article XX Section 4 of this agreement provides for personal leaves of absence for employees called to jury duty. Section 4.3 of this Article states that:

> 4.3 It is the responsibility of the member of report to work whenever the member is not required to attend jury duty service.

The District contends that this language supports its policy governing unit members who are excused from jury duty for the day. The Association contends that this language was intended to apply only to those situations where an employee is not required to report at all for jury duty on a given day, and that by its action the District departed from past practice with regard to leave policy.

Article VI, Section 1.0 of the collective bargaining agreement defines a grievance as:

> (1) a statement/claim by a teacher or group of teachers covered hereby, that the District has violated an express term of this Agreement and that by reason of such violation the teacher(s) rights have been adversely affected...

Article VII, Section 1.0 provides in pertinent part:

> Grievances which are not settled pursuant to Article VI, and which the Association desires to contest further, and which involve the interpretation or application of the express terms of this Agreement, shall be submitted to arbitration as provided in this Article, but only if the Association gives written notice to the District of its desire to arbitrate the Grievance within ten (10) working days after the termination of Level II of the Grievance procedure.

Section 5.0 of Article VI provides:

> the decision of the arbitrator within the limits herein prescribed shall be final and binding upon the parties to the dispute.

Based on the facts stated above and section 3541.5(a) of the EERA, the charge must be dismissed and deferred to arbitration under the collective bargaining agreement.

Section 3541.5(a) states in pertinent part:

> . . . the board shall not do either of the following:. . . (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.

PERB Regulation 32620(b)(5) requires the Board agent processing the charge to "(d)ismiss the charge or any part thereof as provided in Section 32630 if . . . it is determined that a complaint may not be issued in light of Government Code sections 3514.5, 3541.5 or 3563.2 or because a dispute arising under HEERA is subject to final and binding arbitration." In Dry Creek Joint Elementary School District (7/21/80) PERB Order No. Ad-81a, the Public Employment Relations Board (PERB) explained that:

> [W]hile there is no statutory deferral requirement imposed on the National Labor Relations Board (hereafter NLRB), that agency has voluntarily adopted such a policy both with regard to post-arbitral and pre-arbitral award situations. (Footnote omitted.) EERA section 3541.5(a) essentially codifies the policy developed by the NLRB regarding deferral to arbitration proceedings and awards. It is appropriate, therefore, to look for guidance to the private sector. (Footnote to Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608.)

In Collyer Insulated Wire (1971) 192 NLRB 837 [77 LRRM 1931] and subsequent cases, the NLRB articulated standards under which deferral is appropriate in prearbitral situations. These requirements are: (1) the dispute must arise within a stable collective bargaining relationship where there is no enmity by the respondent toward the charging party; (2) the respondent must be ready and willing to proceed to arbitration and must waive contract-based procedural defenses; and (3) the contract and its meaning must lie at the center of the dispute.

These standards are met with respect to the charge in this case. First, no evidence has been produced to indicate that the parties are not operating within a stable collective bargaining relationship. Second, by letters from its representative, Steven Babb, dated November 23, 1982 and December 7, 1982, (Exhibits 1 and 2) the respondent has indicated its willingness to proceed to arbitration and to waive all procedural defenses.

Finally the issue raised by this charge that the District unilaterally changed its jury duty policy for employees released for the day directly involves an interpretation of Article XX, Section 4.3 of the collective bargaining agreement. Accordingly this charge must be deferred to arbitration and dismissed.

Pursuant to Public Employment Relations Board regulation 32635 (California Adminsitrative Code, title 8, party III), you may appeal the refusal to issue a complaint (dismissal) to the Board itself.

Right to Appeal

You 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 Notice (section 32635(a). To be timely filed, the original and five (5) copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) on April 6, 1983 or sent by telegraph or certified Unites States mail postmarked not later than April 6, 1983 (section 32135). The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

If you file a timely appeal of the refusal, any other party may file with the executive assistant to the Board an original and five (5) copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal (section 32635(b)).

Service

All documents authorized to be filed herein except for amendments to the charge must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany the document filed with the Regional Office or the Board itself (see section 32140 for the required contents and a sample form). The documents will be considered properly "served" when personally delivered or deposited in the first-class mail postage paid and properly addressed.

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 executive assistant to the Board at the previously noted address. A request for an extension in

which to file a document with the Regional Office should be addressed to the Regional Attorney. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the subject document. The request must indicate good cause for the position of each other party regarding the extension and shall be accompanied by proof of service of the request upon each party (section 32132).

Final Date

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

Very truly yours,

Dennis Sullivan
General Counsel

Marjorie J. Weinzweig
Regional Attorney

MJW:djm

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November
23rd
1 9 8 2

OUR FILE NUMBER
481,001-11

Marjorie Weinzweig, Esq.
Regional Attorney
Public Employment Relations Board
3470 Wilshire Boulevard, Suite 1001
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Re Teachers Association of Lancaster
v. Lancaster Elementary School
District, Case No. LA-CE-1616

Dear Ms. Weinzweig:

In response to your letter of November 18 regarding the above-captioned matter, it is the position of the Lancaster Elementary School District (the "District") that PERB is prohibited from issuing a complaint in this matter at this time because of the restrictions imposed by Government Code § 3541.5(a)(2).

The Second Amended Charge in this case alleges that the District violated the Rodda Act by unilaterally implementing a new policy and procedure regarding jury duty leave. As I understand it, the charge specifically relates to a situation in which a unit member reports to jury duty in the morning and thereafter is excused from such duty for the remainder of the day after having served only a short period of time or no time on the jury. The District's policy under these circumstances has been to require the employee to report back to work after being excused from jury duty. It appears to be the position of the Teachers Association of Lancaster (the "Association") that this policy is a recent change and that under prior policy a unit member was not required to report back to work in these circumstances.

Article XX, Section 4.3 of the collective bargaining agreement between the District and the Association, a copy of which is already on file with PERB, provides:

> "It is the responsibility of the member to report to work whenever the member is not required to attend jury duty service."

EXHIBIT 1

It is the District's position that this language fully supports its policy governing unit members who are excused from jury duty. Of course, it is possible that the District's reading of this section may be erroneous, but this is precisely the sort of issue which should be initially determined by an arbitrator pursuant to Article VII of the agreement.

Accordingly, because the conduct complained of by the Association in the Second Amended Charge is the subject of Section 4.3 of Article XX of the agreement, the District submits that PERB is prohibited from issuing a complaint at this time until the parties have exhausted the grievance machinery of the agreement, as is set forth in Government Code § 3541.5(a)(2). The District's position in this matter was communicated to the Association at the time that the Memorandum of Agreement attached as Exhibit A to the Second Amended Charge was agreed to by the parties. As I mentioned to you earlier, the District is willing to waive any contentions of timeliness if this matter is submitted to arbitration and is willing to proceed to arbitration forthwith.

Sincerely yours,

Steven C. Babb

Steven C. Babb
for O'MELVENY & MYERS

SCB/rc
cc: Charles R. Gustafson, Esq.

O'MELVENY & MYERS

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December
7th
1 9 8 2

OUR FILE NUMBER
26,577-27

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Teachers Association of Lancaster
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Re Teachers Association of Lancaster
v. Lancaster Elementary School District,
Case No. LA-CE-1616

Dear Mr. Gustafson:

As a followup to my November 23 letter to Marjorie Weinzweig in connection with the above-captioned case, a copy of which was sent to you, this will confirm that the Lancaster Elementary School District is willing to waive any and all procedural or other contentions regarding the arbitrability of the above-captioned case, and that the District is willing to proceed forthwith to arbitrate the merits of whether or not its policy of requiring unit members to report back to work after being excused from jury duty violates the collective bargaining agreement between the District and the Teachers Association of Lancaster.

Sincerely yours,

Steven C. Babb

Steven C. Babb
for O'MELVENY & MYERS

SCB/rc
cc: Marjorie Weinzweig

EXHIBIT 2