STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 1650,	)	
Charging Party,	)	Case No. SF-CE-174-H
v.	)	PERB Order No. Ad-139-H
REGENTS OF THE UNIVERSITY OF CALIFORNIA (SAN FRANCISCO),	)	Administrative Appeal (Interlocutory)
Respondent.	)	February 15, 1984

Appearances: Glenn Rothner, Attorney (Reich, Adell & Crost) for American Federation of State, County and Municipal Employees, Local 1650; Gerald A. Becker, Attorney for the Regents of the University of California.

Before Tovar, Morgenstern and Burt, Members.

DECISION

TOVAR, Member: This interlocutory appeal by the Regents of the University of California (University) is before the Public Employment Relations Board (PERB or Board) upon the certification of an administrative law judge (ALJ) pursuant to section 32200 of PERB's rules and regulations.[1] The University appeals the attached order of the ALJ denying its motion to dismiss the instant charge, which alleges that the University unlawfully discharged an employee because of his

[1]PERB's rules and regulations are codified at California Administrative Code, title 8, section 31001 et seq.

protected activity. The University's motion was made on the grounds that it is prepared to submit the dispute to binding arbitration as provided for in its Staff Personnel Manual and that PERB must therefore defer its jurisdiction over the dispute.

For the reasons which follow, we affirm the ALJ's denial of the University's motion to dismiss.

DISCUSSION

Subsection 32620(b)(5) of PERB's rules and regulations provide that a charge is to be dismissed where it is based upon ". . . a dispute arising under HEERA [which] is subject to final and binding arbitration."2

The University asserts that the instant charge can be resolved via the binding arbitration procedure which it makes available to its employees through the Staff Personnel Manual. The Manual is a publication unilaterally compiled and issued by the University. In view of the availability of this procedure, it argues, PERB is compelled to defer its jurisdiction under the terms of its own regulations.

The University has misinterpreted the regulation. The policy of deferral to binding arbitration is not unique to regulation 32620. Rather, the doctrine has a well-established history before both the National Labor Relations Board and the

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2The Higher Education Employer-Employee Relations Act (HEERA) is codified at Government Code section 3560 et. seq.

PERB itself. In his order denying the University's motion, the ALJ reviewed that history and, on that basis, concluded that regulation 32620 mandates deferral of the Board's jurisdiction to binding arbitration only where the parties have previously agreed to such a procedure through a collectively negotiated agreement. In addition to the cases cited by the ALJ, we note King City Joint Union High School District (3/3/82) PERB Decision No. 197, in which we reviewed at p. 33, the clear public policy disfavoring involuntary arbitration arrangements.

In finding that such prior agreement is required before the Board will defer its jurisdiction to binding arbitration, the ALJ correctly interpreted regulation 32620. We therefore adopt his rationale on this point as the conclusion of the Board itself.[3]

ORDER

The motion to dismiss the charge in Case No. SF-CE-174-H is DENIED.

Members Morgenstern and Burt joined in this Decision.

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[3]While the ALJ went on to address the issue of deferral where the charge is one of anti-union discrimination, we find it unnecessary to reach this question. We therefore disavow the ALJ's discussion of this matter, deferring our own consideration of the issue until such time as it is squarely placed before us by a case in controversy.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 1650, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA (SAN FRANCISCO), Respondent.	)	Case No. SF-CE-174-H ORDER ON MOTION TO DISMISS COMPLAINT (TO DEFER TO ARBITRATION)

The charge in this case was filed on August 5, 1983. It alleged that the University's discharge of Joseph Brenner, a University transportation assistant and vice-president of Local 1650, American Federation of State, County and Municipal Employees (AFSCME), the charging party, was motivated by the University's knowledge of Brenner's participation in AFSCME. A complaint was issued by the General Counsel on August 17, 1983.

On September 28, the University filed its Answer to the Complaint, and a Motion to Dismiss the Complaint, based on the asserted availability of a procedure by which a hearing officer not employed by the University could be called on to hear and decide the dispute underlying the complaint.

On October 31, a hearing was held before the undersigned administrative law judge, at which time each party presented evidence relevant to the University's motion to dismiss the

complaint. At the close of presentation of evidence, the administrative law judge denied the motion to dismiss the complaint and stated the reasons. The hearing was then recessed until December 13, 1983, to allow the respondent to pursue an interlocutory appeal of the hearing officer's denial of the motion to dismiss. The administrative law judge has certified the question to the Board, in a separate document.

This order is issued to state in a more structured form, the reasons for the denial of the motion.

I. The Grievance.

On July 1, 1983, Brenner submitted a grievance challenging his discharge, and alleging, inter alia,

> I believe that Jim Wood was well aware of my position as an active AFSCME 1650 member and officer and that this action of dismissal was at least in part for that reason.

The grievance also alleged that the investigation undertaken by Brenner's supervisor before the discharge was incomplete and irresponsible. Brenner denied specifically that he had engaged in any misconduct related to his job responsibilities, and set out his reasons for that assertion. The grievance was denied, and on October 6, Brenner asked to submit the case to review by a hearing officer.

II. The University's Dispute Resolution Procedures.

The University Staff Personnel Manual includes provisions, in section 280, defining a resolution procedure for disputes

which arise between employees and the University. The procedure, like the other provisions of the Staff Personnel Manual, were adopted some time ago by the University, and is not the product of collective bargaining or negotiations with any employee organization.[1]

Pertinent portions of the dispute resolution procedure set out in the manual are reprinted here:

> 280.16 Non-University Hearing Officers. As an alternative to the use of a University Hearing Committee or Hearing Officer, an employee may elect in writing that the grievance be heard by a non-University Hearing Officer. The Chancellor shall obtain a panel of prospective non-University Hearing Officers from the local office of the American Arbitration Association.
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> 280.17 The hearing process shall provide an opportunity for the employee or the employee's representative and the department head or the department head's representative (see Staff Personnel Policy Section 280.31) to examine witnesses and to submit relevant evidence. Each party shall provide the other with relevant material and names of all witnesses who are to be introduced at a hearing. To the extent possible this material should be provided at least seven calendar days prior to the hearing.

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[1]In May and June 1983, PERB conducted a series of elections among University employees to determine whether employees in specified bargaining units favored collective bargaining representation by employee organizations. Prior to that time, the only employees who were represented by employee organizations for collective bargaining purposes were police officers, and faculty members at one campus. The dispute resolution procedure at issue here was in use long before the May-June elections, and the certifications which followed.

280.20 Responsibility and Authority of the Hearing Committee or Officer. The Hearing Committee or Officer shall:

. . . . . .

b. conduct a hearing to determine the facts and whether the management action grieved was in violation of Staff Personnel Policy or the Chancellor's implementing procedure or, if the grievance involves corrective action or dismissal, whether the management action was reasonable under the circumstances; . . . .

280.22 The Hearing Committee or Officer shall have no authority to depart from or otherwise modify Staff Personnel Policies.

280.24 Decision. The decision of the Hearing Committee or Officer shall be final and binding when the issue reviewed under this policy alleges violations of Staff Personnel Policies 270 (Corrective Action), 740 (Dismissal of Regular Status Employees), or 760 (Layoff, Furlough, and Reduction in Time from Career Positions) and if the employee had regular status at the time the grievance was filed. Recommended decisions to resolve all other issues are advisory to the Chancellor.

In addition, the Chancellor of the San Francisco campus of the University has adopted certain regulations to implement the University-wide policies. Relevant portions include the following:

> 280.16 The responsibility for obtaining a panel of prospective Non-University Hearing Officers from the local office of the American Arbitration Association is delegated by the Chancellor to the Labor Relations Manager. Upon receipt of a list from the American Arbitration Association, the parties shall independently strike any name(s)

> unacceptable, rank any remaining name(s) in order of preference and return the prospective list to the American Arbitration Association for selection of a Non-University Hearing Officer. . . .
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> 280.17 . . . In the event either party wishes principals or witnesses to be sworn, it will be strictly up to the principals or witness to determine if they wish to be sworn with the understanding that declining to be sworn carries no implication whatsoever concerning the credibility of the principals or witnesses. Principals and witnesses should understand that they will be held to the veracity of their statements.

At the time of the hearing, the University and the Union had obtained a list of possible hearing officers from the American Arbitration Association, and each had submitted to the AAA its list of unacceptable and acceptable hearing officers. A hearing officer had not yet been selected and consequently, no hearing dates had been scheduled.

III. The Authority of the Arbitrator

Section 280.20 of the Staff Personnel Manual cited above describes the hearing officer's authority or jurisdiction.

Tom Matteoli, University labor relations coordinator assigned to the San Francisco campus, who has in the past represented the University in hearings arising under the dispute resolution provisions cited above, testified that the phrase "reasonable under the circumstances" refers to the appropriateness of the severity of the penalty imposed by the University on an errant employee, in light of the misdeed of

the employee. Matteoli also testified, in response to a question put by the representative of the Union, that there is no section of the Staff Personnel Manual which expressly prohibits discrimination against employees based on their affiliation with, or support for, a union. There is, however, in section 280.32, a prohibition against reprisals against employees for using or participating in the grievance process.

The Union contended during the hearing that pursuant to the past practice of the University and of University hearing officers assigned to hear disputes, the hearing officer would be unable to hear evidence regarding the Union's contention that Brenner was discharged because of his participation in Local 1650. However, the University placed in evidence an Arbitrator's Opinion and Award issued May 11, 1983, in which the grievant was Patrick Harvey. In the opinion, the arbitrator ruled on (and rejected) the Union's contention that Harvey was suspended because of union activity. On page 13 of the decision, the arbitrator wrote:

> The Union cites an incident involving the wearing of a Union button but neither that incident nor the prior and subsequent conduct of management demonstrates any basis to conclude that the Grievant was discriminated against or punished because of Union advocacy.

Counsel for the University in the instant case stated on the record that in the contemplated hearing before the hearing officer in Brenner's case, the University will not object to

the introduction of evidence concerning Brenner's union activity. University counsel indicated it is his view that a hearing officer who eventually hears a case under the University's dispute resolution mechanism will have the authority to determine the significance of Brenner's union activity in the University's discharge decision.

The Union representative in this case, Ellen Shaffer, testified that in another grievance (in which the grievant was Ellen Harvey) heard by a University hearing committee, the chair of the committee did not allow certain evidence to be presented regarding the union activities of the grievant. However, it also appears from the testimony that there was no allegation in the grievance that the University's action with respect to that grievant was motivated by anti-union animus.

Shaffer also testified that it is difficult to raise the issue of anti-union animus in a University grievance, since there is no specific section of the Staff Personnel Manual which prohibits it, and grievances are limited to those which allege violations of the Manual. She also testified that at times the University has refused to "accept" a written grievance, based on the contents of the initial grievance document. She did not, however, indicate that the University, in the grievance about which she testified, or in any other grievance, rejected a grievance specifically because it raised

the issue of anti-union motivation on the part of the University.

ANALYSIS AND CONCLUSIONS

The practice of deferring to the decision of an arbitrator was adopted by the National Labor Relations Board in 1955, beginning with the Spielberg Manufacturing Company decision, 112 NLRB 1080. The Board provided this explanation:

> [t]he proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act. In these circumstances we believe that the desirable objective of encouraging the voluntary settlement of labor disputes will be best served by our recognition of the arbitrator's award.

The NLRB expanded on its rational for voluntarily deferring to a private forum decision-making process in International Harvester Company (1962) 138 NLRB 923, enf'd sub nom Ramsey v. NLRB (7th Cir. 1964) 327 F.2 784:

> If complete effectuation of the Federal policy is to be achieved, we firmly believe that the Board, which is entrusted with the administration of one of the many facets of national labor policy, should give hospitable acceptance to the arbitral process as "part and parcel of the collective bargaining process itself," and voluntarily withhold its undoubted authority to adjudicate alleged unfair labor practice charges involving the same subject matter, unless it clearly appears that the arbitration proceedings were tainted by fraud, collusion, unfairness, or serious procedural irregularities or that the award was clearly repugnant to the purposes and policies of the Act.

In Dubo Manufacturing Corporation (1963) 142 NLRB 431, the Board held that it would defer action on a charge of discriminatory discharge where the employer had been ordered by a federal court to arbitrate the case. The Board emphasized the statutory policy favoring the utilization of contractual grievance machinery, particularly arbitration, in resolving disputes falling within the reach of both the contract and the NLRA.

In 1971, in Collyer Insulated Wire, 192 NLRB 837, the Board announced its willingness to defer its own resolution of a dispute to the arbitration process established in a collective bargaining agreement, even before the dispute was the subject of a grievance.

The Board's reasoning in the Collyer case was summarized as follows in Morris, The Developing Labor Law (1983) at page 923:

> The Board majority ruled that the Board should and would defer to existing grievance-arbitration procedures prior to either party's invocation of those procedures in the following circumstances: (1) Where the dispute arose "within the confines of a long and productive collective bargaining relationship," and there was no claim of "enmity by Respondent to employees' exercise of protected rights"; (2) where "Respondent has . . . credibly asserted its willingness to resort to arbitration under a clause providing for arbitration in a very broad range of disputes and unquestionably broad enough to embrace 'the dispute before the Board'"; and (3) where the contract and its meaning lie at the center of the dispute.

> The Board's plurality opinion rested on broad foundations: (1) that the courts have recognized a national policy of encouraging resolution of labor disputes through the grievance-arbitration machinery; (2) that it is in keeping with the statutory policy, expressed in Section 203(d) of the LMRA to encourage the parties to resolve disputes through the "method agreed upon by the parties"; . . . .

The Collyer case involved a charge filed with the NLRB which alleged a violation of NLRA section 8(a)(5), prohibiting an employer from making unilateral changes in working conditions. In National Radio (1972) 198 NLRB 527 [80 LRRM 1718], the Board expanded its Collyer doctrine to include charges alleging violations of NLRA section 8(a)(3), which prohibits discrimination by employees to discourage union activity.

However, in 1977, the NLRB overruled the National Radio expansion of the Collyer doctrine, while affirming the validity of Collyer in its original scope. In General American Transportation Corp. (1977) 228 NLRB 808, the Board announced that henceforth it would not defer, pre-arbitration, in cases which alleged violations of individual rights protected by the NLRA. It would continue to defer in cases which alleged violations of rights guaranteed to a Union or to an employer. The Board refused to defer, in General American Transportation, because the charge alleged violations of sections 8(a)(1) and 8(a)(3).

The policy stated in General American Transportation is current NLRB policy.

Throughout this period, there was no aspect of the National Labor Relations Act which required the NLRB to defer in any cases. The policy was solely a matter of the NLRB's discretion.

Deferral in California Labor Relations Laws.

The Legislature included deferral provisions in EERA (the law governing employment relations in school districts) and in SEERA (the law governing labor relations in the state civil service) but not in HEERA (the law governing labor relations in the state's institutions of higher learning). The EERA deferral provision, in Government Code section 3541.5(a) reads:

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

The SEERA deferral provision, in Government Code section 3514.5 reads:

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

Neither provision, it should be noted, makes the

distinction which the NLRB makes: that is, neither distinguishes between individual rights charges on the one hand, and charges concerning employee organization rights, or employer rights, on the other.

PERB has adopted certain regulations pertinent to the issue of deferral. Section 32620(b)(5) reads, in pertinent:

> (b) The powers and duties of such Board agent shall be to:
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> . . . . . .
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> (5)Dismiss the charge or any part thereof . . . 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.[2]

Section 32661 of the Board's regulations provides a procedure for a party to file a charge with the Board after completion of the arbitration process, to bring before PERB an allegation that the result of the process is repugnant to EERA, HEERA, or SEERA.

Denial of the Deferral Request is Required Here

In this case, the University asks the PERB to decline to carry out a task which is specifically assigned to it by the

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[2]It is assumed here that this section is applicable here, although, on its face, it applies to the pre-complaint period.

HEERA: to determine whether an action adverse to an employee of the University was motivated by hostility toward the employee's participation in an employee organization and, thus, is in violation of section 3571(a) of HEERA. There is no statutory provision that requires the Board to defer action on this allegation. It is my conclusion that deferral would not be an appropriate exercise of the Board's discretion. Were PERB to defer here, we would be declining to carry out our statutory duty, or unnecessarily delaying action for an indefinite period.

All of the NLRB's major deferral decisions have had, as their explicit rationale, the desirability of encouraging and respecting the use, by unions and employers, of dispute resolution mechanisms created by agreement reached through collective bargaining. This preference has its origin in the NLRA's statement of purpose, which refers to "encouraging the practice and procedure of collective bargaining." See, e.g., Collyer Insulated Wire, 192 NLRB at 840; General American Transportation Corp., 228 NLRB at 811; National Radio, 198 NLRB at 531.

HEERA includes a similar statement of purpose. Although HEERA does not explicitly indicate an intent to "encourage" collective bargaining, it does refer, in section 3560, to "harmonious and cooperative labor relations" and declares it "advantageous and desirable" to expand the "opportunity for

collective bargaining" to employees of the institutions covered by the HEERA.

If the dispute resolution procedure in use at the University were the result of a negotiated agreement between the University and the Union, it might be concluded that the present case should be deferred to the arbitration process. That is, even in the absence of a statutory requirement, PERB might find it appropriate to defer its consideration of certain charges, reserving the right to review the nature of the arbitration process and the legal criteria applied in each case. But the dispute resolution process here is not the result of a collective bargaining agreement. It is a unilaterally defined procedure.[3]

Second, even if, despite the unilateral nature of the procedure, it is proper to apply NLRB practice here, I would conclude that deferral is inappropriate because the charge which is the basis of the PERB complaint is clearly one which

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[3]It has, in fact, several features unlikely to be seen in a collectively bargained arbitration procedure. First, each party has an unlimited right to veto the names of prospective arbitrators. Thus, there is the possibility that, even with both parties acting in good faith, the commencement of the arbitration may be delayed indefinitely, or the process be stymied at its inception. Second, there is a requirement that the hearing officer submit his decision to one party, the University's personnel department, for "technical review" before it is issued. Mr. Matteoli was unable to explain the nature of the "technical review" referred to.

raises an issue of discrimination, a violation of an individual right. Under these circumstances, the NLRB would not defer to the private forum, following the precedent established in General American Transportation.

The impropriety of the NLRB's deferral of charges which allege violation of individual rights was addressed most specifically by NLRB Chairwoman Murphy, in her opinion in General American Transportation. The rights protected by section 7 of the NLRA are public rights; a public agency, the NLRB was created to protect them, she noted. Thus, it is not proper for the NLRB to defer resolution of disputes about those rights to a private forum, even though such dispute

> may also involve an underlying disagreement between he parties as to the meaning and/or application of their contract.

There is a third possible ground on which the motion to defer could be considered. That is, whether the hearing officer to be appointed will have the authority to decide the dispute which has been submitted to PERB by the charge; or, in the alternative, whether the hearing officer will, of necessity, make factual findings needed to determine the issue raised by the charge. Los Angeles Unified School District (6/30/82) PERB Decision No. 218.

The evidence in this area is quite muddy. The University regulations under which the hearing officer is to operate suggest that the hearing officer will not have the authority to

decide whether the University was motivated in part, at least, by anti-union animus. The regulations appear to suggest the hearing officer would not have the authority to decide, for example, whether Brenner's misconduct, if it occurred, was the real reason for the discharge, as well as a good reason for the discharge.

There is other evidence which indicates that at least one arbitrator has been willing to consider such evidence. And University counsel indicates the University will place no barrier in the way of introduction of such evidence. Nevertheless, there remains uncertainty about whether the University hearing officer will interpret the University regulations which define his/her role in such a way to allow a decision on the discrimination issue before PERB, or on the findings of fact relevant to the discrimination issue.

Since I have denied the motion to defer on two other grounds, I will not rule on the issue of whether the hearing officer will have sufficient authority to fulfill the requirements set out by the NLRB and PERB precedents.

DATED: November 3, 1983

MARTIN FASSLER (FD)
Administrative Law Judge