STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

RIVERSIDE COMMUNITY COLLEGE CHAPTER, CTA/NEA,	)	
Charging Party,	)	Case No. LA-CE-3038
v.	)	Administrative Appeal
RIVERSIDE COMMUNITY COLLEGE DISTRICT,	)	PERB Order No. Ad-229
Respondent.	)	February 27, 1992

Appearances: California Teachers Association by Deborah S. Wagner, Attorney, for Riverside Community College Chapter, CTA/NEA; Gibson, Dunn & Crutcher by Elisabeth B. Long, Attorney, for Riverside Community College District.

Before Hesse, Chairperson, Shank and Camilli, Members.

DECISION

SHANK, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Riverside Community College Chapter, CTA/NEA (Association) of an administrative law judge's (ALJ) dismissal of the complaint (attached hereto) for lack of jurisdiction and deferral to arbitration. In its charge, the Association alleged that the Riverside Community College District (District) violated section 3543.5(a) and (b) of the Educational Employment Relations Act (EERA)[1] by refusing to allow the Association to use the

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references are to the Government Code. EERA section 3543.5 states, in pertinent part, that it shall be unlawful for a public school employer to:

> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to

District's employee mailboxes to distribute the Association's October 1990 newsletter.

The Board has reviewed the entire record, the ALJ's order, the Association's exceptions, and the District's response thereto, and finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and therefore adopts them as the decision of the Board itself.

DISCUSSION

In deferral to arbitration cases, the Board is bound by Lake Elsinore School District (1987) PERB Decision No. 646 (Lake Elsinore). In Lake Elsinore, the Board held that EERA section 3541.5(a)(2) denies jurisdiction to PERB over matters involving conduct arguably prohibited by the collective bargaining agreement (CBA) until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted either by settlement or by binding arbitration. Further, the Board held that deferral is jurisdictional, not discretionary.

The Association filed several exceptions to the ALJ's order. Specifically, the Association contends the ALJ erred by: (1) finding that the CBA's grievance machinery covers the matter at issue; (2) finding that the arbitrator is authorized to

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> discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

determine the substantive arbitrability of the case before reaching its merits; and (3) failing to find that deferral to arbitration would be futile.

In asserting that the ALJ erred by finding that the CBA's grievance language covers the matter at issue, the Association essentially restates the argument made before the ALJ. The Association contends the proper interpretation of the grievance language requires a finding that because an unfair practice charge could be filed alleging a violation of EERA section 3543.1(b),[2] it is explicitly excluded from the grievance procedure.

The ALJ correctly resolved this issue in accord with the Lake Elsinore test. The ALJ examined the language of the parties' CBA and determined that "Article IV (B) clearly addresses the Association's access rights." Further, Article XVII (A) gives the Association the specific right to file a grievance on its own behalf concerning Article IV violations.

When considering contract interpretation disputes it is proper to consider the whole contract taken together, so as to give effect to every part. (1 Witkin, Summary of Cal. Law (9th ed. 1987) sec. 686, p. 619.) Further, "An interpretation which

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[2]Section 3543.1(b) states, in pertinent part:

> Employee organizations shall have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes, and other means of communication, subject to reasonable regulation. . . .

gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful or of no effect." (Id., sec. 690.)

In Temple City Unified School District (1989) PERB Decision No. 782, pp. 8-9, the Board considered the parties' conflicting interpretations of a provision in their agreement. While the ALJ found some ambiguity in the language, the Board held that it was unlikely that the union "would have intended a construction which minimized its right to file grievances." In this case, the grievance procedure contained in Article XVII expressly grants the Association the right to file a grievance on its own behalf concerning alleged violations of Article IV (access rights). A finding in support of the Association's view would make this express statement void and would limit the Association's right to file grievances. Further, the Board has previously noted California's strong policy in favor of arbitration. (Lake Elsinore.) In Inglewood Unified School District (1990) PERB Decision No. 821 (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." (Citations.) The Board therefore affirms the ALJ's finding that the CBA's grievance machinery covers the matter at issue.

The Association further contends that the ALJ erred by abdicating to an arbitrator the authority to determine whether

PERB has jurisdiction over this case. In reliance on Saddleback Community College District (1984) PERB Decision No. 433 (Saddleback), the Association argues that because the parties dispute the meaning of the contract, PERB should conduct a hearing to fully litigate this issue. The Association further asserts that the U.S. Supreme Court supports the reasoning of Saddleback when it held that "the question of whether a collective bargaining agreement creates a duty for the parties to arbitrate the particular grievance is to be decided by the courts, not by the arbitrator." (AT&T Technologies, Inc. v. Communications Workers of America, et. al. (1986) 106 S.Ct. 1415, 475 U.S. 643 (AT&T).)

In ruling whether deferral is appropriate, PERB must determine whether the conduct underlying the unfair practice charge is arguably prohibited by the language of the parties' CBA. PERB's jurisdictional review, however, is limited in scope to the express language of the contract, and not to the merits of the unfair practice charge. 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. (Inglewood.)

It should be emphasized that PERB's jurisdiction to determine whether to dismiss a matter on grounds of deferral, and the arbitrator's jurisdiction to determine arbitrability are separate and distinct issues. PERB does not abdicate its authority when it determines deferral is appropriate. Once the

Board has determined a matter must be deferred to arbitration, the Board lacks jurisdiction over those matters deferred, and cannot make any determinations with regard to them.

The Association's reliance on Saddleback is misplaced. In Saddleback, the Board held that the Board agent, in determining whether to dismiss a charge or issue a complaint, overstepped his authority by interpreting a disputed provision of the parties' contract. The Board ruled that the function of the Board agent is to determine whether the facts alleged state a prima facie case and not to resolve disputed facts. Saddleback is inapplicable to this case. Here, the determination is whether the case should be dismissed for lack of jurisdiction under the Lake Elsinore deferral doctrine.

The Association also relies on AT&T in contending that PERB, rather than an arbitrator, must interpret the contract's arbitration provisions. In AT&T, the union asked the court to enforce the arbitration provision in the parties' contract and compel the employer to submit to arbitration. The Court in AT&T held that the courts will enforce the terms of the parties' arbitration contract so that both sides are required to submit to the arbitration process only those issues they agreed to submit.

In contrast, PERB is not empowered to enforce contracts between the parties.[3] PERB's authority is limited to a

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[3]EERA section 3541.5(b) states:

> The board shall not have the authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged

jurisdictional review of the language of the contract. If the conduct appears to be arguably prohibited by the contract, PERB is denied jurisdiction. Further, EERA section 3548.7[4] requires a party to proceed directly to court to seek enforcement of the parties' arbitration agreement. Adopting the position endorsed by the Association would lead the Board to delve into matters of contract interpretation that are unrelated to any alleged unfair practice and would exceed PERB's jurisdictional authority. Accordingly, this exception is without merit.

Finally, the Association argues the ALJ erred by failing to find that deferral to arbitration would be futile. Section 3541.5(a)(2) provides that "when the charging party demonstrates that resort to contract grievance procedure would be futile, exhaustion shall not be necessary." The Association contends that the District could refuse to take the matter to arbitration based on the disputed grievance language. The Association also

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violation of any agreement that would not also constitute an unfair practice under this chapter.

[4]Section 3548.7 states:

> 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.

argues it would be futile to proceed to arbitration because an arbitrator would be unable to resolve the underlying dispute.

This argument was not presented to the Board agent. Instead, the argument was raised for the first time on appeal. PERB Regulation 32635[5] sets forth the procedures permitting a charging party to appeal the dismissal of a complaint. This regulation states, however, that "Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." The Association has not provided good cause to excuse its failure to raise the futility allegation below. In accordance with the above regulation, the Board will not consider these allegations raised for the first time on appeal.

ORDER

For the reasons stated above, the unfair practice charge and complaint in Case No. LA-CE-3038 is hereby DISMISSED.

Chairperson Hesse and Member Camilli joined in this Decision.

[5]PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

RIVERSIDE COMMUNITY COLLEGE CHAPTER, CTA/NEA, Charging Party, v. RIVERSIDE COMMUNITY COLLEGE DISTRICT, Respondent.	)	Case No. LA-CE-3038 ORDER GRANTING MOTION TO DISMISS AND DEFER TO ARBITRATION (5/7/91)

PROCEDURAL HISTORY

On November 1, 1990, the Riverside Community College Chapter, CTA/NEA (hereafter Charging Party or Association) filed an unfair practice charge against the Riverside Community College District (hereafter Respondent or District).

The Office of the General Counsel of the Public Employment Relations Board (hereafter PERB or Board) issued a complaint, based on the charge, on January 16, 1991, alleging that the District violated sections 3543.5(a) and (b) of the Education Employment Relations Act (hereafter EERA or Act)[1] by refusing to allow the Association to use the District's employee mailboxes for the distribution of an issue of the Association's newsletter on or about September 28, 1990. On the same date the PERB regional attorney issued a letter denying Respondent's request for deferral to arbitration on the ground that it is not clear

[1]The EERA is codified at Government Code section 3540, et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

that the grievance machinery of the CBA covers the dispute raised by the charge.

Respondent filed a timely Answer on February 6, 1991. In its answer, Respondent denied unlawful conduct and asserted several affirmative defenses. One of the defenses reasserts the claim that the charge is based on conduct falling within the scope of the parties' contract grievance and arbitration procedure and further, Charging Party has raised claims that Respondent's actions violate the contract. Therefore, it is argued, the charge must be dismissed and deferred to the contractual grievance and arbitration procedure pursuant to section 3541.5(a)(2) and PERB Regulation 32620(b)(5).

An informal settlement conference on February 6, 1991, did not resolve the dispute.

On March 14, 1991, the District filed a Motion to Dismiss Complaint. The Association filed a Motion to Stay Hearing of the Complaint Pending Resolution of the Motion to Dismiss on March 21, 1991. Charging Party's motion was granted by the undersigned March 21, 1991. The formal hearing set for March 26, 1991, was postponed, pending a written ruling on Respondent's motion.

Charging Party filed its Opposition to the Motion to Dismiss on March 26, 1991.

FACTUAL BACKGROUND

The Association and the District were parties to a collective bargaining agreement (CBA) with a term effective October 13, 1987, to August 31, 1990. In August 1989, they

entered into a memorandum agreement that extended the term of that CBA to August 1991.

On September 28, 1990, the District denied, by written memorandum, the Association the right to distribute the October 1990 issue of its newsletter, the "Au Courant," to members of its bargaining unit via the faculty mailboxes at the Riverside campus. The newsletter contained endorsements of specific candidates in an upcoming District board of trustees election. The District's September 28 memorandum cited California Education Code section 7054[2] as the reason for the denial of access to its internal mail system. The Association did not file a grievance challenging this action.

On October 19, 1990,[3] the Association did file a grievance challenging the District's refusal to permit the Association to distribute a packet of information in faculty mailboxes on September 12, 1990, endorsing candidates in the same board of trustees election. The grievance stated as follows:

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[2]Education Code section 7054 states:

> Except as provided in Sections 7056, 35174 and 72632, no school district or community college district funds, services, supplies or equipment shall be used for the purpose of urging the passage or defeat of any school measure of the district, including, but not limited to, the candidacy of any person for election to the governing board of the district.

[3]The Association also filed a second grievance on October 19, 1990, alleging that the District violated Article IV, paragraph A, by also prohibiting the Association's use of its duplicating equipment in the September 28, 1990 memorandum.

> An informational packet consisting of several sheets and identified as originating with the local C.T.A. chapter identified above as grievant was placed in faculty mailboxes as permitted in Article IV -- association rights. Paragraph B indicates "The association shall have the right to use faculty mail boxes to communicate with faculty members." Member[s] of the executive board of the "association," including the undersigned were ordered by John Matulich to immediately remove the communications from the faculty mail boxes. The order was in direct conflict with the contract. We wish or request specifically John Matulich honor the District contract and permit the association to utilize the mail boxes when the association is communicating with faculty members. Your letter to the association dated Sept. 21 indicates this to be a continuing problem.

The current status of this grievance is unknown.

DISCUSSION

Under section 3541.5(a)(2)[4] and the Board's deferral doctrine enunciated in Lake Elsinore School District (1987) PERB Decision No. 646, PERB has no jurisdiction over conduct arguably prohibited by the parties' CBA until the grievance machinery of the CBA, if it exists and covers the matters at issue, has been exhausted either by settlement or by binding arbitration, or

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[4]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. . . .

PERB Regulation 32620(b)(5) addresses the implementation of section 3541.5(a)(2).

until [unless] futility is demonstrated.[5] (Eureka City School District (1988) PERB Decision No. 702, p. 7.) The key portion of the Board's Lake Elsinore holding, as it pertains to the present case, is that the conduct at issue must be "arguably prohibited" by the agreement.

To determine whether the allegations in the instant complaint should be deferred, the applicable language of the CBA must first be examined. The District maintains that Article XVII (Grievance Procedure), paragraph A, of the CBA gives the Association the right to file a grievance claiming that the District, among other things, has violated the provisions of Article IV (Association Rights).

Article IV (Association Rights), paragraph B, of the CBA provides, in relevant part, as follows:

> The Association shall have the right to use not less than twenty (20) designated faculty bulletin boards for posting notices of its activities, and shall have the right to use faculty mailboxes for communications with faculty members. . . . The exercise of these rights is subject to generally applicable District regulations. . . .

Article XVII (Grievance Procedure), paragraph A, of the CBA states as follows:

> The purpose of this grievance procedure is to provide a means by which certain disputes may be resolved in an equitable and efficient manner. A grievance is a claim by an employee covered hereby that an express term of this Agreement has been violated by the District and that because of such violation his or her rights have been affected. A

[5]In this case, neither party has raised the futility issue.

> grievance shall not include any claims or request to challenge, change, amend or add to existing policy, rules or regulations or to adopt or negotiate new policies, rules or regulations. A grievance also shall not include any employer-employee relations matter for which a different method of review is specifically provided by law. In cases involving a claim that the terms of Articles IV, V or the evaluation process set forth in Article XI (but not the evaluation itself) have been violated, the Association shall have the right to file a grievance on its own behalf. In all other cases, there shall be no such right. [Emphasis added.]

Article XVII, section I, of the CBA provides for binding arbitration of grievances.

There is no dispute here concerning whether the District's conduct is "arguably prohibited" by terms of the parties' agreement. The key question is whether the grievance machinery "covers the matter at issue."

The language in Article IV (B) clearly addresses the Association's access rights to the District's internal mail system via the faculty mailboxes. Article XVII (A) appears to give the Association the specific right to file a grievance on its own behalf concerning an alleged violation of Article IV. Thus, the allegation in the unfair practice charge of denial of access to faculty mailboxes on September 30, 1990, is arguably covered by the Association Rights provision (Article IV (B)) of the CBA through invocation of the grievance procedure (Article XVII (A)).

It is noted that, although no grievance has been filed concerning the instant charge, the Association did address an almost identical issue in a grievance filed October 19, 1990. Yet, the Association argues that deferral is inappropriate in this instance, because certain language in Article XVII (A) prohibits it from filing a grievance in this matter. That language is underlined, supra, at p. 6, in the text of Article XVII (A).

The District and the Association sharply disagree in their interpretations of the applicability of the phrase "matters for which a different method of review is specifically provided by law" to the allegation presented in the complaint. The District argues that the clause refers to issues that solely arise from sources other than the CBA, such as employee terminations, issues that arise solely under EERA, and constitutional claims which are excluded from the scope of the contract grievance procedure. Thus, issues that do not implicate the CBA must be reviewed and considered by other means. Since, it is argued, the conduct alleged in the complaint allegedly constitutes a violation of Article IV and of the EERA (section 3543.1(b),[6] it does not fall within the scope of issues excluded by the language above.

The Association asserts that the disputed phrase "plainly means" that since an unfair practice charge, which provides another method of review of the District's conduct, could be

[6]Section 3543.1(b) provides the statutory rights of access for employee organizations.

filed concerning a violation of section 3543.1(b), an allegation of an EERA violation is explicitly excluded from the grievance procedure. The Association seeks to buttress this argument by contending that since the parties have a legitimate dispute over contract interpretation, a hearing is necessary to resolve the dispute. The Association cites Saddleback Community College District (1984) PERB Decision No. 433, to support this argument.

Neither of these arguments is persuasive. While it is recognized that the Association is seeking redress for important statutory rights, the parties have also expressly addressed the Association's access rights in their CBA. Further, the Association has already asserted the existence of its contractual access rights by filing a grievance challenging similar conduct by the District. The Association has presented no justification for concluding, in this instance, that the parties' dispute over contract interpretation precludes mandatory deferral. Inasmuch as the disputed language is an express provision of the contract, it is within the purview of the arbitrator to determine the question of substantive arbitrability of the case before reaching the merits of the case.[7]

Under the PERB's Lake Elsinore deferral standard, a charge must be deferred if the conduct complained of is "arguably prohibited" by the CBA and the existing grievance machinery covers the matter at issue. In this case, the same deferral

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[7]See Elkouri and Elkouri, How Arbitration Works, Fourth Edition, at pp. 212-216.

standard should be applicable since the complained-of-conduct appears to be prohibited by the CBA and the grievance machinery "arguably covers" the matter at issue.

Accordingly, the unfair practice charge and complaint must be dismissed for lack of jurisdiction.

ORDER

For the above-stated reasons, the motion to dismiss and defer is granted and the complaint is DISMISSED.

Pursuant to Public Employment Relations Board Regulation 32635(a), the Charging Party 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 dismissal (California Code of Regulations, title 8, section 32635(a)). To be timely filed, the original and five copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing (California Code of Regulations, title 8, section 32135). Code of Civil Procedure section 1013(a) shall apply. The Board's address is:

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

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

Dated: May 7, 1991

W. Jean Thomas
Administrative Law Judge