



The Board has carefully reviewed the ALJ's order denying the motion to dismiss, the District's appeal of the ALJ's order, and the Fremont Education Association, CTA/NEA's (Association) response to the District's appeal. On July 19 and September 17, 1993, the District also filed supplements to its reply to the Association's response to the appeal.<sup>2</sup>

#### BACKGROUND

On April 24, 1992, the Association filed a charge alleging that the District retaliated and discriminated against an employee, George St. Clair (St. Clair), in violation of EERA section 3543.5(a) and (b).<sup>3</sup>

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<sup>2</sup>PERB Regulations 32646(b) and 32635 provide for the filing of an appeal within 20 days of the denial of deferral. PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The District timely filed its appeal. However, there is no provision in PERB regulations which allows additional filings after the expiration of the filing deadline. Such a filing is handled according to PERB Regulation 32136 which states:

A late filing may be excused in the discretion of the Board for good cause only. A late filing which has been excused becomes a timely filing under these regulations.

As the District made no showing of good cause, the late filed documents were not considered by the Board.

<sup>3</sup>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

On September 8, 1992, PERB issued a complaint which alleged that St. Clair engaged in many activities protected by EERA. He served as building representative at Homestead High School during the 1985-86 and 1987-88 school years; on March 5, 1991, he filed a claim for damages against the District in order to remedy his alleged loss of preferential rehire rights; and on May 21, 1991, he addressed the District board of trustees in support of the Association's bargaining position. The complaint alleges that, because of St. Clair's protected activity, the District retaliated against him by issuing two negative evaluations and did not re-employ him for the 1992-93 school year.

At the time he issued the complaint, the PERB regional attorney also issued a letter in which he refused to dismiss and defer the matter to arbitration because the employer's conduct was not prohibited by the contract. On September 29, 1992, the District filed its answer and a motion to dismiss the complaint and defer it to arbitration. On January 8, 1993, the ALJ denied the District's motion on the ground that the parties' collective bargaining agreement (agreement) does not contain language which prohibits the District from engaging in the conduct alleged in the complaint.

On January 14, 1993, the District appealed the ALJ's denial of its motion arguing that deferral to arbitration was required

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applicant for employment or reemployment.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

because the alleged discrimination is prohibited by the agreement. The District discusses other issues in its appeal which were not brought by proper motion and in which the ALJ declined to join pursuant to PERB Regulation 32200. Thus, the only issue before the Board is whether this matter must be deferred to the arbitration process on the ground that the alleged violative conduct is prohibited by the parties' agreement.

#### DISCUSSION

EERA section 3541.5(a) provides, in pertinent part, that PERB shall not:

Issue a complaint against conduct also prohibited by the provisions of the [collective bargaining agreement in effect] 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, PERB 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. (Ibid.) For example, in Los Angeles Community College District (1989) PERB Decision No. 761, where an employee alleged that the district had discriminated against him for pursuing protected activity, the Board found specific language in the parties' agreement which

prohibited the alleged violative conduct. In that case, the agreement stated that the district agreed to "comply with all federal and state laws regarding non-discrimination." The Board stated that EERA is a state law that prohibits, among other things, discrimination against employees because of their exercise of rights guaranteed by EERA. In Los Angeles Unified School District (1990) PERB Decision No. 860, the Board made it clear that the exercise of PERB's jurisdiction is not precluded unless the alleged unfair practice is arguably prohibited by the parties' agreement. Accordingly, it is not sufficient for the agreement to merely cover or discuss the matter. The conduct alleged to be an unfair practice must be prohibited.

In this case, the District proposes two theories by which the parties' agreement prohibits the alleged violative conduct. First, the agreement expressly incorporates EERA. Second, the conduct complained of is prohibited by section 5.2 of the agreement, entitled "Personal Freedom," as discrimination against employees for exercising "constitutional rights of citizenship" or engaging in "political activities."

As to its "incorporation" theory, the District suggests that the agreement expressly incorporates EERA in Article 1.2 which states:

This Agreement is entered into pursuant to Chapter 10.7, Sections 3540 through 3549 of the Government Code.

In addition, the District cites Article 2, sections 2.3 and 2.3.2 which state that the District's powers, rights, and authority

to dismiss employees are "subject to the provisions of the law."

We find that these passing references to EERA and some unidentified "provisions of law" do not incorporate into the contract rights guaranteed to employees and employee organizations by EERA. The parties' failure to unambiguously include EERA protections in the agreement does not support an argument that they intended to convey those rights or to subject them to the contractual grievance procedure. The mere mention that the agreement is entered into "pursuant to" EERA's statutory framework and the insertion of the language "subject to the provisions of the law" do not equal the incorporation of rights. The plain meaning of the provisions cited require that the incorporation theory be rejected.

The contention that the conduct complained of is prohibited by the personal freedom section of the agreement is equally unpersuasive.<sup>4</sup>

Article 5, section 5.2 of the agreement reads as follows:

Personal Freedom

The Employer is not concerned with the  
personal life of any member of the Unit,

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<sup>4</sup>The District cites Ofsevit v. Trustees of California State University and Colleges (1978) 21 Cal.3d 763 and City of Madison Joint School District No. 8, et al. v. Wisconsin Employment Relations Commission (1976) 429 U.S. 167 in support of its contention that its conduct is covered by section 5.2 of the agreement. These cases do not address the issue before us. In both Madison and Ofsevit the plaintiff alleged a violation of his First Amendment rights outside of the context of a collective bargaining agreement. Thus, these cases give us no guidance in determining whether the language in section 5.2 prohibits conduct which discriminates against employees because they have engaged in employment-related union activity.

unless it prevents the member from performing the member's assigned functions. The employee is entitled to full constitutional rights of citizenship, and the member's religious or political activities are not grounds for discipline or discrimination with respect to the member's professional employment, as long as he/she does not violate any local, state, or federal law.

We interpret this section to mean that the employer is prohibited from becoming involved with the employee's personal life. When considered in the context of the entire agreement, this section is most reasonably interpreted to provide protections for actions that are focused away from the work place and involve personal choices of political affiliation and religious belief. The clear focus of this section is not on employment-related issues. Unlike the agreement in Los Angeles Community College District, supra, PERB Decision No. 761, this section does not include language which specifically prohibits discrimination.

The complaint alleges that the District discriminated against St. Clair because he: (1) served as building representative, (2) filed a damage claim concerning preferential rehire rights, and (3) addressed the board of trustees concerning the Association's bargaining position. These activities were not personal in nature, but took place at work and directly concerned his employment.

The Board finds that this section was intended to address only activities involving the employee's personal life and was not intended to cover activities related to the work place. We find that section 5.2 of the agreement does not meet the

requirements set forth in Los Angeles Unified School District, supra, PERB Decision No. 860, as it does not arguably prohibit discrimination against employees for participation in conduct protected by EERA.

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, we REMAND this case to the Chief Administrative Law Judge to be processed in accordance with PERB regulations.

Member Caffrey joined in this Decision.

Member Hesse's concurrence begins on page 9.

Hesse, Member, concurring: I concur in the disposition made by the majority. I write separately to clearly and concisely state my position.

I have reviewed the entire record in this case, including the Public Employment Relations Board (PERB or Board) administrative law judge's (ALJ) order denying the motion to dismiss, the Fremont Union High School District's (District) appeal of the order denying the motion to dismiss, the Fremont Education Association, CTA/NEA's (Association) response to the District's appeal, the District's reply to the Association's response to the appeal and the District's supplemental filing received by PERB on July 19, 1993.<sup>1</sup> For the reasons outlined

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<sup>1</sup>PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

This appeal is governed by the procedures provided in PERB regulation 32646 and more importantly, regulation 32635. Regulation 32635 allows the respondent in this case to file an appeal with the Board itself within 20 days of the date of service of the ALJ's ruling. The charging party may file a statement of opposition with 20 days following the date of service of the respondent's appeal.

Here, the Association filed a statement of opposition to the District's appeal within 20 days. Thereafter, the District submitted a response to the Association's opposition to the appeal. The District then augmented the record by filing a supplemental filing approximately 5 months later. The Association did not file an objection to the District's reply brief and supplemental filing.

PERB regulations do not address whether a reply brief or any supplemental filing may be submitted under the circumstances in this case. Indeed, PERB regulations neither expressly permit nor prohibit supplemental filings following the filing of exceptions and responses to the exceptions. In fact, regulation 32320(a)(2) provides the Board itself with some latitude to take additional information. As the District has raised issues of interest, I have considered both filings as an aid in ruling on the issues

below, I would deny the District's appeal of the ALJ's ruling on the motion to dismiss.

#### DISCUSSION

In this case, the charge alleges that the District violated the Educational Employment Relations Act (EERA or Act) section 3543.5(a) by discriminating and retaliating against George St. Clair (St. Clair) and violated section 3543.5(b)<sup>2</sup> by interfering with the Association's rights. The District argues that the charge must be deferred to binding arbitration under the parties' agreement because the conduct which was alleged to have violated those provisions of EERA, is also prohibited by the terms of

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raised in the appeal.

<sup>2</sup>EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references are to the Government Code. Section 3543.5(a) and (b) provide, 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.

their agreement.<sup>3</sup>

The Board has granted deferral in cases where the parties have chosen to include the rights granted by statute in their contract and have done so by expressly repeating the statutory language or incorporating it by reference. In this case, however, while the parties were free to do so, their contract does not include or expressly incorporate the rights granted by EERA section 3543.5(a) and (b). While I do not adopt the reasoning of the ALJ suggesting that deferral will never be ordered absent the inclusion of EERA language in the parties' agreement, I find that the parties' failure to unambiguously include EERA protections in the contract is a strong indication that they did not intend to convey those rights or subject them to the contractual grievance procedure.

I reject the District's argument that the contract clauses which merely mention the Government Code provisions that codify EERA, can reasonably be read to incorporate substantive rights and protections. Mere mention that the contract is entered into "pursuant to" the Act's statutory framework does not equal the incorporation of rights. Similarly, I reject the District's

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<sup>3</sup>As noted in the Board majority decision, section 1.2 of the agreement states that the agreement is entered into pursuant to Chapter 10.7, Sections 3540 through 3549 of the Government Code. Also cited is section 2.1 of the agreement (which recognizes the Association as the exclusive representative "as defined in Chapter 10.7, Sections 3540 through 3549.3 of Division 4 of Title 1 of the Government Code and Article 2 of this Agreement.") and section 16.1.1 (which defines the Act to mean "Chapter 10.7, Sections 3540 through 3549.3 of Division 4 of Title 1 of the Government Code of the State of California.").

assertion that the language "subject to provisions of law" found in Article 2, section 2.3.2,<sup>4</sup> is sufficient to confer on employees the right to engage in activities protected by EERA free from retaliation or to confer on the Association the right to represent employees in their employment relations. Without more, the vague reference to "provisions of law" is too tenuous a basis on which to conclude that the parties' contract covers the matter at issue in this unfair practice.<sup>5</sup>

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<sup>4</sup>Article 2, sections 2.3 and 2.3.2 provide, in pertinent part:

2.3 Employer

The District . . . hereby retains and reserves unto itself, as limited only by the terms and provisions of this Agreement, all powers, rights, authority, duties, and responsibilities conferred upon and vested in it by the laws, Constitution of the State of California, and the Constitution of the United States, including, but without limiting the generality of the foregoing, the rights:

2.3.2 Subject to the provisions of the law, to hire all employees, to determine their qualifications and conditions for their continued employment, or their dismissal or demotion, and to promote employees.

<sup>5</sup>In the District's July 19, 1993 supplemental filing, the District places too great an emphasis on Los Angeles Community College District (1989) PERB Decision No. 761. In that case, the Board summarily affirmed a Board agent's decision to defer to arbitration, a charge alleging retaliation based on a contract provision in which the District specifically agreed to comply with all state laws regarding nondiscrimination. In deferring the charge, the Board agent noted that EERA is a state law that prohibits discrimination. In contrast, the parties' contract in this case makes no reference to anti-discrimination laws or to any other substantive statutory rights. Los Angeles Community College District, supra, does not compel deferral where the contract contains a general reference to "provisions of law" or

Turning specifically to the EERA 3543.5(a) charge, I reject the District's contention that St. Clair's activity as a building representative and his presentation before the Board of Trustees was conduct arguably prohibited by the personal freedom provision of the contract.<sup>6</sup>

First, the language of Article 5, section 5.2 does not expressly confer broad constitutional protections of free speech and assembly, as the District's argument assumes. The clause, entitled "personal freedom," indicates that the employer is unconcerned with an employee's personal life. It states that an employee is entitled to "full constitutional rights of citizenship" and that a member's religious or political activities will not be grounds for discipline or discrimination. When considered as a whole, this provision is most reasonably read to provide protections for actions that have nothing to do with the work environment, but involve personal issues of political affiliation and religious beliefs. The clear focus of

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to statutory provisions that codify EERA.

<sup>6</sup>The provision, Article 5, section 5.2, entitled "Personal Freedom," states:

The Employer is not concerned with the personal life of any member of the Unit, unless it prevents the member from performing the member's assigned functions. The employee is entitled to full constitutional rights of citizenship, and the member's religious or political activities are not grounds for discipline or discrimination with respect to the member's professional employment, as long as he/she does not violate any local, state, or federal law.

the clause is not on the employment-related issues in which a union would be involved, but on an employee's activities that are personal in nature and do not legitimately involve the employer. The contract does not incorporate broad constitutional rights. Rather, within the context of an employee's personal life, the contract protects "full constitutional rights of citizenship." When that language is read in the context of the entire clause with references to religious and political activity, it seems apparent that the parties intended to protect activities, such as voting, involvement in partisan political activities and party affiliations, an opinion expressed by the PERB regional attorney. The proviso of section 5.2, which places restrictions on an employee's personal life if it prevents any bargaining unit member from performing his or her assigned tasks, conforms to this interpretation.

Second, the District's reliance on Ofsevit v. Trustees of Cal. State University & Colleges (1978) 21 Cal.3d 763 [148 Cal.Rptr. 1], to broaden the application of section 5.2 is misplaced. In that case, the Supreme Court found substantial evidence to support the lower court's conclusion that the University had denied reappointment to a lecturer in retaliation for his exercise of his First Amendment rights.<sup>7</sup> While the

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<sup>7</sup>The Supreme Court cited the findings and conclusions upon which the lower court based its opinion: (1) that the plaintiff was a member of and participated in the activities of the American Federation of Teachers; (2) was an outspoken academic employee in favor of the political activities of students and academic employees in connection with a student and faculty strike; (3) that the termination of the plaintiff was an

plaintiff's union activities are included, the Court ruled that it was the plaintiff's outspoken political alignments within the polarized department that triggered his dismissal and that this decision violated the plaintiff's rights under the First Amendment.

Based on my reading of the case, I do not find Ofsevit, supra, to support the broad conclusion advanced by the District that union activities are synonymous with political activities. Ofsevit was decided well before the enactment of the Higher Education Employer-Employee Relations Act, when there was no statute granting State University lecturers the right to participate in union activity. Indeed, Ofsevit concluded that the lecturer's outspoken political activity -- a small part of which involved union activities -- was the reason for the University's failure to reappoint him and that conduct violated his First Amendment rights. If anything, the case stands for the conclusion that union activity is conduct protected by the First Amendment. That does not advance the District's argument because, as noted above, the personal freedom provision in the parties' contract does not explicitly grant broad First Amendment rights.

The District also relies on City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission

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expression of official dissatisfaction with his political alignments as they related to the structure and organization of the Department of Social Work Education; and (4) was a denial of his First Amendment rights.

(1976) 429 U.S. 167 [50 L.Ed.2d 376, 97 S Ct. 421]. In that case, the U.S. Supreme Court struck down an order of the Wisconsin Employment Relations Commission directing the school board to cease and desist from permitting any employees but union officials from appearing and speaking at school board meetings on matters subject to collective bargaining. The Court held that the Commission's order, which prohibited speech by teachers on matters subject to collective bargaining, deprived them of their First Amendment right to address the school board.

Like the ruling in Ofsevit, the Court's conclusion in City of Madison, supra, does not support the District's position that the parties' contract protects St. Clair from discipline or discrimination based on his comments to the Board. As noted above, the contract does not confer First Amendment rights, but confines itself to the "full constitutional rights of citizenship," a phrase I interpret to mean rights such as voting and political activity. City of Madison is firmly based on free speech rights and focuses on the constitutionality of the Commission's order. It cannot be expanded to equate speech at the board meeting with political activities or the constitutional rights of citizenship mentioned in the parties' contract.

Thus, neither City of Madison nor Ofsevit support the District's assertion that the EERA section 3543.5(a) allegation must be deferred to arbitration under Lake Elsinore School District (1987) PERB Decision No. 646 because St. Clair's role as building representative or his presentation before the Board of

Trustees is conduct arguably covered by the parties' agreement.<sup>8</sup>

The District's argument that the section 3543.5(b) violation is also covered by the terms of the contract<sup>9</sup> is likewise unpersuasive. First, the repeated assertion that reference to Government Code sections which codify EERA demonstrate that EERA protections are incorporated into the contract is fallacious. The language cited by the District, such as section 1.2, which states that the contract was entered into "pursuant to sections

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<sup>8</sup>The District's reliance on Pittsburgh Unified School District v. California School Employees Association. (1985) 166 Cal.App.3d 875 [213 Cal.Rptr. 34], does not advance its position. In that case, the Court found no justification for the injunction prohibiting California School Employees Association from picketing and leafletting outside the business offices of school board members. In reaching that decision, the Court concluded that the conduct at issue in the injunction involved constitutional considerations and was not an unfair practice subject to PERB's exclusive jurisdiction.

Similarly, California Federation of Teachers v. Oxnard Elementary Schools (1969) 272 Cal.App.2d 514 [77 Cal.Rptr. 497], does not support the District's view. Oxnard concludes that the provisions of the Winton Act regulating employer-employee relations do not unconstitutionally impair the rights of individuals to freedom of association and assembly.

<sup>9</sup>In further support of this claim, the District cites to section 6.2.1 of the contract (definition of grievance as "a claim by one or more members of the Unit or the Association of an alleged violation, misinterpretation, or misapplication of the terms and conditions of this Agreement"); section 6.2.2 (definition of aggrieved as "a member of the Unit or the Exclusive Representative asserting a grievance"); and section 6.2.7 (definition of a claim as "the assertion of a grievance by one or more members of the Unit, the Association, or its representative(s)").

The contention made by the District in its September 17, 1993 supplemental filing is that by filing a unilateral change grievance, the Association has admitted that violations of EERA are grievable and therefore deferrable under Article 2, section 2.3 is unavailing and without merit.

3540 through 3549 of the Government Code," in no way can be read to incorporate the provisions of EERA that convey substantive rights to employee organizations. Indeed, the District cites no provision of the contract that arguably prohibits interference with rights similar to those conferred to employee organizations by EERA section 3543.1.

The District's attempt to equate the Association's right to file a grievance with the right to be free from interference is likewise unavailing. The fact that the Association may file a grievance cannot be converted into a substantive prohibition as is established by EERA section 3543.5(b).