STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

FRED S. FLECK, Charging Party, v. CHAFFEY JOINT UNION HIGH SCHOOL DISTRICT, Respondent, ASSOCIATED CHAFFEY TEACHERS, CTA/NEA, Joined Party.	)	Case No. LA-CE-264 PERB Decision No. 202 March 26, 1982

Appearances: Anne E. Fragasso, Attorney for Fred S. Fleck; Sandra H. Paisley (California Teachers Association) for Associated Chaffey Teachers, CTA/NEA, Joined Party.

Before Gluck, Chairperson; Moore, and Tovar, Members.

DECISION

The Associated Chaffey Teachers, CTA/NEA (Association) excepts to the hearing officer's proposed finding that an individual has an indefeasible right under the Educational Employment Relations Act (EERA)[1] to be represented during a negotiated grievance proceeding by a representative of the employee's choice so long as that person is not an agent of an employee organization other than the exclusive representative.

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[1]EERA is codified at Government Code section 3540 et seq. All statutory references in this decision are to the Government Code, unless otherwise noted.

FACTS

The Association is the exclusive representative of the certificated employees of the Chaffey Joint Union High School District (District). The negotiated collective bargaining agreement for 1978-1979 contained the following limitary language in its grievance procedure:

> Article 5, section (b)(2). The grievant has the right to be represented by one authorized representative selected by the association at any personal conference or formal hearing requested by the grievant, as provided herein, beyond the informal level.

Fred S. Fleck, a teacher and a member of the American Federation of Teachers, an employee organization not the exclusive representative in the District, filed a grievance under the contract procedure and sought to be represented by an individual who had not been approved by the Association. Relying solely upon the language of Article 5,[2] the District refused to process the grievance.

Fleck, thereupon, charged the District with violating sections 3543 and 3543.5(a) and (d) of EERA.[3] At a prehearing conference, the Association requested and was given permission to be joined as a respondent.

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[2]It was never contended by either the District or the Association that Fleck's representative was an agent of a rival employee organization. See Mount Diablo Unified School District, et al (12/30/77) EERB Decision No. 44. Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board.

[3]Section 3543 states:

> Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public school employees shall also have the right to refuse to join or participate in the activities of employee organizations and

In his proposed decision, the hearing officer found that section 3543 grants to the employee the right to file

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> shall have the right to represent themselves individually in their employment relations with the public school employer, except that once the employees in an appropriate unit have selected an exclusive representative and it has been recognized pursuant to Section 3544.1 or certified pursuant to Section 3544.7, no employee in that unit may meet and negotiate with the public school employer.
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> Any employee may at any time present grievances to his employer, and have such grievances adjusted, without the intervention of the exclusive representative, as long as the adjustment is reached prior to arbitration pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8 and the adjustment is not inconsistent with the terms of a written agreement then in effect; provided that the public school employer shall not agree to a resolution of the grievance until the exclusive representative has received a copy of the grievance and the proposed resolution and has been given the opportunity to file a response.

Section 3543.5 provides, in relevant part:

> It shall be unlawful for a public school employer to:
>
> (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.
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> . . . . . .
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> (d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

grievances independent of the exclusive representative and to be represented by a person of his own choosing, with the exception that he cannot be represented by an agent of a nonexclusive representative. With this one limitation, he found that the right was absolute and that the exclusive representative and the District could not circumscribe the right by mutual agreement. Accordingly, he found the District to have violated section 3543.5(a) by its refusal to hear Fleck's grievance and ordered both the District and the Association to cease and desist from denying any employee this right. The 3543.5(d) charge was dismissed for lack of evidence and no exception was filed by the charging party.

DISCUSSION

Section 3543 provides that individual employees have the right to present grievances and to have such grievances adjusted. A limitation on an employee's choice of representative would be permissible only if the right to represent one's self were not absolute. If the right were found to be defeasible, the District and Association would be permitted to negotiate a contract provision expressing conditions under which employees would be entitled to such self-representation.

The hearing officer's conclusion that the right of self-representation is absolute is based on his finding of a distinction between the effort of an exclusive representative to waive an employee's individual right and its power to waive the collective rights of those employees it represents. We find the issue here rests on other considerations.

Section 3543 is virtually identical to section 9(a) of the National Labor Relations Act (NLRA).[4] Federal courts have construed

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[4]Section 9(a) states:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, that

this section with its provisos as merely providing an employer who agrees to hear an individual grievance with an affirmative defense against a charge that it has thereby bypassed the exclusive representative on matters of wages, hours or terms and conditions of employment. The section, according to the court, does not vest in the employee an absolute right to present and have such grievances adjusted. Black-Clawson v. Machinists (1962, 2nd Cir.) 313 F.2d 179 [52 LRRM 2038], cited with approval by Supreme Court in Emporium-Capwell v. Western Addition Community Organization (1975) 420 U.S. 50 [88 LRRM 2660]. The Court relied, in a substantial measure, on the principle that provisos rarely grant absolute rights.

Section 3543 differs somewhat with respect to the use of proviso language. Whereas the federal act employs the term twice, EERA does so only once. The question arises as to whether the absence of one proviso in section 3543 requires a different interpretation than that given the federal law. We think not.

The first paragraph of section 3543 parallels the NLRA in providing for the right of employees to choose an exclusive representative organization for the purpose of representation "on all matters of employer-employee relations." This paragraph is followed by a statement, that

> any employee may, at any time, present grievances without the intervention of the exclusive representative . . .

language identical to that of section 9(a)(1) except for the absence of the prefatory words "provided that."

> any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

A proviso qualifies those provisions which precede it. Black-Clawson, supra; Cox, Rights Under a Labor Agreement (1956) 69 Harv.L.Rev. 601, 624. It follows that the effect of this latter language is similar to that of a proviso, since it qualifies the exclusive representative's right to insist that it, and only it, may represent employees on hours, wages and terms of conditions of employment. This limitation on the exclusive representative's right leads to the conclusion that this portion of the section is intended to carry the same meaning as the parallel section of the NLRA and, therefore, asserts only an affirmative defense available to the employer.

The explicit proviso in section 3543 is further evidence that the employee's right is qualified. It expressly requires the employer to forward a copy of the proposed resolution to the exclusive representative and to allow the representative time to respond. On its face, this provision limits the employee's right to have his grievance adjusted solely through his own efforts and guarantees the exclusive representative's right to intervene. The second proviso in section 9(a) is virtually identical. Taken in its entirety then, any differences between section 3543 and 9(a) become more semantic than substantive.

We do not reach this conclusion solely on the basis of a word-by-word comparison of the two provisions. The California Supreme Court has pointed out that where the provisions of state acts are identical or substantially similar to those of existing federal statutes, the inference may be drawn that the State Legislature intended that the state laws be interpreted and applied in accordance with federal precedent. Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608 [87 LRRM 2453].

There are strong policy considerations here which support the conclusion that we have reached as to the meaning of section 3543. A fundamental purpose for the enactment of EERA is the improvement of personnel management and employer-employee relations.[5] To that end, EERA has provided for a

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[5]Section 3540 provides, in pertinent part:

> It is the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California by providing a uniform basis for recognizing the right of public school employees to join

system of exclusive representation of employees. This principle was specifically selected by the Legislature to supersede the Winton Act and its multi-representational form of collective bargaining.[6]

Under the system of exclusivity, employees are able to address their employment concerns in a cohesive and meaningful manner. Fragmentation of employee participation can be avoided; continuity and stability in management-employee relations are enhanced.

Archibald Cox observes that a primary function of the grievance procedure is to guarantee uniformity of interpretion of the negotiated agreement and the "common law" of the work site. Cox, supra. The negotiating representative is certainly more qualified to interpret the written agreement and protect the rights of the employees covered by its provisions than any given individual employee. By permitting the advocacy and adjustment of disputes by individual employees or their personally-selected representatives who are strangers to the negotiating and administrative history, the risk of disparate results, dissatisfaction, and confusion among the employees is magnified with consequential loss of confidence in the effectiveness of the exclusive representative.

> [I]f a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. Republic Steel v. Maddox (1965) 379 U.S. 650 [59 LRRM 2143]. 7/

> organizations of their own choice, to be represented by such organizations in their professional and employment relationships with public school employers, to select one employee organization as the exclusive representative of the employees in an appropriate unit, . . .

[6]Former Education Code section 1380, as amended by Statutes of 1970, chapter 412 section 1, chapter 1413 section 1.

[7]In Mount Diablo, et al., supra, and Santa Ana Unified School District (9/25/78) PERB Decision No. 73, the Board discussed the concept of exclusivity in the context of permitting rival employee organizations or their agents to file

Further, a union should have the right

> to screen grievances and process only those it concludes should be processed . . . [T]his is a valuable right which inures to the benefit of all employees. Black-Clawson, supra; Ostrofsky v. United Steelworkers (1959) 171 F.Supp. 782 [43 LRRM 2744], aff'd 273 F.2d 614 [45 LRRM 2486].

The proviso of section 3543 makes it clear that the exclusive representative has the duty to protect its authority as sole party empowered to negotiate for the employees of the unit on all matters of employment relations. The negotiated agreement in the Chaffey District does nothing to the contrary, other than adjusting the time frame for intervention.

Further, the processing of grievances is a form of continuing negotiations over the written agreement (NLRB v. Acme Industrial Co. (1967) 385 U.S. 432 [64 LRRM 2069]) in which the adjustment of the grievance provides the meaning and content to the general and often deliberately ambiguous terms of the agreement. United Steelworkers v. Warrior & Gulf Navigation Co. (1960) 363 U.S. 574 [46 LRRM 2416]. EERA clearly indicates that the Legislature intended the grievance procedure to be a preferred method of settling job disputes and improving employment relations.[8]

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grievances after an exclusive representative has been selected. The Board found that it was the legislative intent to prohibit a nonexclusive representative from such involvement, finding a high potential for disruption of the collective bargaining process.

[8]Subsection 3541.5 (a) reads in pertinent part:

> Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that 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, . . .

We note in addition that our reading of section 3543 eliminates the time-consuming and wasteful two-tiered processing of grievances that would take place if the exclusive representative would have to wait until the grievance had been heard and the tentative resolution been reached before responding. Aside from the burdens attendant on such duplicate proceedings, the resolution of disputes would be unnecessarily delayed and disagreements could ripen into discontent.

We do not find in the hearing officer's concern for the rights of individual employees, as contrasted with those of the collective group, grounds for reaching a different conclusion than that we reach here. The hearing officer's reliance on NLRB v. Magnavox Co. (1974) 415 U.S. 322 [85 LRRM 1475] to distinguish between a union's authority to waive collective rights as opposed to individual rights is misplaced.

In Magnavox, the United States Supreme Court found that a union cannot waive an employee's right to distribute material on the employer's premises during nonwork time because this would impair the employee's right to free selection of a bargaining representative. The court contrasted this nonwaivable right to the right to strike, which can be waived permissibly by agreement between the employer and union when it rests "on the premise of fair representation." Id., at p. 325.

Section 3544.9 of the EERA expressly places such a duty of fair representation on the exclusive representative.[9] Thus, the Association's approval or selection of a representative pursuant to the contract terms would be subject to the requirement of this section.

It is clear that, in determining whether an attempted waiver of employee rights is to be condemned or permitted, it is appropriate to balance the interests of the individual against those of the collective group. See Black-Clawson, supra. As already noted, the collective interests in the uniform administration of the agreement and the viability of the selected negotiating representative is fundamental to the process of representation in a system based on exclusivity. We consider these matters of sufficient magnitude to outweigh the individual employee's interest in self help.

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[9]Section 3544.9 states:

> The employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit.

ORDER

Upon the entire record and the foregoing decision, the Public Employment Relations Board ORDERS that the unfair practice complaint issued against the Chaffey Joint Union High School District is DIMISSED.[10]

By: Harry Gluck, Chairperson Irene Tovar, Member

Member Barbara D. Moore's concurrence begins on page 11.

[10]Although the District did not except to the section 3543.5(a) violation, the charge is dismissed in the interest of justice because the finding of such a violation is inextricably interwoven with the issues before us on appeal. Blache v. Blache (1951) 37 Cal.2d 531, 538; 233 P.2d 547.

Member Moore, concurring:

For the reasons set forth below, I concur in the result arrived at by the majority.

Charging Party contended and the hearing officer held that section 3543 establishes a right on the part of individual employees to present grievances to their employers. The section 3543 language at issue herein parallels the language of the proviso to section 9(a) of the NLRA. Unlike the majority, I do not find the language of the two sections to be "nearly identical." There are certain differences which should be noted. Unlike section 9(a), which enumerates rights of exclusive representatives, section 3543 sets forth the rights of employers under the EERA. The first portion of section 3543 which is expressed as a proviso or caveat to the affirmative provision of the section is the language indicating that once an exclusive representative is selected only it may meet and confer with the employer. The language regarding presentation of individual grievances in section 3543 is expressed affirmatively, as an additional employee right, not (as in 9(a)) as an exception to the general language regarding the rights of exclusive representatives and attendant duties of employers under the NLRA. Further, EERA more severely limits the role exclusive representatives are entitled to play in resolution of individual grievances. Whereas the NLRA requires that the employer give the exclusive representative the opportunity to be present at any resolution, the EERA merely requires that employers give exclusive representatives a copy of the grievance and the proposed resolution and grant it the opportunity to file a response. While these differences are important to note, I am not convinced that the ultimate effect of section 3543 is different than that of section 9(a). Each provides a limited exception to the requirement that employers refrain from direct dealing with employees regarding matters within scope.

Section 9(a) has been interpreted to mean that an employer may entertain and resolve individual grievances if it so desires, but nothing requires an employer to hear such grievances. As the 6th Circuit Court of Appeals stated in Broniman v. Great Atlantic and Pacific Tea Company (6th Cir. 1965) 353 F.2d 559 [60 LRRM 2566, at 2568].

> The employer is not required to meet (with an individual employee) for the purpose of adjusting a grievance. The statute provides a permissible step in adjustment, not a required one.

The court thus held that section 9(a) did not require an employer to hear an individual grievance, but merely enabled a willing employer to do so without running afoul of the unfair labor practice provisions of the NLRA.1

The General Counsel of the NLRB has interpreted section 9(a) of the NLRA as having the same limited effect. Thus, in upholding a Regional Director's refusal to issue a complaint alleging a violation by an employer who refused to entertain an employee grievance, the General Counsel stated, ". . . the proviso of section 9(a) merely grants permission for an individual employee or group of employees to present grievances, but nowhere in the Act is there a requirement that the employer deal with such an employee or group of employees, i.e., that such a refusal is a violation of section 8." Administrative Rulings of the General Counsel, Case No. 418, (November 3, 1952) 31 LRRM 1039. See also Administrative Rulings of the General Counsel, Case No. 317, (June 2, 1952) 30 LRRM 1103.

Since I find the ultimate effect of section 3543 to be the same as that of 9(a), I find that the "right" to file individual grievances does not establish an obligation on the part of unwilling employers to hear or adjust such grievances. Rather, it enables a willing employer to entertain and adjust such grievances without subjecting itself to unfair practice liability for bypassing the exclusive representative of its employees.

Because unwilling employers may refuse to entertain any individual grievance presentation on a case-by-case or blanket basis, it follows that they may contractually agree to limit

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[1]Broniman, supra, is directly on point for this proposition. Black-Clawson, relied upon by the majority, is factually distinguishable. That case dealt with an individual's right to compel an employer to submit an individual grievance to arbitration. The language regarding grievances in that case, while helpful, is mere dicta. Similarly, the Supreme Court in Emporium-Capwell stated that it viewed the attempt by employees in that case to discuss matters with their employer as an attempt to bargain, and not to file a grievance, and that it was deciding that case on the former ground and expressly not upon the latter.

the circumstances under which they will hear such grievances in a less restrictive manner such as that agreed to by the District and Association herein. I find the hearing officer's discussion as to whether the individual grievance right could be "waived" inapposite to the present case; because I do not find that EERA, by establishing the individual grievance right for employees, concurrently requires that unwilling employers entertain grievances under any circumstances, the limitation placed upon the presentation of individual grievances by the parties herein could not constitute a waiver of a right.

The majority cites the establishment of a system of exclusivity by the Legislature as a step towards fulfillment of the legislative purpose of improving employer-employee relations, by increasing continuity and stability and avoiding fragmentation, and attempts to utilize that as an argument for allowing limitations on individual employee grievances. This is an argument which might well have been raised against legislative enactment of the disputed section 3543 language. However, as the Legislature chose to enact the portion of section 3543 which expressly carves out a limited exception to the principle of exclusive representation, it is incongruous to argue that the general rule of exclusivity negatives the statutory exception thereto.

Neither do I rely for my conclusion on the notion, propounded by the majority, that the duty of fair representation imposed upon exclusive representatives extensively limits the exclusive representative's right to control filing of grievances. Although the doctrine applies to the exclusive representative's acts in that regard, it provides only a limited check on the exclusive representative's discretion to, for example, approve the selection of individual employees' grievance representatives. Unless a refusal to approve a grievance representative under the contract at issue herein were arbitrary, discriminatory, or undertaken in bad faith, it would not be a violation of the duty of fair representation. Vaca v. Sipes (1967) 386 U.S. 171 [64 LRRM 2369]. I would disfavor opening a "Pandora's Box" and releasing a duty of fair representation charge each time an exclusive representative refused to approve or select a given grievance representative under a contract provision such as that at issue here. Exclusive representatives should have extremely broad, unfettered discretion to make such decisions, based on a variety of internal and external considerations, without fearing that PERB will second-guess or review each such decision.

For the reasons set forth above, I concur in the result reached by the majority. I find that the contractual provision at issue herein does not conflict with, and hence does not constitute a waiver of, the limited opportunity provided by section 3543 for employees to bring grievances to the attention of their employers.

Barbara D. Moore, Member