STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

STATE EMPLOYEES TRADES COUNCIL LOCAL 1268, LIUNA AFL-CIO,	)	
Charging Party,	)	Case No. SF-CE-185-H
v.	)	PERB Decision No. 392-H
CALIFORNIA STATE UNIVERSITY,	)	August 1, 1984
Respondent.	)	

Appearances; Mary H. Mocine (Mocine, Plotz & Eggleston), Attorney for State Employees Trades Council Local 1268, LIUNA AFL-CIO; William B. Haughton, Attorney for California State University.

Before Hesse, Chairperson; Jaeger and Burt, Members.

DECISION

BURT, Member: This case is before the Public Employment Relations Board (Board) on Respondent California State University's (CSU or University) appeal of the attached Order of an administrative law judge (ALJ). The Order denies CSU's motion to defer to arbitration that portion of the complaint based on the allegation by the State Employees Trades Council Local 1268, LIUNA AFL-CIO that CSU failed to participate in good faith in the contractual arbitration process in violation of the Higher Education Employer-Employee Relations Act (HEERA), subsections 3571 (a) and (b).[1] Pursuant to PERB

[1]The HEERA is codified at Government Code section 3560 et seq. Section 3571 reads in pertinent part:

regulation 32200,[2] the ALJ certified this interlocutory appeal to the Board itself. After a complete review of the record, the Board affirms the ALJ's findings and conclusions and adopts the attached Order as the decision of the Board itself.

In affirming the underlying Order, we approve the ALJ's reasoning with the following comments. We agree with the ALJ that CSU failed to carry its burden of demonstrating that the charge of bad-faith participation in the grievance procedure is amenable to arbitral resolution.[3] As the ALJ noted, there is

---

> It shall be unlawful for the higher education 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.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

[2]PERB regulations are codified at California Administrative Code, title 8, section 31001 et seq.

[3]We disagree with the dissenting member's assumption that a charge of bad-faith participation in the grievance procedure necessarily translates into an outright refusal to process grievances and would thus be a clear contractual violation of any grievance procedure set forth in a collective bargaining agreement. There is no case authority for this proposition, nor does the record in this case mandate the Board's (or an arbitrator's) acceptance of this leap in reasoning. By denying the deferral request, the majority does not specifically find that the University did not violate the contract which may include implied terms. Rather, we find that, regardless of whether the contract in its broadest sense is violated, the dispute is not amenable to arbitral resolution.

no specific contract language addressing the conduct in question, and the contract explicitly limits the authority of an arbitrator solely to ruling on whether CSU's conduct violated specific terms of the contract.

We find, however, additional justification for not deferring this issue in National Labor Relations Board (NLRB) decisions refusing to defer when the integrity of the arbitration process itself is at issue. For example, in United States Postal Service (1982) 263 NLRB 357 [111 LRRM 1534], the NLRB was asked to defer to arbitration the question of whether the employer had improperly altered its past practice of releasing shop stewards to process grievances. The NLRB declined to defer, adopting the ALJ's decision which stated, at p. 366:

> [N]oting that allegations of wrongdoing which bear directly on a union's ability to use the very grievance procedures themselves are matters that go the [sic] core of labor-management relations, I find that it would not be appropriate to defer the issues in the case to the arbitral process.

See also Native Textiles and Communications Workers of America, Local 1127 (1979) 246 NLRB 228 [102 LRRM 1456]. The proper functioning of the grievance/arbitration process is of similar importance to the labor relations scheme established by HEERA, and it is equally inappropriate to defer the issue in the instant case to arbitration. Sending the employees' charge of bad-faith participation in the arbitration process back

through the very process the employer has allegedly obstructed and delayed is rather like a utility agency telling a person whose phone is broken to call the telephone company to fix it.

ORDER

For the reasons stated above and in the attached Order, the Board adopts the ALJ's Order as its own and the appeal of the Order on Motion to Defer is hereby DENIED.

Chairperson Hesse joined in this Decision.

Jaeger, Member, dissenting: PERB's administrative law judge places an unnecessary, and somewhat misguided, emphasis on the Association's reference to a "covenant of good faith." Although I agree that absence of good faith is not, by itself, a basis for PERB deferral, I do find it of probative value in determining whether a party has refused to engage in certain required processes. Just as absence of good faith in negotiations translates as a refusal to bargain, so lack of good faith in processing a grievance requires a finding that the party is really refusing to process the grievance.

The negotiated agreement here requires the parties to follow stipulated grievance procedures. The Union supports its bad faith claim with factual allegations which, if true, would establish that the University was effectively refusing to process the grievance on holiday pay and certain other matters, thus breaching its contractual obligation. According to the contract, any alleged contractual breach may be subject to final and binding arbitration upon demand by a party.

Thus, the issues raised here are whether the University did actually conduct itself as the Union claims and, if so, whether that conduct constituted a refusal to comply with the contractual grievance procedures. By denying the deferral request, the majority finds that the University did not breach the contract and thus decides the very issue which the arbitration procedure was designed to deal with.[1]

I do not find the cases cited by the majority, United States Postal Service and Native Textiles, to stand for the

[1]The majority may also have indirectly decided the unfair practice charge, albeit inadvertently, since the arbitration and unfair practice issues appear to be identical. PERB's normal inquiry in deferral matters is whether the issues raised by the charge can be addressed by the arbitrator. The Board does not consider the merits of the charge. The NLRB's contract-related findings in Native Textiles and United States Postal Service, infra, were occasioned by appeals from the decisions of the administrative law judges who had conducted full hearings on the unfair practice complaints as well as the deferral issues. Here, of course, the unfair practice hearing has not been held and only the deferral issue had reached the Board.

proposition they claim. In Postal Service, the NLRB law judge made an express finding that the general counsel's complaint did not allege a breach of the negotiated contract. Rather, he found it to be a complaint that the employer had engaged in "efforts to change the long-established policy under which stewards" were to be released upon request, and that:

> The General Counsel is seeking to have the Board write finis to such continued efforts and is not alleging that Respondent adopted a temporary modification of a contractual provision which would be susceptible to the grievance-arbitration procedures for appropriate clarification and interpretation. P. 366.

Since the decision rested on the finding that the complaint did not allege a contract breach, the quotation selected by the majority may be treated as dicta. Nevertheless, it should be read together with Native Textiles, which the law judge cited immediately following the quoted language. In Native Textiles, the NLRB concluded that the parties' contract did not cover the dispute on which arbitration was sought.[2] But, perhaps of greater significance is the fact that the three-member-NLRB panel deciding this case included members Fanning and Jenkins, both of whom have openly and consistently disagreed with and refused to follow the board's Collyer deferral policy.[3]

2The employer refused to allow a certain union representative to process an ongoing grievance.

3For a comprehensive presentation of Fanning's and

Their views are demonstrated by the following:

> The right of employees to designate and to be represented by representatives of their own choosing is a basic statutory policy . . . and a fundamental right guaranteed employees by Section 7 of the Act. When it is alleged, as here, that an employer is refusing to recognize a designated representative of its employees, especially for a matter of such obvious importance as processing grievances, it is not simply a matter of contract interpretation, but rather an alleged interference with a basic statutory right that this Board is entrusted with protecting. Accordingly, it is not a matter to be deferred to arbitration. Native Textiles, p. 229. (Emphasis added.)

Thus, it is clear that the judge in Postal Service, having determined that no contract breach was charged, was necessarily following the majority rationale in Native Textiles.

Of course, members Fanning and Jenkins, consistent with their opposition to deferral, were "dissenting" from an administrative policy voluntarily followed by other board members. PERB members have no such latitude. Although, unlike the Educational Employment Relations Act, HEERA contains no provision mandating deferral, the Board has adopted Regulation 32620(b)(5) which does.[4] See Regents of the University of California (12/15/83) PERB Order Ad-139-H.

Jenkins' position on pre-arbitral deferral, see 1 Morris, The Developing Labor Law (2d ed. 1983) Ch. 20, pp. 926-956.

[4]Subsection 32620(b)(5) provides:

> (b) The powers and duties of such Board agent shall be to:

Finally, The majority's sympathy for the mythical telephone subscriber perks up an otherwise regrettable decision, but overlooks the fact that here it is the University, the alleged "perpetrator," which is seeking binding arbitration to determine whether it has indeed breached the collective bargaining agreement. The majority might have expressed some interest in why the disadvantaged telephone customer would not accept the phone company's offer to refer his complaint to the binding judgment of a mutually selected repairperson.[5]

I find that the dispute goes to the core of the meaning of the contractual grievance provisions, that the party against whom the claim of breach is alleged is willing - indeed, requests - that the matter be referred to arbitration, and that the grieving Union has provided no factual or legal basis for this Board's refusal to comply with its obligations under Regulation 32620(b)(5). I would therefore defer.

. . . . . .

> (5) Dismiss the charge or any part thereof as provided in Section 32630 if it is determined that the charge or the evidence is insufficient to establish a prima facie case; or 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.

[5]Ironically, the majority's parable better fits the ALJ's conclusion that arbitration is not available because a grievance had not been filed over the University's failure to process the grievances, a view that places procedure above substance and, to coin a word, "bureaupathy" over judicial purpose.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

STATE EMPLOYEES TRADES COUNCIL LOCAL 1268, LIUNA AFL-CIO, Charging Party, v. CALIFORNIA STATE UNIVERSITY (SAN FRANCISCO), Respondent.	)	Case No. SF-CE-.185-H ~~ORDER ON MOTION TO DEFER~~

INTRODUCTION

On May 21, 1984, the respondent in this action filed a motion to defer the matter to arbitration. On May 30, 1984, the charging party filed a response to the motion to defer. A review of the substance of the charge, the amendments to the charge, and the procedural steps preceding the motion to def2r, is required.

FACTUAL BACKGROUND

The charging party (Union) and the respondent (University) are signatories to a collective bargaining agreement (or contract) for a term commencing January 25, 1983 and ending June 30, 1984. The contract includes a grievance procedure culminating in binding arbitration.

In July 1983 a dispute arose between the Union and the University regarding the amount of holiday pay which certain employees covered by the contract, employed at the Humboldt

campus of the University, were entitled to. The Union filed a grievance about the dispute.

In August 1983, there arose a dispute between the Union and the University regarding the entitlement of certain employees of the University, employed at the Chico campus, to holiday pay. The Union filed a grievance about the dispute.

In September 1983, two disputes arose between the University and the Union regarding the University's decision to subcontract to outside businesses work to be done on the Sacramento campus of the University. In each of these two cases, the Union alleged that the work was, or may have been, bargaining unit work which should have been assigned to bargaining unit employees. The Union filed a grievance about each of the two subcontracting incidents.

None of the grievances was resolved at the pre-arbitration level, and the Union notified the University it wished to submit each grievance to arbitration.

Beginning in November 1983, the Union proposed consolidation of the Humboldt and Chico grievances into one, for arbitration purposes, and consolidation of the two Sacramento grievances into one, for arbitration purposes. the University declined to agree to the consolidation proposals, and indicated it preferred four different arbitrations.

In December, the Union counsel again sought University consent to consolidate the two contracting-out grievances, and

the two holiday pay grievances. Alternatively, the Union proposed choosing one arbitrator to hear all four unconsolidated grievances consecutively on one day. Each of these consolidation proposals was rejected by the University.

Following these exchanges, the Union filed a grievance alleging that the University's refusal to consolidate the prior grievances was itself a violation of the contract. And on February 16, 1984, the Union filed an unfair practice charge against the University, alleging that the University violated HEERA section 3571(a) and (b) by its refusal to consolidate grievances for arbitration purposes, and by its delay in processing the grievance about the refusal to consolidate, for the purpose of arranging arbitration on that dispute.[1] The Union's charge describes a sequence of events beginning with the filing of the consolidation grievance on December 21, 1983, and continuing until February 15, 1984.

---

[1]HEERA sections 3571(a) and (b) read as follows:

> It shall be unlawful for the higher education 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.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

On March 12, the charging party filed an amendment to the charge, alleging that at various times after the filing of the initial charge on February 16, the University delayed participation, or failed to participate in various ways, in the contractual grievance process in connection with a third grievance over holiday pay (referred to as the "In Lieu Day" grievance). The charge alleged that the University had violated sections 3571(a) and (b) by this conduct.

On March 16, the general counsel issued a complaint against the University, incorporating the allegations of the charge as amended on March 8.

At some point, the Union and the University agreed that the consolidation grievance would be submitted to the arbitrator on the basis of written briefs only, and that no evidence would be presented. The University submitted to Arbitrator Donald Wollett its letter brief on the matter on March 27. The Union submitted its letter brief in that arbitration on April 6, 1984.

On May 7, the charging party submitted a second amendment to the charge, setting out a longer chronology of events, beginning on December 16, 1983 and continuing until May 4, 1984. This chronology has to do with communications between the Union and the University, or attempts at communication, concerning three different grievances (the consolidation grievance, the "in-lieu day" grievance, and the Bjorge

grievance).[2] This amendment to the charge, like the initial charge and the March 8 amendment, accused the University of intentionally delaying and refusing to cooperate in the contractual grievance procedure, and thereby denying to the Union and to the employees represented by the Union rights guaranteed by HEERA sections 3571(a) and 3571(b).

THE MAY 7 AMENDMENT TO THE CHARGE

An employer's refusal to process a union's contractual grievances, or its unreasonable delay in processing or answering grievances, violates NLRA sections 8(a)(5) and 8(a)(1). Murphy Diesel Company (1970) 184 NLRB 757 [76 LRRM 1469]; American Beef Packers, Inc. (1971) 193 NLRB 1117, 1119 [78 LRRM 1508]. There appears to be no PERB decision in which similar conclusions are reached by PERB with respect to comparable provisions of HEERA sections 3571(a) and 3571(c). However, in view of the similarity of HEERA language to NLRA language in this respect, and in view of the similarities of HEERA's purpose and the NLRA's purpose, it is concluded that such conduct by an employer subject to the HEERA would be a violation of HEERA sections 3571(a) and (c).[3] 3

---

[2]The substance of these last two grievances was not described in the charge.

[3]The construction of similar or identical provisions of the National Labor Relations Act (hereafter NLRA), 29 U.S.C, section 141 et seq., may be used to aid interpretation of the

PERB regulation section 32647 authorizes a Board agent to issued an amended complaint incorporating a charging party's allegations of a respondent's unlawful conduct, if the amendment charging party seeks to amend the complaint after the complaint is issued. In this case, the facts alleged in the May 7 amendment regarding events occurring after March are closely related in subject matter to the facts alleged concerning events which took place before issuance of the complaint on March 16. The facts alleged, if true, would establish a prima facie violation of HEERA sections 3571(a) and (c),[4] under the authority cited above. Therefore, it is hereby ordered that the complaint issued on March 16 be amended to include the allegations of the May 7 amendment.

THE DEFERRAL MOTION

A party to a PERB proceeding seeking PERB deferral to a grievance procedure in which the underlying dispute may be resolved, has the burden of establishing that the grievance-resolution mechanism is the result of collective bargaining, and that the dispute set out by the charge is one which is

---

EERA. See, e.g., San Diego Teachers Assn. v. Superior Court, 24 Cal.3d 1, 12-13; Fire Fighters Union v. City of Valley (1974) 12 Cal.3d 608, 618.

[4]The facts would also establish a derivative violation of HEERA section 3571(b). North Sacramento School District (12/20/82) PERB Decision No. 264.

cognizable under grievance machinery to which PERB must defer. Regents of the University of California (San Francsico) (2/15/84) PERB Prder No. Ad-139-H, and Charter Oak Education Association (2/25/82) PERB Order No. Ad-125.

In this case, the respondent has shown there is a binding arbitration provision in a collective bargaining agreement between the University and the Union. However, the University must also show that the disputes which underlie the charge are amenable to decision and resolution under that grievance machinery.

The instant cases involves two disputes. One dispute has to do with the University's refusal to consolidate grievances. The other dispute concerns the Union's allegation that the University is denying to University employees and to the Union rights guaranteed to each by the University's failure to refusal to participate in good faith in the grievance-resolution mechanism of the contract, by prompt return of telephone calls, active participation in the choosing of an arbitrator, and the selection of arbitration dates.

The consolidation dispute is clearly subject to resolution by the arbitration process. The contract includes a provision which indicates that the parties

> may consolidate grievances on similar issues at any level of the procedure. (Emphasis added.)

The dispute is whether the University unreasonably refused to

agree to the Union's consolidation proposals. The parties have submitted their dispute to an arbitrator chosen through contractual procedures. All the factors supporting pre-arbitral deferral are present, and it is appropriate for the PERB to defer resolution of this dispute to the contractual arbitration process.[5] 5

However, the question of whether the remainder of the charge and complaint should be deferred raises different considerations. First, there is no indication that' a grievance has been filed with regard to the allegations of bad faith participation in the grievance procedure. Second, several provisions of the contract raise serious doubts about whether this dispute is amenable to resolution by an arbitrator whose authority arises from the contract. Section 9.1 of the contract defines a grievance as,

> (a) a written allegation by an employee that there has been a violation, misapplication, or misinterpretation of a specific term(s) of this Agreement or (b) a written allegation by an employee that there has been a violation, misapplication, or misinterpretation of a specific CSU policy governing working conditions or CSU work rule.

Section 9.10.f of the contract states:

> It shall be the function of the arbitrator to

---

[5]The charging party retains the right to seek PERB action if it believes the arbitrator's award to be repugnant to the HEERA. PERB Regulation 32661.

> rule on the specific grievance. The arbitrator shall be subject to the following limitations:
>
> . . . . . .
>
> (6) The standard for review of the arbitrator is whether the CSU violated, misapplied, or misinterpreted a specific term(s) of the Agreement.

The respondent argues that there is an implied covenant of good faith and fair dealing in every contract in California, and cites several sections of Witkin's Summary of California Law for that contention. However, it is clear in the contractual language that the parties have delegated to an arbitrator only the authority to rule on whether the University's conduct violated a specific term of the agreement.

The respondent asserts that a breach of the implied covenant of good faith is subject to the grievance and arbitration provisions of the contract, but in view of the specific limitations on the definition of grievance, and on the authority of the arbitrator, that bare assertion is unpersuasive. The respondent cited no precedent establishing the authority of an arbitrator to rule on whether an employer has violated an implied covenant of good faith in a labor contract. The cited sections of Witkin provide no such precedent, and the leading authority in the field, How Arbitration Works, Elkouri and Elkouri (3rd ed. 1973) appears to include no such precedent.

The respondent also argues that in the absence of a specific contractual provision for a time period in which an arbitrator is to be chosen, it is implied that each party is entitled to a time reasonable in the circumstances for choosing an arbitrator, and the reasonableness of the University's conduct in this respect is subject to decision by an arbitrator. However, the dispute, as outlined in the May 7 amendment to the charge, has to do with a number of aspects of the University's conduct aside from alleged delays in the choosing of an arbitrator (including delays in pre-arbitration stages of the grievance processing, in connection with two grievances). Thus, the University's argument on this point is relevant to only a part of the issue.

It is concluded, then, that the University has not shown that the dispute set out in the charge is amenable to resolution through the contractual dispute-resolution mechanism. Therefore, the University has not carried its burden of establishing that deferral is required of those aspects of the charge concerning the University's alleged delays and failure to cooperate in the contractual grievance process.[6]

---

[6]There are a number of NLRB decisions in which the Board held that if one aspect of a complaint is deferrable while another is not, the Board will not defer any aspect of the complaint if the facts concerning the two allegations are

ORDER

IT IS HEREBY ORDERED that the complaint in this action, issued by the general counsel on March 16, 1984, be amended to refer, in paragraph 4 of that complaint, to the charge as amended on March 12, 1984 and on May 7, 1984.

IT IS FURTHER ORDERED that the aspect of the complaint herein which refers to the University's alleged refusal to consolidate various grievances for arbitration purposes will be deferred. The respondent's motion to defer PERB consideration of all other aspects of the complaint is denied.

DATED: June 6, 1984

. . . .

MARTIN FASSLER
Administrative Law Judge

---

inextricably intertwined (e.g., National Rejectors Industries (1978) 234 NLRB 251 [97 LRRM 1142]]). Our Board has not specifically adopted this aspect of NLRB procedure. In any event, the facts underlying the two aspects of the instant charge are not "inextricably intertwined." The facts underlying the Union's allegation that the University is delaying and otherwise failing to cooperate in good faith in the grievance-resolution procedure are quite distinct from the facts concerning the University's refusal to consolidate the specific grievances which the Union sought to consolidate.