STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS ALACO CHAPTER NO. 615,	)	
Charging Party,	)	Case No. SF-CE-934
v.	)	PERB Decision No. 747
ALAMEDA COUNTY SUPERINTENDENT OF SCHOOLS,	)	June 27, 1989
Respondent.	)	

Appearances; Patti Roberts, Field Representative, for California School Employees Association and its ALACO Chapter No. 615; Breon, Galgani, Godino & O'Donnell by Margaret E. O'Donnell, Attorney, for Alameda County Superintendent of Schools.

Before Porter, Craib and Camilli, Members.

DECISION

PORTER, Member: This matter is before the Public Employment Relations Board (PERB or Board) on exceptions filed by both parties to the proposed decision of a PERB administrative law judge (ALJ). The ALJ found that the Alameda County Superintendent of Schools (Respondent) violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA)[1] when it refused to bargain a reduction in hours, and

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.5 provides, in pertinent 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

when it dealt directly with the affected group of represented employees.

At the start of the formal hearing, the ALJ raised the issue of whether the matter was subject to deferral, and directed the parties to submit briefs addressing this issue.[2] In his proposed decision, the ALJ refused to defer on the ground that the Respondent failed to raise deferral in its answer or by a motion to dismiss the complaint. Consequently, the ALJ concluded that Respondent waived its right to raise the deferral objection.

DISCUSSION

Initially, it must be noted that the ALJ issued his proposed decision in this matter prior to the Board's issuance of Lake Elsinore School District (1987) PERB Decision No. 646.[3] In

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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.
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> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

[2]The Respondent, in its brief, argued essentially that the subject matter of this case was covered by the contract wherein a grievance procedure culminating in binding arbitration was established. Respondent claimed that this matter was clearly subject to deferral, a nonwaivable jurisdictional defense which could be raised appropriately at any stage of the proceeding. Accordingly, the Respondent requested that the ALJ dismiss the instant case for lack of PERB jurisdiction. The charging party argued that Respondent failed to raise deferral, an affirmative defense, in a timely manner.

[3]See also Eureka City School District (1988) PERB Decision No. 702.

Lake Elsinore, at pages 17-33, the Board held that the mandatory language of EERA section 3541.5(a)(2)[4] establishes a jurisdictional rule requiring that a charge be dismissed and deferred if the conditions set forth in section 3541.5(a)(2) exist, and expressly overruled prior Board precedent holding that such deferral was discretionary.[5] Furthermore, the Board noted in Lake Elsinore that, since the matter was jurisdictional, it was not subject to waiver.

In the instant case, we agree with the ALJ's finding that the reduction in hours dispute and the related bypassing claim are arguably covered by language contained in the parties'

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[4]Section 3541.5(a)(2) states, in pertinent part:

> (a) 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:
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> . . . . . .
>
> (2) issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration. However, when the charging party demonstrates that resort to contract grievance procedure would be futile, exhaustion shall not be necessary.

[5]The Court of Appeal affirmed the Board's Lake Elsinore decision in Elsinore Valley Education Association, CTA/NEA v. PERB (Lake Elsinore School District) (July 28, 1988) E5078 (nonpub. opn.).

agreement.[6] Moreover, the dispute is properly a subject for grievance/arbitration, and the contract provides for binding arbitration as the final step of the grievance procedure. Accordingly, the statutory proscription contained in section 3541.5(a) requires dismissal of the currently pending unfair practice charge for lack of jurisdiction.

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[6]Our dissenting colleague asserts that the subject matter at issue here is not covered by the contract grievance machinery. In support of this claim, the dissent interprets and relies upon a section of the parties' agreement that was neither raised nor addressed by the parties to this dispute in response to the ALJ's specific order to brief the issue of deferral to arbitration. The Respondent contended that the contract grievance machinery covered the subject matter at issue and that the matter should be deferred. The charging party did not dispute this; instead, its sole contention was that Respondent had waived deferral by failing to raise it as an affirmative defense in a timely manner. The ALJ, by way of footnote, noted the existence of this contractual proviso, but stated that, in the absence of the parties raising the issue and/or offering evidence as to its meaning and their intent, he declined to engage in the interpretation of this ambiguous contract language. We will likewise refrain from doing so for the same reasons.

That the meaning of the provision is unclear and ambiguous was recognized by the ALJ and, in fact, is further highlighted by the dissenting opinion. After stating that the provision "on its face" precludes claims cognizable under EERA from being subject to arbitration, the dissent goes on to state that this is the "most reasonable interpretation," and is preferable to a literal interpretation of the section which would also preclude pure contract claims from arbitration. Asserting that a particular interpretation is the "most reasonable interpretation" necessarily implies that the section must be subject to more than one interpretation and, therefore, is ambiguous and cannot be clear "on its face." We do not think it appropriate to speculate as to the meaning of contract language which the parties themselves do not even find applicable to this dispute.

ORDER

Based upon the foregoing, the unfair practice charge in Case No. SF-CE-934 is hereby DISMISSED.

Member Camilli joined in this decision.

Member Craib's dissent begins on page 6.

Member Craib, dissenting: I do not agree that this case must be deferred to arbitration. As explained below, my review of the parties' contract has revealed that the grievance machinery does not "cover the matter at issue" as required by Educational Employment Relations Act (EERA) section 3541.5, subdivision (a)(2). Consequently, the Public Employment Relations Board (PERB or Board) does have initial jurisdiction to address the merits of this dispute.

The parties' 1983-84 agreement contains the following provision at section 7.6.2.3, under the heading "Powers of the Arbitrator":

> He/she shall have no power to rule on any of the following:
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> . . . . . .
>
> Any claim or complaint for which there is another remedial procedure or course established by law or by regulations having the force of law, including the Rules and Regulations of the Office of the Alameda County Superintendent of Schools Personnel Commission.

On its face, this provision precludes an arbitrator from hearing a claim cognizable under EERA, for the filing of an unfair practice charge with the PERB clearly represents "another remedial procedure or course established by law or by regulation . . . ."[1] Thus, a dispute which is otherwise within

[1]section 7.6.2.3, if read literally and out of context, would also preclude the arbitrator from hearing a pure contract claim, for such a claim could be pursued in the courts. However, when viewed in context, such a reading is nonsensical, for it would preclude arbitration altogether. Instead, the most reasonable interpretation is one where the arbitrator has the

the jurisdiction of PERB is simply not subject to arbitration under the parties' contractual grievance machinery. Consequently, in this case, EERA section 3541.5, subdivision (a)(2), does not apply and PERB may properly exert initial jurisdiction.[2]

While the reductions in hours were announced prior to the expiration of the 1983-84 contract, they were not implemented until after its expiration. However, the subsequent contract (effective July 1, 1984 to June 30, 1985, but not executed until July 15, 1985), contained a section 7.6.2.3 identical to that contained in the 1983-84 contract. Moreover, both contracts contained the following provision, at section 7.6.2.11:

> Any action which could have resulted in the filing of a grievance, occuring [sic] during the period between the termination date of this Agreement and the effective date of a new Agreement, . . . shall be processed under the applicable Rules and Regulations of the Office of the Alameda County Superintendent of Schools Personnel Commission.

Given the use of the term "effective date," it is not clear if this provision applies where there is a gap between the expiration date of the old contract and the execution date of a

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usual authority to hear a claim based on the contract, except where the claim is also cognizable in another forum under a theory of law not based on contract enforcement.

[2]The administrative law judge, in his proposed decision, noted the content of section 7.6.2.3, but was unwilling to consider it without extrinsic evidence of the parties' intent. I believe that approach to be mistaken, for not only is the provision clear enough on its face, but PERB should not refuse to consider issues which could affect its jurisdiction to resolve the dispute.

new contract which contains a retroactive effective date. In any event, it is of no import whether section 7.6.2.3 or section 7.6.2.11 applies to the dispute herein, for under neither provision can it be said that the parties' contractual grievance machinery "covers the matter at issue" and ends in binding arbitration, as required for deferral pursuant to EERA section 3541.5, subdivision (a)(2). Accordingly, the Board does have jurisdiction to address the merits of this dispute.