STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

STATE EMPLOYEES TRADES COUNCIL, Charging Party,	)	Case No. LA-CE-316-H
v.	)	PERB Decision No. 986-H
CALIFORNIA STATE UNIVERSITY, Respondent.	)	March 30, 1993

Appearance: Eggleston, Siegel and LeWitter by James E. Eggleston, Attorney, for State Employees Trades Council.

Before Hesse, Caffrey and Carlyle, Members.

DECISION

CARLYLE, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the State Employees Trades Council (SETC) to a Board agent's dismissal and deferral to arbitration (attached hereto) of SETC's charge that the California State University (CSU) violated Government Code section 3571(a), (b) and (c) of the Higher Education Employer-Employee Relations Act (HEERA).[1]

[1]HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references are to the Government Code. Section 3571 states, in pertinent part:

> It shall be unlawful for the higher education 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.

The Board has reviewed the Board agent's dismissal and finding it free of prejudicial error adopts it as the decision of the Board itself.

DISCUSSION

On appeal, SETC argues that deferral to arbitration is futile as CSU refuses to submit the issues to the arbitrator. However, PERB is not empowered to enforce contracts between parties.[2] PERB's authority is limited to a jurisdictional review of the language of the contract. To remedy a situation as the one alleged by SETC, HEERA section 3589(b)[3] permits a party to

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

(c) Refuse or fail to engage in meeting and conferring with an exclusive representative.

[2]Section 3563.2(b) states:

(b) The Board shall not have authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of such an agreement that would not also constitute an unfair practice under this chapter.

[3]Section 3589(b) states:

(b) Where a party to a memorandum of understanding is aggrieved by the failure, neglect, or refusal of the other party to proceed to arbitration pursuant to the procedures provided therefor in the memorandum, 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 memorandum of understanding.

proceed directly to court to seek enforcement of the parties' arbitration agreement.[4]

SETC also asserts it is inappropriate to defer to arbitration, the allegation concerning the refusal to provide information. SETC relies on National Labor Relations Board v. Davol, Inc. (1979) 101 LRRM 2242 (Davol) where the National Labor Relations Board declined to defer to arbitration, a charge that an employer refused to provide information requested to pursue a grievance to arbitration. However, Davol is distinguishable from this case. In Davol, the contract between the parties did not require parties to furnish information or provide for binding arbitration on such matters. Here, however, section 7.11 of the collective bargaining agreement (CBA) provides in part:

> Upon written request to the Office of the Chancellor, the Union shall be provided with specifically identified information on wages, hours, and working conditions related to negotiations. . . .

Further the CBA between SETC and CSU provides for binding arbitration of grievances. As the refusal to provide requested information directly involves an interpretation of section 7.11 of the CBA, the charge was properly dismissed and deferred to arbitration.

ORDER

The unfair practice charge in Case No. LA-CE-316-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Member Caffrey joined in this Decision.

Member Hesse's dissent begins on page 4.

[4]The Board notes CSU's May 6, 1992 letter to the Board agent which states that if this matter is deferred to arbitration, CSU will waive all procedural defenses to arbitrating this dispute.

Hesse, Member, dissenting: The dismissal reflects an improper and incomplete reading of the Public Employment Relations Board's (PERB or Board) prearbitration deferral jurisdiction under the Higher Education Employer-Employee Relations Act (HEERA). Consequently, I would reverse the dismissal and remand the case to the General Counsel for further investigation.

State Employees Trades Council (SETC or Union) has the burden of establishing the Board's jurisdiction. On appeal, SETC argues that the Board has jurisdiction as deferral to arbitration is not appropriate where the request for arbitration is futile. SETC disputes the suggestion made in the California State University's (CSU) letter (dated May 6, 1992) to the PERB Board agent that "if the dispute is dismissed by PERB and deferred to arbitration, the CSU will waive all of its procedural defenses to arbitrating this dispute, including timeliness, which may exist in this case." (See Board agent's letter of September 22, 1992, attached.) First, SETC argues that CSU did not notify the Union that CSU would go to arbitration. Secondly, on May 28, 1992, 22 days after the May 6 CSU letter, in a telephone conference with Arbitrator Kathy Kelly, SETC and CSU representatives, CSU flatly refused to submit the dispute to arbitration and refused to process to arbitration a separate grievance related to the dispute on the grounds that the grievance was untimely.

The Board agent relies upon the standards articulated in Collyer Insulated Wire (1971) 192 NLRB 837 [77 LRRM 1931] to find that the charge must be deferred to arbitration. I disagree with

the standard the Board has applied to the pleading. In Lake Elsinore School District (1987) PERB Decision No. 646 (Lake Elsinore) pp. 31-32, the Board found the Collyer standards neither controlling nor instructive and expressly overruled the application of Collyer prearbitration deferral standards to the Educational Employment Relations Act (EERA) and the Ralph C. Dills Act cases. Although the jurisdictional magic words (see EERA section 3541.5(a)[1]) do not appear in HEERA section 3563.2,[2]

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[1]Section 3541.5 states, in pertinent part:

> The initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board. Procedures for investigating, hearing, and deciding these cases shall be devised and promulgated by the board and shall include all of the following:
>
> (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:
>
> (1) Issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge;
>
> (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. The board shall have discretionary jurisdiction to review the settlement or arbitration award reached pursuant to the grievance machinery solely for the purpose of determining whether it is repugnant to the purposes of this

PERB Regulation 32620(b)(5)[3] reinforces part of the policy of

> chapter. If the board finds that the settlement or arbitration award is repugnant to the purposes of this chapter, it shall issue a complaint on the basis of a timely-filed charge, and hear and decide the case on the merits. Otherwise, it shall dismiss the charge. The board shall, in determining whether the charge was timely filed, consider the six-month limitation set forth in this subdivision to have been tolled during the time it took the charging party to exhaust the grievance machinery.

[2]Section 3563.2 states:

> The initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board. Procedures for investigating, hearing, and deciding these cases shall be devised and promulgated by the board.
>
> (a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge.
>
> (b) The Board shall not have authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of such an agreement that would not also constitute an unfair practice under this chapter.

[3]PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB Regulation 32620 states, in pertinent part:

> (b) The powers and duties of such Board agent shall be to:
>
> (5) Dismiss the charge or any part thereof as provided in section 32630 if it is

Lake Elisnore. It requires the Board to dismiss the charge if it is subject to final and binding arbitration. While the HEERA statute neither grants the Board the authority to review nor does the statute prohibit Board review of cases where the request for arbitration is futile, the regulation implies that arbitration is a viable means of resolving the parties' dispute. On appeal, the Union has alleged that arbitration is not viable and that it was prejudiced by the Board agent's reliance on the CSU letter.

In the underlying charge before the Board, it is difficult to determine whether the SETC advanced the argument that a request for arbitration would be futile and whether the Board agent properly considered the futility theory.[4] (See Ramona Unified School District (1984) PERB Decision No. 472.) The concept of futility under EERA section 3541.5 requires a demonstration that the arbitration step of the grievance procedure cannot be invoked or completed. (See State of California (Department of Corrections) (1986) PERB Decision No. 561-S.) The employer's willingness to proceed to arbitration is in dispute. Where the integrity of the arbitration process is

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> 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.

[4]SETC alleges that it did not have an opportunity to respond to the Board Agent's warning letter or amend the charge because the warning letter was received by SETC on September 28, 1992, the day before the Board Agent's deadline for a response.

at issue in HEERA, I find that the Board has the discretion to examine the futility concept. (See California State University (SETC) (1984) PERB Decision No. 392-H.)

Therefore, I would reverse the dismissal and remand the case to the PERB General Counsel for further investigation.

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Boulevard, Suite 650
Los Angeles, CA 90010-2334
(213) 736-3127

September 29, 1992

James E. Eggleston
Eggleston & Siegel
1330 Broadway, Suite 1700
Oakland, CA 94612

RE: DISMISSAL AND REFUSAL TO ISSUE COMPLAINT (DEFERRAL TO **ARBITRATION), Unfair Practice** Charge **No. LA-CE-316-H,** State Employees Trades Council **v.** California State **University**

Dear Mr. Eggleston:

In the above-referenced charge, the State Employees Trades Council (SETC) alleges that the California State University (CSU) refused to bargain effects of layoff, refused to provide requested information, and retaliated against employees for pursuing grievances. This conduct is alleged to violate Government Code sections 3571(a), (b) and (c) of the Higher Education Employer-Employee Relations Act (HEERA).

I indicated to you, in my attached letter dated September 22, 1992, that the above-referenced charge was subject to deferral to arbitration. You were advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge or withdrew it prior to September 29, 1992, it would be dismissed.

I have not received either an amended charge or a request **for withdrawal. Therefore, I** am dismissing the charge based on **the facts and reasons contained** in my September 22 letter.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, you **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. (Cal. Code of Regs., tit. 8, sec. 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 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing. (Cal. Code of Regs., tit. 8, sec. 32135.) Code of Civil Procedure section 1013 shall apply. The Board's address is:

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

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code of Regs., tit. 8, sec. 32635(b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code of Regs., tit. 8, sec. 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed.

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code of Regs., tit. 8, sec. 32132.)

Final Date

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

Sincerely,

JOHN W. SPITTLER
General Counsel

By Thomas J. Allen
THOMAS J. ALLEN
Regional Attorney

Attachment

cc: Carlos Cordova

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Boulevard, Suite 650
Los Angeles, CA 90010-2334
(213) 736-3127

September 22, 1992

James E. Eggleston
Eggleston & Siegel
1330 Broadway, Suite 1700
Oakland, CA 94612

RE: WARNING LETTER (DEFERRAL TO ARBITRATION), Unfair Practice Charge No. LA-CE-316-H, State Employees Trades Council v. California State University

Dear Mr. Eggleston:

In the above-referenced charge, the State Employees Trades Council (SETC) alleges that the California State University (CSU) refused to bargain effects of layoff, refused to provide requested information, and retaliated against employees for pursuing grievances. This conduct is alleged to violate Government Code sections 3571(a), (b) and (c) of the Higher Education Employer-Employee Relations Act (HEERA).

The collective bargaining agreement between SETC and CSU provides for binding arbitration of grievances. The agreement also provides in relevant parts as follows:

> 7.11 Upon written request to the Office of the Chancellor, the Union shall be provided with specifically identified information on wages, hours, and working conditions related to negotiations. Such information shall be provided within a reasonable period of time. The Union may be required to bear the cost of such information, if there is a cost associated. It is understood that this Article shall not be construed to require the CSU to develop or compile any information or data in a form not already compiled.
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> * * *
>
> 7.16 An employee shall not suffer reprisals for participating in union activities.
>
> * * *
>
> 9.18 No reprisals of any kind shall be taken against any unit member for the filing and processing of any grievance.

* * *

29.3 When the CSU determines that there may be a need for implementation of any procedures outlined in this Article [Layoff], the CSU agrees to immediately meet and confer with the Union on the bargaining unit impact including, but not limited to, voluntary programs, reduced worktime, leaves of absence, and other personnel actions.

* * *

29.8 An employee who possesses documentable specialized skills that are needed for the program not possessed by other employees **in** classification(s) undergoing layoff, may be excluded by the President from the **layoff** list.

Based on the facts stated above and PERB Regulation 32620(b)(5) (Cal. Code of Regs., tit. **8,** sec. **32620(b)(5)), this charge must be dismissed and deferred to arbitration under the agreement.**

PERB Regulation 32620(b)(5) requires **the Board agent processing the charge to:**

> Dismiss the charge or any part thereof as provided in section 32630 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.

In Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81a, the Board explained that:

> While there is no statutory deferral requirement imposed on the National Labor Relations Board (hereafter NLRB), that agency has voluntarily adopted such a policy both with regard to post-arbitral and pre-arbitral award situations.[2] EERA section 3541.5(a) essentially codifies the policy developed by the NLRB regarding deferral to arbitration proceedings and awards. It is appropriate, therefore, to look for guidance to the

> private sector.[3] [Fn. 2 omitted; fn. 3 to Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608.]

Although this case arose under the Educational Employment Relations Act, and was overruled on statutory grounds in Lake Elsinore School District (1987) PERB Decision No. 646, the rationale is still applicable to cases arising under the Higher Education Employer-Employee Relations Act. (Regents of the University of California (1983) PERB Order No. Ad-139-H; California State University (1984) PERB Decision No. 392-H.)

In Collyer Insulated Wire (1971) 192 NLRB 837 [77 LRRM 1931] and subsequent cases, the National Labor Relations Board articulated standards under which deferral is appropriate in prearbitral situations. These requirements are: (1) the dispute must arise within a stable collective bargaining relationship where there is no enmity by the respondent toward the charging party; (2) the respondent must be ready and willing to proceed to arbitration and must waive contract-based procedural defenses; and (3) the contract and its meaning must lie at the center of the dispute.

These standards are met with respect to this case. First, no evidence has been produced to indicate that the parties are not operating within a stable collective bargaining relationship. Second, by the attached letter from its representative, Carlos Cordova, dated May 6, 1992, the Respondent has indicated its willingness to proceed to arbitration and to waive all procedural defenses. Finally, the issues raised by this charge, that CSU refused to bargain effects of layoff, refused to provide requested information, and retaliated against employees for pursuing grievances, directly involve an interpretation of sections 7.11, 7.16, 9.18, 29.3 and 29.8 of the agreement.

Accordingly, this charge must be deferred to arbitration and will be dismissed. Such dismissal is without prejudice to the Charging Party's right, after arbitration, to seek a repugnancy review by PERB of the arbitrator's decision under the Dry Creek criteria. (See PERB Reg. 32661 [Cal. Code of Regs., tit. 8, sec. 32661]; Los Angeles Unified School District (1982) PERB Decision No. 218; Dry Creek Joint Elementary School District, supra.)

If there are any factual inaccuracies in this letter or any additional facts which would require a different conclusion than the one explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form clearly labeled First Amended Charge, contain all

the facts and allegations you wish to make, and be signed under penalty of perjury by the Charging Party. The amended charge must be served on the Respondent and the original proof of service filed with PERB. If I do not receive an amended charge or withdrawal from you before September 29, 1992, I shall dismiss your charge. If you have any questions, please call me at (213) 736-3127.

Sincerely,

Thomas J. Allen

Thomas J. Allen
Regional Attorney

Attachment

THE CALIFORNIA STATE UNIVERSITY

BAKERSFIELD • CHICO • DOMINGUEZ HILLS • FRESNO • FULLERTON • HAYWARD • HUMBOLDT • LONG BEACH • LOS ANGELES • NORTHRIDGE • POMONA
SACRAMENTO • SAN BERNARDINO • SAN DIEGO • SAN FRANCISCO SAN JOSE • SAN LUIS OBISPO • SAN MARCOS • SONOMA • STANISLAUS

OFFICE OF GENERAL COUNSEL
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May 6, 1992

CERTIFIED MAIL
Return Receipt Requested

Thomas J. Allen

Regional Attorney Public Employment Relations Board
3530 Wilshire Blvd., Suite 650
Los Angeles, California 90010-2334

Re: Unfair Practice Charge No. LA-CE-316-H - State Employees Trades Council v. California State University - CSU, Long Beach; Our File No. L92-237

Dear Mr. Allen:

Our office is in receipt of the statement of charges in the above-mentioned matter. It is our position that the matter should be deferred to arbitration under the Collyer[1] doctrine and/or the statement of charges fails to state a prima facie case for violation of HEERA and should therefore be dismissed.

In a nutshell, the Charging Party alleges that the employer has breached its statutory duty to bargain in good faith by refusing to bargain over implementation of a layoff decision and by refusing to provide information regarding implementation of a layoff decision. In addition, the Charging Party alleges that the employer has retaliated against bargaining unit employees and the union for pursuing grievances challenging layoff decisions.

[1] Collyer Insulated Wire (1971) 192 NLRB 837, 77 LRRM 1931.

I. Failure to bargain in good faith on the layoff decision.

The Charging Party alleges that the campus has failed to bargain matters related to implementation of the layoff decision. The statement of charges, however, fails to allege that a layoff decision has in fact been made. As of the date of this letter, the employer has not finalized any layoff decision. Specifically, no notice of layoff has been forwarded to the employee as is required by Articles 29.15 and 29.16 of the Memorandum of Understanding (MOU) between the parties (copies attached). Any requirement of the employer under HEERA to negotiate implementation of layoff is premature at this time (see, Mt. Diablo Unified School District (1983), PERB Dec. No. 373, p. 26).

If PERB determines that the employer has a duty to bargaining the implementation of layoff prior to rendering a final decision to institute layoff, the Board should find that the union has waived its right to negotiate this issue. Specifically, the Charging Party alleges that the CSU failed to bargain over the so-called proposed "specialized skills test." The MOU between the parties grants the president of a campus the sole discretion to determine which employees possess documentable specialized skills sufficient to be excluded from the layoff list. (See Article 29.8, attached.)

Furthermore, if the employee or the union believes that the campus has violated, misapplied or misinterpreted this Article of the MOU pursuant to Articles 9.1 and 9.2 (see attached), both the employee and the union have a right to submit the matter to the contract grievance procedure.[2] The parties have a stable collective bargaining relationship and if the dispute is dismissed by PERB and deferred to arbitration, the CSU will waive all of its procedural defenses to arbitrating this dispute, including timeliness, which may exist in this case. For the above-stated reasons, it is clear that all of

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[2] In fact, the CSU's request to the affected employees regarding specialized skills was made pursuant to an order by an arbitrator interpreting the language of Article 29.8. In her decision, Arbitrator Kelly reserved jurisdiction over any and all disputes that may arise concerning implementation or interpretation of her decision. This fact supplies additional justification for deferring this matter to arbitration. (A copy of Arbitrator Kelly's decision is attached to Charging Party's Statement of Charges.)

the Collyer requirements for deferral to arbitration exist in this case.

II. Retaliation charge.

Charging Party has failed to allege any facts concerning this allegation. Therefore, Charging Party has failed to state a prima facie case on this issue and this charge should be dismissed by PERB.

Sincerely,

BRUCE M. RICHARDSON
Deputy General Counsel

CARLOS CORDOVA
Attorney

CC:mks:0956D
Enclosures

cc: Ms. Irene Cordoba (all w/o enclosures)
Mr. Earnest Burnside
Ms. Ramona Canas
Richard Ludmerer, Esq.
Mr. Armando Contreras