STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS BARSTOW CHAPTER #306,	)	Case No. LA-CE-3396
Charging Party,	)	Request for Reconsideration
	)	PERB Decision No. 1138
v.	)	
	)	PERB Decision No. 1138a
BARSTOW UNIFIED SCHOOL DISTRICT,	)	
	)	May 31, 1996
Respondent.	)	
	)	

Appearances: California School Employees Association by William C. Heath, Attorney, for California School Employees Association and its Barstow Chapter #306; Atkinson, Andelson, Loya, Ruud and Romo by Ronald C. Ruud, Attorney, for Barstow Unified School District.

Before Caffrey, Chairman; Garcia and Johnson, Members.

DECISION

CAFFREY, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on a request by the California School Employees Association and its Barstow Chapter #306 (CSEA) that the Board reconsider its decision in Barstow Unified School District (1996) PERB Decision No. 1138 (Barstow USD). In that decision, the Board found that the Barstow Unified School District (District) did not violate section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA)[1] when it refused to negotiate with CSEA 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 states, in pertinent part:

unilaterally contracted out pupil transportation and vehicle maintenance services in June 1993.

BACKGROUND

In Barstow USD, the Board interpreted language within the District Rights article of the parties' collective bargaining agreement (CBA) which gave the District the exclusive right to "contract out work, which may lawfully be contracted for." The Board determined that this language clearly gave the District the right to contract out, and constituted a clear and unmistakable waiver by CSEA of its right to negotiate over the District's decision to do so. In reaching this conclusion, the Board was aware of separate legal action in which CSEA was challenging the lawfulness under the Education Code of the District's contracting out of transportation services. The Board stated at footnote 6:

> The Board notes that the question of the lawfulness under the Education Code of contracting out transportation services is

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> It shall be unlawful for a public school employer to do any of the following:
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> (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.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

> being pursued by the parties in a separate legal action in the courts. The Board's decision here addresses the District's right with regard to contracting out which is determined to be lawful.

In effect, the Board in Barstow USD determined that the District had the contractual right to contract out transportation services, assuming it was lawful to do so under the Education Code. The Board did not consider the Education Code issue, which the parties were already litigating before the Fourth District Court of Appeal.

The Board's decision in Barstow USD was issued on February 20, 1996. On March 18, 1996, the court issued its decision concerning the Education Code issue which reversed the decision of the San Bernardino County Superior Court and remanded the case to the lower court with directions. (Personnel Commission of the Barstow Unified School District v. Barstow Unified School District et al. (1996) ____ Cal.App.4th ___ [50 Cal.Rptr.2d 797] (Personnel Commission of the Barstow USD).) Specifically, the lower court was directed to stay its proceedings regarding CSEA's Education Code claims pending the exhaustion by CSEA of its administrative remedy at PERB.

CSEA'S REQUEST FOR RECONSIDERATION

CSEA's request for reconsideration is based on two grounds. First, CSEA argues that the Board's decision in Barstow USD contains a prejudicial error of fact in the Board's finding that the parties' CBA contained no limitation on the District's contractual authority to contract out work. CSEA argues that the

inclusion of the phrase "which may lawfully be contracted for" in the contracting out provision incorporates within the CBA any Education Code prohibitions against contracting out.

CSEA cites Roseville Joint Union High School District (1986) PERB Decision No. 580 (Roseville Joint UHSD) asserting that in the face of similar contracting out language within a CBA, PERB noted that the contracting out of janitorial work was prohibited by the Education Code. Accordingly, the Board stated that to the extent that the District had contracted out janitorial work, it had violated the Education Code and the EERA by making an unlawful unilateral change. CSEA argues that the circumstances here are analogous, stating that "this case turns on the interpretation of the Education Code."

CSEA asserts that "PERB has the jurisdiction to interpret the Education Code." Referring to Whisman Elementary School District (1991) PERB Decision No. 868 (Whisman El. SD), CSEA notes that PERB interprets the Education Code as necessary to carry out its responsibility to administer the EERA. CSEA then argues that the contracting out of transportation services in a merit district is prohibited by the Education Code, summarizing the arguments included in its brief to the appellate court on this issue.

The second basis of CSEA's request for reconsideration is "newly discovered evidence" in the form of the tentative opinion of the Fourth District Court of Appeal, mailed to the parties on January 29, 1996. CSEA asserts that the opinion tends to show

that the court will defer to PERB on the Education Code issue which PERB did not consider in Barstow USD.

DISTRICT'S RESPONSE

The District opposes CSEA's request for reconsideration. The District states that CSEA elected to litigate the Education Code issue in the courts and not in a PERB unfair practice charge proceeding. In fact, the District notes that CSEA stated during the hearing before the administrative law judge (ALJ) that PERB was not being asked to rule on the Education Code issue. In its response to the District's exceptions to the ALJ's proposed decision, CSEA refers to the court's consideration of the Education Code, stating that PERB is without jurisdiction to enforce the Education Code. The District asserts that "CSEA now seeks to completely reverse its position" in its reconsideration request, something it cannot do since the Board will not entertain issues raised for the first time on appeal of an ALJ decision. (Marin Community College District (1978) PERB Decision No. 55 (Marin CCD).)

The District notes that the tentative appellate court decision referred to by CSEA in its request has been replaced by a final, published decision. (Personnel Commission of the Barstow USD.) Since the court has remanded the matter to the Superior Court and stayed the proceedings on the Education Code issue, the District notes that CSEA is free to pursue the Education Code issue in court after exhausting its administrative remedy at PERB.

The District distinguishes Roseville Joint UHSD, cited by CSEA, since the parties in that case litigated a dispute over an Education Code interpretation in the context of a Board agent's dismissal, while here CSEA chose to litigate the Education Code issue in court, and not at PERB.

DISCUSSION

PERB Regulation 32410 provides parties with the opportunity to request reconsideration of a Board decision. It states, in pertinent part:

> (a) Any party to a decision of the Board itself may, because of extraordinary circumstances, file a request to reconsider the decision within 20 days following the date of service of the decision. . . . The grounds for requesting reconsideration are limited to claims that the decision of the Board itself contains prejudicial errors of fact, or newly discovered evidence or law which was not previously available and could not have been discovered with the exercise of reasonable diligence.

In Barstow USD, the Board did not consider the issue of the lawfulness under the Education Code of contracting out transportation services by the District. The Board specifically noted that that issue was being litigated by the parties in the courts. Since the case was presented to the Board as a contract interpretation/waiver case, and the parties were litigating the Education Code issue in court, the Board did not consider that issue in the interest of judicial economy.

The Court of Appeal has now issued its opinion in which it addresses in some depth the proper role of PERB and the court in

considering the issues raised by a case such as this. The court frames the question as:

> . . . whether CSEA was entitled to proceed in the superior court on the basis that the pleadings in that court alleged only Education Code violations, in spite of the pendency of CSEA's PERB charge alleging claims over which PERB undeniably would have exclusive initial jurisdiction.

Citing El Rancho Unified School Dist, v. National Education Assn. (1983) 33 Cal.3d 946 [192 Cal.Rptr. 123], the court determines that the issue presented in the proceedings before PERB and the court is fundamentally the same - the legality of the District's action to contract out transportation services. The court notes that, while PERB lacks jurisdiction to enforce the Education Code (Oxnard Educators Association (Gorcey/Tripp) (1988) PERB Decision No. 664 (Oxnard Educators Assn.)), exhaustion of the administrative remedy at PERB is required even when PERB lacks jurisdiction over some of the issues involved. (Leek v. Washington Unified School Dist. (1981) 124 Cal.App.3d 43 [177 Cal.Rptr. 196].) The court states that:

> . . . no case has been brought to our attention, and we have found none, in which a litigant was permitted to proceed in superior court on a claim that the adverse party's conduct violated the Education Code, while proceeding simultaneously before PERB on a claim that the same conduct violated the EERA.

The court further notes that PERB in this case could furnish relief equivalent to that which the court could provide, a consideration which further requires exhaustion of the

administrative remedy. (San Diego Teachers Assn. v. Superior Court (1979) 24 Cal.3d 1 [154 Cal.Rptr. 893].)

It is important to note that the court was aware of the Board's decision in Barstow USD when it issued its decision. However, the court notes CSEA's request for reconsideration and concludes:

> Because CSEA failed to exhaust its remedy, the trial court lacked jurisdiction to proceed, and its judgment was premature and is not properly before us for review.

As noted by the court, PERB is without jurisdiction to enforce the Education Code (Oxnard Educators Assn.). However, the Board does have jurisdiction to interpret the Education Code as necessary to carry out its duty to administer EERA. In doing so, the Board seeks to harmonize the legislative intent underlying the EERA with the Education Code provisions. (San Bernardino City Unified School District (1989) PERB Decision No. 723; Whisman El. SD.)

CSEA correctly asserts that this case turns on the interpretation of the Education Code. If it is lawful under the Education Code for the District to contract out transportation services, then the language of the parties' CBA gives the District the right to do so without further negotiations pursuant to EERA. If it is not lawful under the Education Code for the District to contract out transportation services, then the District did not have the right under the CBA to do so, and its action constituted an unlawful unilateral change in violation of the EERA.

The court has described the policy considerations requiring parties to exhaust their administrative remedy at PERB. As part of the administrative proceedings at PERB, it is clear that the Board may interpret the relevant Education Code provisions in this case to determine if an EERA violation occurred. The District does not dispute the Board's authority to do so in its opposition to this request for reconsideration, stating that "CSEA could have asked for an interpretation of the Education Code in the unfair practice proceeding . . . ."

With the benefit of the guidance of the court, it is apparent now that the principle of exhaustion of administrative remedies, as well as the interests of judicial economy, would have been well served by PERB interpreting the Education Code provisions as part of the original proceedings in Barstow USD. While PERB did not do so in its original decision, the guidance of the court makes it clear that it remains appropriate for PERB to do so now. The principles of administrative exhaustion and judicial economy lend support to the Board's responsibility and authority to interpret the Education Code provisions here as necessary to determine whether an EERA violation has occurred. Consequently, the Board concludes that the opinion of the appellate court in Personnel Commission of the Barstow USD constitutes newly discovered law which was not previously available within the meaning of PERB Regulation 32410. Reconsideration by the Board of its decision in Barstow USD is appropriate, with reconsideration limited to the sole issue of

whether it was lawful under the Education Code and, therefore, under the EERA, for the District to contract out transportation services in June 1993.

The primary contention of the District in opposing this reconsideration request is that CSEA selected the forum in which to pursue its Education Code claim, choosing judicial rather than PERB review, so to allow CSEA "to completely reverse its position" now is inappropriate. The District cites Marin CCD for the proposition that PERB will not entertain any issue raised for the first time on appeal of an ALJ's decision.

First, as noted by the court, PERB's jurisdiction to interpret the Education Code as necessary to administer the EERA is not subject to the forum selection preferences of the parties. (Fresno Unified School Dist, v. National Education Assn. (1981) 125 Cal.App.3d 259 [177 Cal.Rptr. 888].) Similarly, the determination of the issues to be considered in an unfair practice proceeding before PERB is made by the Board and its agents, and not by the parties to the proceeding.

Second, the District's citation to Marin CCD is misplaced. That case involved an appeal of a Board agent's decision in which a party made the contention for the first time on appeal to the Board that an employee met the EERA definition of "confidential employee" rather than "management employee." The Board declined to consider the assertion because the parties had not been given the opportunity to present evidence on the issue. The question before the Board here arises in the context of a request for

reconsideration, the standard for which specifically provides that newly discovered evidence or law, obviously not previously presented by the parties, represents appropriate grounds for requesting reconsideration.

The principle underlying the Board's action in Marin CCD, that the parties must be provided due process and adequate opportunity to present their evidence and arguments, is relevant here. CSEA has presented argument on the issue of the lawfulness of the District's contracting out of transportation services under the Education Code, but the District has not. It is essential that both parties have the opportunity to present argument on this issue upon the Board's granting of this request for reconsideration. Therefore, it is appropriate for the Board to provide the parties with 30 days to submit written argument to the Board on the sole issue of the lawfulness of the District's contracting out of transportation services under the Education Code and, therefore, under the EERA.

ORDER

The request by the California School Employees Association and its Barstow Chapter #306 that the Public Employment Relations Board reconsider its decision in Barstow Unified School District (1996) PERB Decision No. 1138 is hereby GRANTED. Reconsideration is granted for the sole purpose of determining whether the District's contracting out of the transportation services in June 1993 was lawful under the Education Code.

It is further ORDERED that the parties to this matter file supporting briefs with the Board within 30 days of service of this Order solely on the issue of whether the District's contracting out of transportation services in June 1993 was lawful under the Education Code.

A document is considered "filed" when actually received by the appropriate PERB office before the close of business on the last day set for filing; or when addressed to the proper PERB office, sent by telegraph, certified or Express United States mail and postmarked not later than the last day set for filing. Service and proof of service are required. (PERB Reg. secs. 32135 and 32140.)[2]

Member Johnson joined in this Decision.

Member Garcia's concurrence begins on page 13.

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

GARCIA, Member, concurring: I would grant the California School Employees Association and its Barstow Chapter #309's request for reconsideration of Barstow Unified School District (1996) PERB Decision No. 1138 because the decision of the Court of Appeal in Personnel Commission of the Barstow Unified School District v. Barstow Unified School District et al. (1996) ____Cal.App.4th_____[50 Cal.Rptr.2d 797], issued shortly after PERB Decision No. 1138, constitutes new law that potentially modifies the foundation of Decision No. 1138. Under PERB Regulation 32410, the Board can and should reconsider this case.