STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

EL CENTRO ELEMENTARY TEACHERS ASSOCIATION, Charging Party, v. EL CENTRO ELEMENTARY SCHOOL DISTRICT, Respondent.	Case No. LA-CE-4859-E PERB Decision No. 1863 November 13, 2006

Appearances: California Teachers Association by Michael D. Hersh, Attorney, for El Centro Elementary Teachers Association; Best, Best & Kreiger by William Wood Merrill, Attorney, for El Centro Elementary School District.

Before Shek, McKeag and Neuwald, Members.

DECISION

McKEAG, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal of a Board agent's dismissal (attached) by the El Centro Elementary Teachers Association (Association). The charge alleged that the El Centro Elementary School District (District) violated the Educational Employment Relations Act (EERA)[1] when it allegedly altered terms regarding health benefits for retirees in the parties' collective bargaining agreement (CBA). The Association alleged that this conduct constituted a violation of EERA section 3543.5(b) and (c).

We have reviewed the entire record in this matter, including but not limited to, the unfair practice charge, the warning and dismissal letters, the Association's appeal and the

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

District's response. We find the warning and dismissal letters to be free from prejudicial error. However, after reviewing the arguments in this case, we discovered an ambiguity regarding the impact of including a permissive subject of bargaining in a CBA. Accordingly, we hereby adopt the warning and dismissal letters as a decision of the Board, subject to the discussion set forth below.

BACKGROUND

In this case, the parties' CBA agreement contained provisions regarding health benefits for both the District's current employees and its retirees. The Association claims the District unilaterally: (1) imposed salary deductions from bargaining unit members, and (2) demanded payments from the retirees when the agreement allegedly did not authorize such payments and deductions. The Board agent deferred the allegations concerning the imposition of salary deductions upon current employees to arbitration, but dismissed the allegations concerning the additional payments by the retirees. The instant appeal focuses solely on the dismissed allegations regarding the retirees.

DISCUSSION

EERA section 3541.5(a) states that an unfair practice charge may be filed by "[a]ny employee, employee organization or employer.. . ." It is well settled that retirees, because they are no longer "employees," are not subject to the protection of EERA. (County of San Joaquin (2003) PERB Decision No. 1570-M.) Consequently, medical benefits for these individuals are permissive subjects of bargaining. (Temple City Unified School District (1989) PERB Decision No. 782, citing Chemical Workers v. Pittsburgh Plate Glass Co. (1971) 404 U.S. 157 [92 S.Ct. 383] (Pittsburg Plate Glass).)

In its appeal, the Association argued, among other things, that once the retirees' health benefits were incorporated into the CBA, the parties were bound by the duty to bargain in good faith to refrain from executing unilateral changes with regard to these subjects during the life of the contract. This argument, which seeks to transform virtually all contract violations into unfair labor practices, is based on an ambiguity in two PERB cases.

In Eureka City School District (1992) PERB Decision No. 955 (Eureka), the Board held:

> Matters not within the scope of representation are reserved to the employer and may not be subject to meeting and conferring. [Fn. omitted.] Although employers retain the right to meet and consult with employee organizations on any subject outside the scope of representation, the parties are not required to bargain over a permissive subject. However, once agreement is reached concerning a permissive subject and it is embodied in the parties' CBA, the parties are bound by the terms of the agreement until its expiration or unless modified by the parties.
>
> The employer retains its management prerogative over subjects outside the scope of representation. Further, by once bargaining and agreeing on a permissive subject, the parties do not make the subject a mandatory topic for future bargaining. (Emphasis added.)

Later, in City & County of San Francisco (2004) PERB Decision No. 1608-M (San Francisco), the Board stated:

> Thus, Eureka recognizes that there is no obligation on either party to negotiate over permissive subjects of bargaining. However, once an agreement is reached regarding a permissive subject and it is embodied in the parties' CBA, the parties are bound to that agreement for its duration. Once the agreement has expired there is no obligation to adhere to the agreement or bargain over a new one. [Emphasis added.]

Although both the Eureka case and the San Francisco case indicate the parties are "bound" by a permissive subject when incorporated into a CBA, neither decision defined the

term "bound." As a result, it is unclear, based on these cases, whether the repudiation of a term in a collective bargaining agreement regarding a matter not within scope constitutes an unfair labor practice.

The Association argued that "bound" refers to being bound by both contract and PERB law. Consequently, the Association concluded that once the retirees' health benefits were incorporated into the CBA, the parties were "bound" by the agreement, and therefore, must bargain any changes to such benefits. In essence, the Association argued that a permissive subject of bargaining (i.e., health benefits for retirees) was transmuted to a mandatory subject when it was incorporated into the parties' CBA. As discussed below, this interpretation is overbroad.

If the Association's reasoning is taken to its logical conclusion, then most, if not all, contract violations, would arguably constitute unfair practices. However, EERA section 3541.5(b) provides as follows:

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

Based on this language, it is clear the Legislature, when it enacted Section 3541.5(b), envisioned a distinction between straight contract violations and contract violations that also constitute unfair practices. In so doing, the Legislature imposed a significant limitation on PERB's jurisdiction. The Association's interpretation, however, essentially renders this limitation moot and would vastly expand PERB's jurisdiction to include the resolution of contractual disputes that do not also constitute unfair practices.

In Pittsburgh Plate Glass, the U.S. Supreme Court similarly considered the impact of incorporating a permissive subject into a collective bargaining agreement under the National Labor Relations Act (NRLA).[2] According to the Court:

> By once bargaining and agreeing on a permissive subject, the parties, naturally, do not make the subject a mandatory topic of future bargaining. When a proposed modification [to a CBA] is to a permissive term, therefore, the purpose of facilitating accord on the proposal is not at all in point, since the parties are not required under the statute to bargain with respect to it... The remedy for a unilateral mid-term modification to a permissive term lies in an action for breach of contract,... not in an unfair-labor-practice proceeding. [Pittsburg Plate Glass at p. 188, fns. omitted.]

We agree with this analysis,[3] and therefore, conclude that a permissive subject is not transformed into a mandatory subject solely on the basis that it is incorporated into a collective bargaining agreement. Accordingly, it is not an unfair practice for an employer to repudiate a contractual provision containing a permissive subject of bargaining because the employer does not have a duty under EERA to negotiate that term.[4]

It is important to note that our decision does not deprive the Association of a remedy. As explained by the Court in Pittsburg Plate Glass, the Association is free to file an action for

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[2]The NRLA is codified at 29 U.S.C.S, section 151, et seq.

[3] Although it is not bound by decisions of the National Labor Relations Board (NRLB), the Board will take cognizance of NLRB precedent where appropriate, as an aid in interpreting identical or analogous provisions of the statutes. (Carlsbad Unified School District (1979) PERB Decision No. 89.)

[4]According to the concurring opinion, this statement may create the "misconception that PERB condones the repudiation of a contractual provision containing a permissive subject of bargaining over which the employer has no duty to negotiate, simply because it does not constitute any unfair practice." We disagree. By ruling we will not enforce contract breaches that do not also constitute unfair practices, the Board is not encouraging contract breaches. Rather, we are simply providing guidance regarding the appropriate venue to assert such cases. Said another way, our refusal to enforce the instant contractual provision should in no way be interpreted as an endorsement of contract breaches by this Board.

breach of contract. This decision merely limits the circumstances under which contract violations also constitute unfair practices. To rule otherwise would vastly expand unfair practice charges flowing from contract violations and would be inconsistent with EERA section 3541.5 (b).

ORDER

The unfair practice charge in Case No. LA-CE-4859-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Member Neuwald joined in this Decision.

Member Shek's concurrence begins on page 7.

SHEK, Member, concurring: I respectfully concur with the majority decision to dismiss the unfair practice charge in this case, and write separately to express my concern over the rationale advanced in the majority opinion.

The present matter presents the issue of whether or not there is an obligation on either party to negotiate over permissive subjects of bargaining that have been incorporated into the parties' collective bargaining agreement (CBA). The Public Employment Relations Board (PERB or Board) agent correctly found that:

> Under [EERA section 3541(b)[1]], although the parties may be bound by the agreement, PERB is precluded from enforcing parties' agreements and is precluded from issuing a complaint based on conduct which does not also constitute a unfair practice. As such, PERB is precluded from enforcing the parties' agreement on retiree health benefits and is precluded from issuing a complaint as the District's conduct would not also constitute an unfair practice. Thus, this allegation must be dismissed.

The majority purportedly discovered "an ambiguity [in two PERB cases] regarding the impact of including a permissive subject of bargaining in a collective bargaining agreement." The majority stated that neither Eureka City School District (1992) PERB Decision No. 955 (Eureka), nor City & County of San Francisco (2004) PERB Decision No. 1608-M (San Francisco) defined the term "bound," as used in the phrases, "the parties are bound by the terms of the agreement until its expiration or unless modified by the parties" (Eureka, at p. 18) and "the parties are bound to that agreement for its duration" (San Francisco, at p. 3). The majority states that it is unclear, based on these cases, whether the repudiation of a term in a collective bargaining agreement regarding a matter not within scope constitutes an unfair labor practice.

[1]Educational Employment Relations Act (EERA).

I submit that the two PERB cases cited above are not ambiguous, and the term "bound," when read within the proper context, is self-explanatory. Any ambiguity surrounding the meaning of the term "bound" that may exist is the product of the El Centro Elementary Teachers Association's (Association) misinterpretation of the reasoning in these two cases. The Association contends in its appeal to the Board that based on these two PERB cases, the "parties are bound by the duty to bargain in good faith." Contrary to the Association's interpretation, both Eureka and San Francisco held that the parties are bound by the terms of the agreement for its duration, until its expiration, or unless modified by the parties. (Eureka, at p. 18; San Francisco, at p. 3.) There is no basis for the Association's contention that the parties are bound to negotiate over permissive subjects of bargaining. The two afore-mentioned PERB decisions are therefore not ambiguous.

I agree with the majority's conclusion that a permissive subject is not transformed into a mandatory subject solely on the basis that it is incorporated into a CBA. Following this conclusion, the majority states:

> Accordingly, it is not an unfair practice for an employer to repudiate a contractual provision containing a permissive subject of bargaining because the employer does not have a duty to negotiate that term.

The statement is incomplete to the extent that the repudiation of a contractual provision containing a permissive subject of bargaining is actionable in a court of law, even though it does not constitute an unfair practice. The statement is also susceptible to misinterpretation or manipulation, by creating the misconception that PERB condones the repudiation of a contractual provision containing a permissive subject of bargaining over which the employer has no duty to negotiate, simply because it does not constitute any unfair practice. I submit this statement is unnecessary and does not serve the purpose of the EERA to promote the

improvement of employer-employee relations within the public school systems in the State of California through the process of negotiating and reaching lawful collective agreements. This statement will indeed encourage employers to break contracts, which will be destabilizing and lead only to labor strife. The Board should not be in the business of encouraging such action.

I also take exception to the majority's statements that in enacting Section 3541.5(b), the Legislature:

> . . . envisioned a distinction between straight contract violations and contract violations that also constitute unfair practices. In so doing, the Legislature imposed a significant limitation on PERB's jurisdiction.
> (Emphasis added.)

Granted PERB lacks jurisdiction under Section 3541.5(b) to enforce parties' settlement agreements, and to issue a complaint on any charge based on alleged violation of any agreement that would not also constitute an unfair practice. (State of California (Department of Youth Authority) (2003) PERB Decision No. 1526-S (State of California).[2]) However, I find no authority to support the majority's qualification that the Legislature imposed a "significant" limitation on PERB's jurisdiction in this regard.

I would therefore adopt the Board agent's warning and dismissal letters as the decision of the Board, without the supplemental reasoning as stated in the majority decision.

[2]"It is well-settled that the Board does not have jurisdiction to enforce agreements between the parties unless the alleged violations also constitute an unfair practice. (Dills Act sec. 3514(b).) This necessarily includes the enforcement of settlement agreements and arbitration decisions." (State of California, at p. 2.)

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

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February 3, 2006

Michael Hersh, Staff Counsel
California Teachers Association
11745 E. Telegraph Rd.
Santa Fe Springs, CA 90670

Re: El Centro Elementary Teachers Association v. El Centro Elementary School District
Unfair Practice Charge No. LA-CE-4859-E
DISMISSAL LETTER (NOTICE OF PARTIAL DEFERRAL TO ARBITRATION)

Dear Mr. Hersh:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 8,2005. The El Centro Elementary Teachers Association alleges that the El Centro Elementary School District violated the Educational Employment Relations Act (EERA)[1] by unilaterally deducting money from employees' and retirees' checks.

I indicated in the attached letter dated December 7, 2005, that the allegation that the District unilaterally changed its policy regarding the deduction of money from employees' checks was subject to deferral to arbitration. The December 7, 2005 letter also indicated that the allegation that the District unilaterally changed its policy regarding the deduction of money from retirees' checks would be dismissed. You were advised that if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, the charge should be amended. You were further advised that unless the charge was amended or withdrawn prior to December 19, 2005, the allegations would be dismissed or deferred to arbitration and dismissed.

On December 19, 2005, you filed a "Response to Warning Letter," regarding the retiree allegation. Your letter indicated that Eureka City School District (1992) PERB Decision No. 955, and City & County of San Francisco (2004) PERB Decision No. 1608-M supported the issuance of a complaint with regard to the retiree allegation. Both allegations are addressed below.

The Change with Regard to the Current Employees

As I explained in the attached letter, Government Code section 3541.5(a) and PERB Regulation 32620(b)(5) require a Board agent to dismiss an allegation in a charge where the

[1] EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

dispute is subject to final and binding arbitration pursuant to a collective bargaining agreement. (Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81; State of California (Department of Food and Agriculture) (2002) PERB Decision No. 1473-S.) The charge alleges that the employer unilaterally changed the parties' health and welfare benefit policy with regard to current employees. This conduct is covered by the parties' collective bargaining agreement, the Respondent has agreed to waive any procedural defenses, and there is no evidence that the dispute arises in other than a stable collective bargaining environment. Accordingly, this allegation must be dismissed and deferred to arbitration. Following the arbitration of this matter, the Charging Party may seek a repugnancy review by PERB of the arbitrator's decision under the Dry Creek criteria. (See Regulation 32661; Los Angeles Unified School District (1982) PERB Decision No. 218; Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81 a.)[2]

The Change with Regard to the Retired Employees

The Warning Letter indicated, inter alia, that retirement benefits for retirees, those who are no longer employed by the employer, are only a permissive subject of bargaining. (Temple City Unified School District (1989) PERB Decision No. 782.) The Charging Party's December 19, 2005 letter cites Eureka City School District (1992) PERB Decision No. 955, which stated, in pertinent part:

> ... once agreement is reached concerning a permissive subject and it is embodied in the parties' CBA, the parties are bound by the terms of the agreement until its expiration or unless modified by the parties.

The Charging Party also cites to City & County of San Francisco (2004) PERB Decision No. 1608-M, which quotes with approval Eureka City School District, supra and indicates, in pertinent part:

> Thus, Eureka recognizes that there is no obligation on either party to negotiate over permissive subjects of bargaining. However, once an agreement is reached regarding a permissive subject and it is embodied in the parties' CBA, the parties are bound to that agreement for its duration.

Both of the above-referenced decisions stand for the proposition that parties are not obligated to bargain over subjects outside of the scope of representation and that if they do reach agreement on a permissive subject which is embodied in their collective bargaining agreement they are bound to the agreement until its expiration. However, neither decision overturns the well-established standards for finding a prima facie unilateral change violation.

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[2] Pursuant to Government Code section 3541.5(a), the six-month limitation on the filing of a charge is tolled during the time required to exhaust the grievance machinery where that procedure ends in binding arbitration.

Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Walnut Valley Unified School District (1981) PERB Decision No. 160; Grant Joint Union High School District (1982) PERES Decision No. 196.) [emphasis added.] Here, the matter at issue, deductions from the retirees' checks for health benefits, is not a matter within the scope of representation. As such, the charge fails to state a prima facie unilateral change violation.

Although the parties included their agreement on this permissive subject in their collective bargaining agreement, PERB is precluded from enforcing such a provision. Both of the cases cited by the Charging Party indicate that the parties are bound to agreements on permissive subjects which have been incorporated into their collective bargaining agreement. However, the issue of enforcing such an agreement is governed by EERA section 3541(b), which provides:

> The board shall not have the authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of any agreement that would not also constitute an unfair practice under this chapter. [emphasis.]

Under this provision, although the parties may be bound by the agreement, PERB is precluded from enforcing parties' agreements and is precluded from issuing a complaint based on conduct which does not also constitute a unfair practice. As such, PERB is precluded from enforcing the parties' agreement on retiree health benefits and is precluded from issuing a complaint as the District's conduct would not also constitute an unfair practice. Thus, this allegation must be dismissed.

Right to Appeal

Pursuant to PERB Regulations,[3] you may obtain a review of this dismissal by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Regulations 32135(a) and 32130.) A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original,

[3] PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

together with the required number of copies and proof of service, in the U.S. mail. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

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. (Regulation 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 Regulation 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. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

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. (Regulation 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,

ROBERT THOMPSON
General Counsel

By
Tammy Samsel
Regional Attorney

Attachment

cc: William Merrill

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

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December 7, 2005

Michael Hersh, Staff Counsel
California Teachers Association
11745 E. Telegraph Rd.
Santa Fe Springs, CA 90670

Re: El Centro Elementary Teachers Association v. El Centro Elementary School District
Unfair Practice Charge No. LA-CE-4859-E
WARNING LETTER (PARTIAL DEFERRAL TO ARBITRATION)

Dear Mr. Hersh:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 8, 2005. The El Centro Elementary Teachers Association alleges that the El Centro Elementary School District violated the Educational Employment Relations Act (EERA)[1] by unilaterally deducting money from employees[1] and retirees' checks. My investigation revealed the following information.

The parties negotiated health care coverage for the certificated employees represented by the Association. For a number of years and through September 30, 2004, the District participated in a Small Group Pool operated by the South Counties Employer-Employee Trust to provide health and welfare benefits to District employees and their dependents in a Self-Directed Plan. The parties' 2002-2005 CBA indicated the District would pay $803.47 per month on behalf of each full-time employee towards health benefits. The CBA indicates that differences between the District's contribution and premium costs for the health plans would initially be paid from one fund and after exhaustion of that fund, the differences would be paid by the individual unit member on a monthly basis by automatic payroll deduction.

In August 2004, the parties agreed to terminate the health coverage that had been provided through SCEET. In August 2004 the District informed SCEET that it was withdrawing from the pool after September 30, 2004. The SCEET trust agreement states, "the District shall be solely responsible for the payment of all liabilities of its Self-Directed Plan that are not paid from the District's self-directed account due to insufficient funds, including, but not limited to, premiums, claims incurred before the termination date, and administrative expenses." These post-termination liabilities are commonly known as "run out" in the health insurance industry. The District agreed to pay SCEET $607,785.31 in run out expenses.

[1] EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

On February 18, 2005, District issued District Memorandum No. 76, which indicated that the District would be deducting approximately $350 from each certificated employee's monthly pay warrant for the period of February 2005 to June 2005 to cover the run out costs. The District issued similar memoranda to 15 retired employees in order for them to maintain health plan benefits provided for in the bargaining agreement.

On February 24, 2005 the Association notified the District that the proposed withholding of the employees' salary was unlawful and demanded that the District cease and desist. The Association alleges the District unilaterally imposed this change without providing notice or an opportunity for the Association to bargain a decision or its effects on bargaining unit members and retirees.

Chapter VIII, Article 5.B of the parties' Agreement provides:

> When authorized by the employee, deductions will be made for group health and accident insurance premiums. This deduction shall be limited to the district participation plan (Education Code Section 44041, 87040).

The above-stated information fails to state a prima facie violation of the EERA within PERB's jurisdiction for the reasons that follow.

The Change with Regard to the Current Employees

Based on these facts and Government Code section 3541.5, the allegation that the District unilaterally changed the health and benefits policy for current employees must be deferred to arbitration under the agreement and dismissed in accordance with PERB Regulation 32620(b)(5).

Section 3541.5(a) of the EERA states, in pertinent part, that PERB shall not:

> Issue a complaint against conduct also prohibited by the provisions of the [collective bargaining] 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.

In Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81a,[2] the Board explained that:

> While there is no statutory deferral requirement imposed on the National Labor Relations Board (hereafter NLRB), that agency

[2] See, also, State of California (Department of Food and Agriculture) (2002) PERB Decision No. 1473-S.

> 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.]

In Collyer Insulated Wire (1971) 192 NLRB 837 [77 LRRM 1931] and subsequent cases, the National Labor Relations Board articulated standards under which deferral to the contractual grievance procedure 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 allegation. 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, William Merrill, dated June 28, 2005, the Respondent has indicated its willingness to proceed to arbitration and to waive all procedural defenses. Finally, the issue raised by the allegation that the District unilaterally changed the parties' health and welfare benefit policy with regard to current employees directly involves an interpretation of Chapter VIII, Article 5.B of the Agreement.

Accordingly, the allegation that the District unilaterally changed the parties' health and benefit policy with regard to current employees must be deferred to arbitration and will be dismissed. Following the arbitration of this matter, the Charging Party may seek a repugnancy review by PERB of the arbitrator's decision under the Dry Creek criteria. (See Regulation 32661; Los Angeles Unified School District (1982) PERB Decision No. 218; Dry Creek Joint Elementary School District, supra.)[3]

The Change with Regard to the Retired Employees

The Board has jurisdiction only when the parties involved have standing either as an employee, an employee organization, or an employer. (See Los Angeles Community College District (1994) PERB Decision No. 1060.) Retirees are not employees under EERA section 3540.1(j). Nor does CTA's status as an exclusive representative extend to include retirees. (EERA section 3540.1 (e).) As such, PERB does not have jurisdiction over this allegation and it must be dismissed.

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[3] Pursuant to Government Code section 3514.5(a), the six-month limitation on the filing of a charge is tolled during the time required to exhaust the grievance machinery where that procedure ends in binding arbitration.

Although the retirees are not employees protected under the Act, the Charging Party alleges the District's conduct toward the retirees, nevertheless constitutes a unilateral change within PERB's jurisdiction. This theory is addressed more thoroughly below.

In determining whether a party has violated EERA section 3543.5(c), PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Decision No. 143.) Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Walnut Valley Unified School District (1981) PERB Decision No. 160; Grant Joint Union High School District (1982) PERB Decision No. 196.)

The District implemented a new policy regarding retirees' health and welfare benefits by requiring retirees to contribute to the cost of the "run out." The District acted without first providing CTA notice and an opportunity to bargain. However, the charge does not demonstrate that the subject of retiree benefits is a matter within the scope of representation.

Retirement benefits for current employees are a mandatory subject of bargaining. (County of San Joaquin (2003) PERB Decision No. 1570; Temple City Unified School District (1989) PERB Decision No. 782.) In contrast, retirement benefits for retirees, those who are no longer employed by the employer, are only a permissive subject of bargaining. (Temple City Unified School District, supra.)

The U.S. Supreme Court reviewed a similar question under the National Labor Relations Act and framed the issue as follows:

> Even if pensioners are not bargaining unit "employees," are their benefits, nonetheless, a mandatory subject of collective bargaining as "terms and conditions of employment" of the active employees who remain in the unit? (Chemical Workers v. Pittsburgh Plate Glass Co. (1971) 78 LRRM 2974, 2981.)

This issue came before the Court because the NLRB had held that pensioners' benefits were a mandatory subject of bargaining on the ground that the benefits vitally affect the terms and conditions of employment of active employees by influencing the value of both their current and future benefits. (Pittsburgh Plate Glass Co., supra at 2981.) The Court disagreed with the Board's assessment of the significance of a change in retirees' benefits to the terms and conditions of employment of active employees and characterized the significance of such a change as speculative and insubstantial at best. (Id at 2982.) The Court found these benefits not to be within the scope of representation. (Id. at 2983.) Accordingly, the charge's allegation regarding the change with regard to retirees must be dismissed.

If there are any factual inaccuracies in this letter or any additional facts that 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 December 19, 2005 , I shall dismiss the above-described allegation(s). If you have any questions, please call me at the above telephone number.

Sincerely,

Tammy Samsel
Regional Attorney

Attachment