STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

DRY CREEK TEACHERS ASSOCIATION, Charging Party, v. DRY CREEK JOINT ELEMENTARY SCHOOL DISTRICT, Respondent.	)	Case No. S-CE-139; Ad-81 PERB Order No. Ad-81a ADMINISTRATIVE APPEAL July 21, 1980

Appearances: Marcus Vanderlaan and Kirsten L. Zerger, Attorneys for Dry Creek Teachers Association; Douglas A. Lewis, Placer County Schools Attorney, for Dry Creek Joint Elementary School District.

Before Harry Gluck, Chairperson; Barbara Moore, Member.

DECISION

The Board is being asked to find that an arbitration award issued pursuant to a negotiated grievance procedure culminating in binding arbitration is repugnant to the Educational Employment Relations Act (hereafter EERA). The Board's jurisdiction to entertain this request is found in Government Code section 3541.5(a).[1]

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[1]Section 3541.5(a) provides:

> 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

FACTS

The Dry Creek Teachers Association (hereafter Association) filed an unfair practice charge against the Dry Creek Joint Elementary School District (hereafter District) on July 17, 1978, alleging that the District had refused to negotiate in good faith in violation of sections 3543.1(a), 3543.5(b), and (c) and section 3547(a), (b) and (c) of the EERA by unilaterally reducing the salaries of certificated employees

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> 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 such 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 chapter. If the board finds that such 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. (Emphasis added.)

Hereafter, all references are to the Government Code unless otherwise stated.

and freezing step and column increases without negotiating such changes with the charging party.

The charge was stayed by the PERB hearing officer pending resolution of the District's claim that PERB must defer to a negotiated grievance procedure including binding arbitration. Eventually, the general matter of the unfair practice charge was referred to arbitration and an award was issued on January 4, 1979. The Association then filed an action in Superior Court seeking to confirm the award and correct or vacate it in part. The court order affirming the award was finalized in October, 1979. Subsequently, the Association filed a petition for reactivation of its unfair practice charge and requested a finding by this Board that the award was repugnant to the purposes of the EERA. The Board itself referred the matter to the general counsel to conduct an immediate investigation and/or hearing of the Association's claim that the award is repugnant and to submit to the Board itself the record of the proceedings undertaken together with his findings and recommendations. Pursuant to that order a hearing was held on April 14, 1980, resulting in a recommendation that the Board find the award to be repugnant.

DISCUSSION

This is the first instance in which the Board has been asked to refuse to defer to an award issued by an arbitrator under a binding arbitration clause that has been negotiated

between the parties. 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]

Because the matter of deferral is discretionary with the National Labor Relations Board, it developed in these cases certain standards to be applied in determining whether deferral should be observed:

1. The matters raised in the unfair practice charge must have been presented to and considered by the arbitrator;

2. The arbitral proceedings must have been fair and regular;

3. All parties to the arbitration proceedings must have agreed to be bound by the arbitral award; and

4. The award must not be repugnant to the National Labor Relations Act, as interpreted by the NLRB.

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[2]Spielberg Manufacturing Co. (1955) 112 NLRB 1080 [36 LRRM 1152] and Collyer Insulated Wire (1971) 192 NLRB 837 [77 LRRM 1931]

[3]Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608.

The Spielberg standards are well within the contemplation of EERA's language. While our statute refers only to repugnancy, PERB is surely not obligated to ignore an unfair practice charge under its deferral obligation if the issues in that charge are not encompassed by the arbitration proceeding and included in the arbitrator's disposition of the case. This conclusion is buttressed by subsection (b) of section 3541.5 which clearly empowers this Board to hear an unfair practice charge even though the facts contained therein may constitute a violation of a collectively negotiated agreement.[4] Nor should or would PERB defer to a process resolving the litigant's rights under the Act where due process was not present, as the Spielberg standard of "fair and regular" proceedings essentially requires. While the NLRB may have applied the "agreement to be bound" standard somewhat more stringently than statutory language of EERA dictates[5] at this point, PERB is required to defer to a mutual settlement or a

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[4]Section 3541.5(b) provides:

> (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.

[5]Wertheimer Stores Corp. (1954) 107 NLRB 1434 [33 LRRM 1398]; Hershey Chocolate Corp. (1960) 129 NLRB 1052 [47 LRRM 1130], enforcement denied on other grounds. Both of these cases hold that the individual employees involved in the grievance must agree to be bound by the artibration award.

"binding arbitration" award pursuant to a negotiated procedure, absent a finding of repugnancy.[6]

Indeed, in the Board's view an arbitration award which has failed to observe any of the foregoing criteria would be inherently repugnant to the purposes of the EERA. Clearly, the legislative purpose in including section 3541.5(a) was the encouragement of voluntary (negotiated) settlement of disputes between the parties. We simply do not see how resort to voluntary dispute settlement would be encouraged if this Board were to give effect to an arbitral award which does not consider the underlying unfair practice, or in which a party was denied due process in the presentation of its case.

In the matter before us, there is no claim that the arbitration award was not meant to be binding upon the parties or that the parties were denied due process. Although the Association contends that the arbitrator did not consider the issues raised in the unfair charge, the Board finds otherwise.[7] While the issue itself as stated does not spell

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[6]Section 3541.5(a) supra.

[7]The issue presented to the arbitrator:

> Did the District violate its collective bargaining agreement as alleged in the grievance isgned [sic] by Mrs. Rigby. If the answer is in the affirmative, what is the appropriate remedy under the terms of the contract, including, but not limited to, the possibility of remanding negotiations to

out the alleged unilateral reduction of teachers' salaries or the freezing of step and column increases, the transcript of the arbitration proceedings demonstrates unequivocally that the facts were presented to the arbitrator. Indeed his decision acknowledges that such acts by the District constituted a violation of the collective agreement between the parties. Therefore, the first and perhaps most fundamental of the four criteria has clearly been met.

Nevertheless, the Board finds that the remedy provided by the arbitrator is so deficient as to justify a finding that the award is repugnant to the purposes of the EERA.

While the Board will not necessarily find an award repugnant because it would have provided a different remedy than that afforded by the arbitrator, it may well so consider an award which fails to protect the essential and fundamental principles of good faith negotiations.

PERB has ruled that unilateral alterations of existing wages, hours and enumerated terms and conditions of employment without affording the exclusive representative the opportunity to negotiate on such matters violate the Act.[8] Beyond that,

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> the parties while retaining jurisdiction over application of the award to insure compliance.

[8]Pajaro Valley Unified School District (5/22/78) PERB Decision No. 51.

however, PERB has made it clear--and now reiterates--that good faith negotiations cannot and should not proceed until the status quo is restored.[9] For that reason, PERB's orders in cases such as this have consistently included the requirement that appropriate remedial action be taken beyond direction to the offending party to negotiate in good faith. The arbitrator here seemingly acknowleged this principle but considered himself without authority to order restoration of the teachers' salary cuts (return to the status quo). His opinion may also be interpreted as reflecting his belief that such a remedy would be inappropriate.[10]

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[9]San Mateo Community College District (6/8/79) PERB Decision No. 94; San Francisco Community College District (10/12/79) PERB Decision No. 105.

[10]In his award, the arbitrator wrote:

> The normal remedy, when an employer is found to have damaged individuals by a contract violation is to make them whole for that contract violation. In this case, that would mean restoring the 10 percent salary reduction and unfreezing movements on the salary schedule. However, to make such an order could mean, hypothetically, that the District, in order to keep from going into a deficit position, would immediately have to start trying to negotiate a 20 percent salary cut for the balance of the year. The "normal" remedy might have been appropriate had this arbitration been held on July 1, 1978 with an order to negotiate issued on July 2: the respective positions of the parties could hardly be harmed.

It is not necessary that we resolve this apparent contradiction or unravel this confusion. In either event, his failure to supply such a remedy, if allowed to stand, would throw the parties negotiating relationship into an imbalance that would necessarily frustrate the Act's intent that negotiations proceed in good faith. It has been the consistent position of this Board that unilateral actions, such as those alleged here, inherently interfere with, restrain, and coerce employees in the exercise of their statutory representation rights as well as the rights of the employee organization.[11] The arbitrator's remedy, which only directs that the parties enter into negotiations, would therefore require that the employees and their representative enter negotiations on the basis of first surrendering fundamental statutory rights to bargain in good faith.

The District argues that PERB is bound by the Superior Court's decision upholding the arbitral award. The issue which the court ruled on concerned whether the arbitrator had exceeded his authority in fashioning the award. This question is quite distinct from a finding of repugnancy of the award itself, and the court's decision is not res judicata.

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[11]San Francisco Community College District, supra.

PERB has exclusive jurisdiction to issue unfair practice complaints.[12] As noted previously, our decision to issue a complaint in post-arbitration deferral cases requires a finding of repugnancy. Since the Superior Court was not ruling on the underlying unfair practice issue or on repugnancy it cannot be said that the court's decision is controlling of this Board's determination to issue an unfair practice complaint. We find no potential or actual conflict between PERB's jurisdiction and that of the courts and, therefore, reject the District's contention that this Board is bound by the Superior Court order.

For the foregoing reasons, in pursuit of its statutory authority contained in section 3541.5(a) of the EERA, the Board expressly finds the arbitration award issued in the matter of the Dry Creek Teachers Association and the Dry Creek Joint Union School District to be repugnant to the purposes of the Educational Employment Relations Act.

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[12]Section 3541.5 reads:

> 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. . . .

See also San Diego Teachers Association v. Superior Court (1979) 24 Cal.3d 1.

ORDER

Based on the entire record in this case, including the recommendations of the hearing officer and the arguments of the parties, the Board directs the chief administrative law judge of the Public Employment Relations Board to reactivate the unfair practice charge filed by the Dry Creek Teachers Association against the Dry Creek Joint Union School District filed on July 17, 1978; and

Further ORDERS the chief administrative law judge to issue a complaint based on said unfair labor practice charge.

PER CURIAM