

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



CALIFORNIA SCHOOL EMPLOYEES )  
ASSOCIATION & ITS MERCED HIGH )  
SCHOOL CHAPTER #252, ) Case No. S-CE-873  
 )  
Charging Party, ) Interlocutory Appeal  
 )  
v. ) PERB Order No. Ad-150  
 )  
MERCED UNION HIGH SCHOOL DISTRICT, ) December 12, 1985  
 )  
Respondent. )  
\_\_\_\_\_ )

Appearances: Penelope Mae Trocke for the California School Employees Association & Its Merced High School Chapter #252; Melbourne N. Gwin, Jr. Attorney for Merced Union High School District.

Before Hesse, Chairperson; Jaeger and Porter, Members.

DECISION

JAEGER, Member: An administrative law judge (ALJ) has certified an appeal to the Board itself of his order denying a motion made by the Merced Union High School District (District) to defer to arbitration an unfair practice complaint issued pursuant to an unfair practice charge filed by the California School Employees Association & Its Merced High School Chapter #252 (CSEA).<sup>1</sup>

<sup>1</sup>Public Employment Relations Board (PERB) Regulation 32200 sets out the standards for certification of interlocutory appeals. Board regulations are codified at California Administrative Code, title 8, section 31001 et seq.

## FACTS

The unfair practice charge and the complaint each contain two separate allegations of violation of the Educational Employment Relations Act (EERA)<sup>2</sup>: (1) that a District employee, Alice Trevino, was terminated because she had exercised her rights guaranteed by EERA by responding to the District's evaluation of her performance as permitted by the parties' collective bargaining agreement, and (2) that the District unilaterally altered the appraisal provisions of its negotiated agreement with CSEA by providing only one evaluation during the probationary period.

The District's motion for deferral was based on its claim that the agreement provided for binding arbitration of grievances. In support of this motion, respondent "rephrased" the unfair practice charge so that the issue was one of "just cause" dismissal. The ALJ, citing Dry Creek Joint Elementary School District (1980) PERB Order Ad-81a, denied the motion, finding, inter alia, that the contract contains no provision which addresses employer action against employees for engaging in protected activity, and that where one of the charges is not subject to resolution through the contractual grievance procedure, none of the charges will be deferred to arbitration.

---

<sup>2</sup>EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Charging party alleges violation of section 3543.5(a), (b) and (c).

## DISCUSSION

The District argues that the Board's holding in North Sacramento School District (1982) PERB Decision No. 264 means that every attempt to enforce a negotiated agreement is, per se, participation in protected activity, and that PERB would therefore always be the only agency which could deal with alleged contract breaches, although EERA prohibits the Board from enforcing such agreements.

By this claim, the District improperly attempts a collateral attack on the North Sacramento decision,<sup>3</sup> and raises an argument that must be reserved for its defense to the merits of the unfair practice complaint. The ALJ made no finding that Trevino was engaged in protected activity. For the purpose of ruling on the deferral motion, he accepted the complaint's allegations of fact as true.<sup>4</sup> The certifiable question, therefore, is whether the ALJ correctly applied the Board's deferral policy.

---

<sup>3</sup>"A collateral attack is made, not in a proceeding brought for the specific purpose of attacking the judgment, but in some other proceeding -- it is an attempt to avoid the effect of a judgment or order made in some other proceeding." Gonzales v. State of California (1977) 68 Cal. App. 3d 621 [137 Cal. Rptr. 681]; see also Palmquist v. Palmquist (1963) 212 Cal. App. 2d 340 [27 Cal. Rptr. 756].

<sup>4</sup>The District asserts that the complaint incorrectly stated that Trevino "exercised [EERA] rights by responding to her evaluation as permitted by Article XIV section A(1) of the . . . collective bargaining agreement." According to the District, this provision applies only to permanent

The District also argues that where Education Code provisions conflict with collective bargaining rights, the latter must give way. Whether this claim is legally sound or supported by the facts is also a matter which may be addressed in the course of contesting the merits of the underlying unfair practice case.<sup>5</sup>

Finally, the District states that the protected activity here is enforcement of the contract. It seeks "resolution of [this] question of law" that it considers controlling. It appears that here, as in its other arguments, the District seeks a ruling on the merits of the charge, rather than on the propriety of the ALJ's order.

#### ORDER

Based on the record certified to the Board, it is ORDERED that the motion made by the Merced Union High School District

---

employees. That may be the case. However, it is not the question certified to the Board. As noted above, the ALJ acted on the basis of the allegations in the complaint and it was on that basis that he ruled on the deferral motion. We note further that the District's claim goes to the merits of the Association's case and may be raised at any point in the ensuing proceedings. Similarly, the Association will have the opportunity to provide support for its allegations on which the complaint was based.

<sup>5</sup>This argument at least borders on being a similar attack against the California Supreme Court's holding in San Mateo City School District, et al. v. Public Employment Relations Board (1983) 33 Cal. 3d 850 [191 Cal Rptr. 800].

to defer to arbitration the unfair practice charge filed by the California School Employees Association & its Chapter #252, is DENIED.

Chairperson Hesse and Member Porter joined in this Decision.