STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

LOCAL 257, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO,	)	
Charging Party,	)	Case No. SF-CE-472
v.	)	PERB Order No. IR-16
OAKLAND UNIFIED SCHOOL DISTRICT	)	July 9, 1980
Respondent.	)	

Appearances: Joseph R. Colton, Attorney (Norback, DuRard, Belkin & Carcione, Inc.) for Local 257, American Federation of State, County and Municipal Employees, AFL-CIO; Sandra Woliver, Attorney for Oakland Unified School District.

Before Gluck, Chairperson; Moore, Member.

DECISION

This case is before the Public Employment Relations Board (hereafter PERB or Board) on a request for injunctive relief filed by Local 257 of the American Federation of State, County and Municipal Employees, AFL-CIO (hereafter AFSCME) against the Oakland Unified School District (hereafter District). AFSCME, the exclusive representative of a unit of custodial employees, has filed a charge containing allegations that the District violated section 3543.5(c) of the Educational Employment Relations Act (hereafter EERA)[1] by unilaterally deciding to

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

reduce the workyear of some employees from twelve to ten months, thereby effectively reducing their hours, and by refusing to meet and negotiate on the effects of its decision to lay off other employees. Based on these charges, it requests that PERB seek to enjoin the District from implementing the layoffs and reduction in hours.

PERB's authority to seek injunctive relief is governed by section 3541.3(j). This section gives PERB the power:

> To bring an action in a court of competent jurisdiction to enforce any of its orders decisions or rulings or to enforce the refusal to obey a subpoena. Upon issuance of a complaint charging that any person has engaged in or is engaging in an unfair practice, the board may petition the court for appropriate temporary relief or restraining order.

Thus, before PERB can decide whether injunctive relief is appropriate, it must first determine that it can issue a complaint on the underlying unfair practice charge. PERB cannot seek injunctive relief unless it can issue a complaint on the charge. Section 3541.5(a) places certain limitations on

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Section 3543.5(c) provides:

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

the Board's authority to issue a complaint[2]. Under this section, PERB cannot "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

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[2]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 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.

exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration."

The record before us indicates that, at the time the District made its decision to layoff some employees and change the hours of others, the parties had an agreement which contained a grievance procedure culminating in binding arbitration.[3] Furthermore, AFSCME has invoked this grievance procedure with respect to both aspects of its unfair practice charge: the implementation of layoffs and the unilateral decision to reduce hours. It filed one grievance alleging that the District's implementation of its decision to layoff certain custodians violated the agreement in that improper notice had been sent to employees and seniority had been ignored. Another grievance alleges that the District's unilateral decision to reduce the hours of custodians violated several parts of the agreement.[5]

On the basis of this record, there is a question as to whether the Board must defer to the parties' contractual

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[3]This agreement expired on June 30, 1980.

[4]AFSCME filed a third grievance on an issue which was not specifically incorporated in its unfair practice charge or its request for injunctive relief.

[5]Specifically, the grievance alleged a violation of Article VIII, which covers hours, Article XX, which imposes a requirement that proposed policy changes which change the terms and conditions of the agreement be negotiated, and Article XXII, which prohibits either party from demanding any changes in the agreement.

dispute resolution procedure. The layoffs and hour reductions were apparently not scheduled to take place until July 1, 1980, the day after the contract expired.[6] This raises an issue as to whether a unilateral decision to implement a change after a contract expires could arguably be a violation of the terms of that contract and thus be subject to the grievance procedure.[7]

AFSCME's position on this issue is unclear: After the District announced its decisions, AFSCME filed an unfair practice charge with PERB, then filed its grievances, and then, in its request for injunctive relief, argued that it had no adequate remedy at law because the actions of the District would occur after the expiration date of the contract.

Further, neither of the parties raised the issue of whether PERB must defer to arbitration in this case, nor is there any indication that they were aware that this would be a major

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[6]There may be a question as to the date the layoffs and hour reductions were scheduled to take place. The notice from the superintendent of schools to custodians whose hours are being reduced indicates that the reduction from a 12-month to a 10-month assignment will be effective on July 1, 1980. However, a memorandum dated April 29, 1980, from the director of building operations to all custodians states that some classified employees will have their jobs eliminated on June 30, 1980. The implementation date of the proposed layoffs and hour reductions may be an important factor in determining whether or not there has been an arguable violation of the contract since the contract was still in effect on June 30, but had expired as of July 1.

[7]This is, of course, a separate question from whether the same unilateral decision constitutes an unfair practice under the EERA.

factor in the Board's resolution of the case. Since this is a jurisdictional issue in that the Board cannot issue a complaint if section 3541.5(a) applies, we must address this issue whether or not the parties have raised it. The Board should not, however, make a decision to defer without providing the parties with a chance to present information and arguments on that issue. Such a decision seriously limits the charging party's ability to have PERB review its unfair practice charge and, moreover, cannot be appealed.[8] If a party disagrees with the Board's decision to defer, its only recourse is to go through arbitration and, if appropriate, petition the Board to determine whether the arbitrator's award is repugnant to the purposes of the EERA. (Sec. 3541.5(a).) Before making a decision which has such a major impact on the disposition of the case, the Board should give the affected parties a chance to brief and argue their positions on the issues involved.

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[8]If the Board decides that section 3541.5(a) (2) applies to an unfair practice charge, then the Board cannot issue a complaint on that charge. Under section 3542(b), a decision not to issue a complaint cannot be appealed. This section provides:

> Any charging party, respondent, or intervenor aggrieved by a final decision or order of the board in an unfair practice case, except a decision of the board not to issue a complaint in such a case, may petition for a writ of extraordinary relief from such decision or order.

Therefore, I would transfer this case to a hearing officer to hold a hearing on the issue of whether the Board can issue a complaint on the unfair practice charge filed by AFSCME or whether it must defer to the parties[1] grievance procedure pursuant to section 3541.5(a)(2).

This result is consistent with PERB's new rules covering deferral under section 3541.5(a). PERB rule 32654, which goes into effect on July 18, 1980, provides for a hearing and/or submission of briefs on deferral issues.[9] While the rule contemplates the issue being raised on the motion of a party, a similar procedure seems appropriate when the Board itself or a Board agent raises the issue.

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[9]PERB rules are codified at California Administrative Code, title 8, secton 31000.

PERB rule 32654 provides in part:

> (a) Objections to the issuance of a complaint pursuant to a prima facie charge may be made on the ground that issuance of said complaint is prohibited pursuant to section 3514.5(a)(2) or 3541.5(a)(2) of the Government Code. Objections shall be in the form of a motion to deny issuance of complaint and must be filed with the Board within the time limits applicable to the filing of an answer to the charge pursuant to Section 32635(a).
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> (b) Upon such motion, the Board shall set the matter for hearing, except that in cases where there are no factual disputes, the Board may limit the parties to submission of briefs or oral argument.

In sum, I would not dismiss AFSCME's charge without giving the parties an opportunity to address the deferral issue at a hearing. But I would also not issue a complaint until the jurisdictional question of whether the Board must defer to the parties' grievance machinery pursuant to section 3541.5(a) has been resolved. Since the Board cannot seek an injunction without issuing a complaint (sec. 3541.3(j)), AFSCME's request for injunctive relief must be denied. Even if I were not convinced that normal PERB processes could remedy the alleged District unfair practices, this Board cannot ignore a serious question as to its jurisdiction to proceed. This question must be resolved, and, for the reasons set forth above, I do not believe it should be resolved without conducting a hearing on the issue.

Barbara D. Moore, Member

The concurrence of Chairman Gluck begins on page 9.

Chairman Gluck, concurring:

I agree that this matter should be remanded for the purpose of allowing the parties the opportunity to address the question of the Board's obligation to defer pursuant to section 3541.5(a). Though rule 32654 is not yet in effect, its spirit and purpose should not be ignored.

Harry Gluck, Chairman

ORDER

Based upon the foregoing statement of facts and discussion, the Public Employment Relations Board declines to seek injunctive relief and transfers this matter to the Chief Administrative Law Judge for further proceedings.

Per Curiam