STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES' ASSOCIATION, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF PERSONNEL ADMINISTRATION), Respondent.	)	Case No. S-CE-291-S PERB Decision No. 600-S December 24, 1986

Appearances: Bradley G. Booth, Attorney for California State Employees' Association.

Before Hesse, Chairperson; Morgenstern, Burt and Porter, Members.

DECISION

BURT, Member: This case is before the Public Employment Relations Board (Board) on appeal by Charging Party of the Board agent's dismissal, attached hereto, of its charge alleging that the State of California (Department of Personnel Administration) violated section 3519(a) and (b) of the State Employer-Employee Relations act (Gov. Code sec. 3512 et seq.).

We have reviewed the dismissal and, finding it free from prejudicial error, adopt it as the Decision of the Board itself.[1]

[1]Member Porter would disavow the Board agent's discussion of United Aircraft Corporation, infra.

ORDER

The unfair practice charge in Case No. S-CE-291-S is hereby DISMISSED without prejudice to the Charging Party's right to seek repugnancy review by the Board after arbitration.

Chairperson Hesse and Member Porter joined in this Decision.

Morgenstern, Member, dissenting: I would reverse the dismissal and issue a complaint.

STATE Of CALIFORNIA GEORGE DEUKMEJIAN, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD
SACRAMENTO REGIONAL OFFICE
1031 18TH STREET. SUITE 102
SACRAMENTO. CALIFORNIA 93814
(916) 322-3198

September 3, 1986

Bradley G. Booth
Attorney-
California State Employees Association
1108 0 Street
Sacramento, CA 95814

Re: California State Employees Association v. Department of Personnel Administration
Unfair Practice Charge No. S-CE-291-S

Dear Mr. Booth:

The above-referenced charge alleges that the Department of Personnel Administration, Department of Corrections and California Youth Authority (State) has refused to grant access to a California State Employees Association (CSEA) labor relations representative. This conduct is alleged to violate sections 3519(a) and (b) of the State Employer-Employee Relations Act (SEERA).

I indicated to you in my attached letter dated August 21, 1986 that the above-referenced charge was subject to deferral to arbitration. You were advised that if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge accordingly. You were further advised that unless you amended the charge or withdrew it prior to August 28, 1986, it would be dismissed.

I have not received either a request for withdrawal or an amended charge and am therefore dismissing the charge based on the facts and reasons contained in my August 21 letter.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal (California Administrative

Code, title 8, section 32635(a). To be timely filed, the original and five copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) on September 23, 1986, or sent by telegraph, certified or Express United States mail postmarked not later than September 23, 1986 (section 32135). The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

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 calendar days following the date of service of the appeal (section 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 section 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.

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 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 (section 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,

JEFFREY SLOAN
General Counsel

By
Robert Thompson
Regional Attorney

Attachment

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STATE Of CALIFORNIA GEORGE DEUKMEJIAN, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD
HEADQUARTERS OFFICE
1031 18TH STREET
SACRAMENTO. CALIFORNIA 95814
(916) 323-3068

August 21, 1986

Bradley G. Booth
Attorney
California State Employees Association
1108 O Street
Sacramento, CA 95814

Re: California State Employees Association v. Department of Personnel Administration
Unfair Practice Charge No. S-CE-291-S

Dear Mr. Booth:

The above-referenced charge alleges that the Department of Personnel Administration, Department of Corrections and California Youth Authority (State) has refused to grant access to a California State Employees Association (CSEA) labor relations representative. This conduct is alleged to violate sections 3519(a) and (b) of the State Employer Employee Relations Act (SEERA).

My investigation revealed the following facts. On July 9, 1986, several members of their staff, including Senior Labor Relations Representative Elizabeth A. Russo, toured Soledad State Prison. During the tour, Ms. Russo observed inmates in two separate classrooms and discussed the issue of class size with these inmates. During these discussions the inmates asked what CSEA could do for them and Ms. Russo replied that CSEA represented employees, that it was unable to represent inmates and that any complaints they had should go to their own union or whatever means established for the prisoners' use. Although these comments were observed by Larry Parrish, supervisor of vocational instruction at the institution, he did not voice any objections to them, nor did he indicate displeasure after the statements had been made. Shortly thereafter the CSEA representatives left the facility.

By letter dated July 21, 1986, the Department of Personnel Administration informed CSEA that Ms. Russo's conduct was totally unacceptable and therefore she would no longer be afforded access to any Department of Corrections/ Department of Youth Authority facilities where inmates were present.

CSEA and the State are parties to a memorandum of understanding with the effective dates of July 1, 1985, through June 30, 1987. Section 2.1 of the MOU reads in pertinent part:

> a. The State recognizes and agrees to deal with designated stewards, bargaining unit council members or CSEA staff on the following:
>
> (1) The administration of this contract.

Section 2.2 of the MOU reads:

> CSEA stewards, staff, or bargaining unit council members may have access to employees to represent them pursuant to section 2.1(a) above. Access shall not interfere with the work of the employees. CSEA stewards, staff, or bargaining unit council members seeking access to employees must notify the department head or designee in advance of the visit. The department head or designee may restrict access to certain worksites or areas for reasons of safety, security, or patient care, including patient privacy; however, where access is restricted, other reasonable accommodations shall be made.

Section 5.5 of the MOU reads, in pertinent part:

> a. The State and CSEA shall be prohibited from imposing or threatening to impose reprisals by discriminating or threatening to discriminate against employees, or otherwise interfering with, restraining, or coercing

> employees because of the exercise of their rights under SEERA or any right given by this agreement. The principals of agency shall be liberally construed.

The grievance procedure contained in the MOU ends in submission of the dispute to final and binding arbitration.

Based on the facts stated above and section 3514.5(a) of the SEERA, this charge must be dismissed and deferred to arbitration under the MOU.

Section 3514.5(a) of SEERA states in pertinent part:

> . . . the board shall not do either of the following: . . . (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.

PERB Regulation 32620(b)(5) (California Administrative Code, title 8) requires the board agent processing the charge to "(d)ismiss the charge or any part thereof as provided in Section 32630 if . . . it is determined that a complaint may not be issued in light of Government Code sections 3514.5, 3541.5 or 3563.2 or because a dispute arising under HEERA is subject to final and binding arbitration." In Dry Creek Joint Elementary School District (7/21/80) PERB Order No. Ad-81a, the Public Employment Relations Board (PERB) explained that:

> [W]hile 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. (Footnote omitted.) 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. (Footnote to Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608.)

Although this case arose under the Educational Employment Relations Act (EERA), it is equally applicable to cases under SEERA as sections 3541.5(a) of the EERA and 3514.5(a) of the SEERA are identical.

In Collyer Insulated Wire 192 NLRB 837, 77 LRRM 1931 (1971) and subsequent cases, the NLRB articulated standards under which deferral 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 case. First, no evidence has been produced to indicate that the parties are not operating within a stable collective bargaining relationship. Second, by the attached document from its representative, Edmund K. Brehl, Esq., dated August 6, 1986, the Respondent has indicated its willingness to proceed to arbitration and to waive all procedural defenses. Finally, the issue raised by this charge that the State refused to grant access to a CSEA representative directly involves an interpretation of sections 2.1, 2.2, and 5.5 of the MOU. Resolution of the contractual issues by an arbitrator will resolve the question of whether the state has interfered with the access rights of CSEA.

Charging Party argues that this case cannot be deferred to arbitration because it would be futile under SEERA section 3514.5 which reads in pertinent part, "However, when the charging party demonstrates that resort to contract grievance procedure would be futile, exhaustion shall not be necessary." In support of this argument Charging Party submitted a declaration from its attorney, Bradley G. Booth, which states that in his experience the State has never adhered to the timelines contained in the Memoranda of Understanding related

to the holding of expedited arbitrations. He cites to three grievances which took between four and fourteen months to reach an expedited arbitration. This fact alone is insufficient to demonstrate that resort to arbitration is futile. Limited research has not developed any case law under either the PERB or the National Labor Relations Board which would support a finding that such a delay in the processing of grievances to arbitration constitutes futility. When questioned on this point, Charging Party cited to Packerland Packing Co. (1975) 216 NLRB No. 128 [88 LRRM 1488]. Examination of this case reveals that the NLRB deferred to arbitration an unfair practice charge concerning retaliation despite the charging party's argument that such would be futile. The futility argument was based on the contentions that the employer had been the respondent in a previous NLRB complaint, delayed or refused to comply with two prior arbitration awards, and had filed a state court civil action against the charging party. The NLRB, relying on the test set forth in United Aircraft Corporation (1973) 204 NLRB No. 133 [83 LRRM 1411] found that this evidence "is not sufficient either alone or together with the other evidence in the record to establish that requiring the parties to submit their present dispute to the contract grievance arbitration procedure will be either unpromising or futile."

In United Aircraft Corporation, supra, the NLRB stated:

> It is true that in Collyer, supra, we noted, as one of the factors supporting our decision to defer to the parties' available grievance and arbitration machinery, that there had been a long relationship between the company and the union and a lack of any employer hostility towards unions in general. We continue to believe that an exploration of the nature of the relationship between the parties is relevant to the question of whether in a particular case we ought or ought not defer contractually resolvable issues to the parties' own machinery. Where the facts show a sufficient degree of hostility, either on the facts of the case at bar alone or in the light of prior unlawful conduct of

which the immediate dispute may fairly be said to be simply a continuation, there is serious reason to question whether we ought defer to arbitration.

However, the nature and scope of the acts currently alleged to show such hostility, together with a measure of the current impact of any past such acts, must all be evaluated and then together be weighed against evidence as to the developing or maturing nature of the parties' collective-bargaining relationship and the proven effectiveness (or lack thereof) of the available grievance and arbitration machinery. Upon a totality of those facts, it must then be determined whether the parties' agreed-upon grievance and arbitration machinery can reasonably be relied on to function properly and to resolve the current disputes fairly.

If the conduct here complained of, viewed in the context of serious past unlawful conduct, appears to establish a continuing pattern of efforts to defeat the purposes of our Act then, particularly if the evidence also should indicate that the parties, own machinery is either untested or not functioning fairly and smoothly, it would seem obvious that we could not reasonably rely on the parties' voluntary machinery fairly and promptly to resolve the underlying problem. In such a situation, therefore, the Act's purposes could best be served by our taking jurisdiction in the first instance.

But if, on the contrary, there is now effective dispute-solving machinery available, and if the combination of past and presently alleged misconduct does not appear to be of such character as to render the use of that machinery unpromising or

> futile, then we ought not depart from our usual deferral policies.

The fact in this case that it takes four to fourteen months to get to an arbitration does not demonstrate that the resort to the grievance arbitration machinery is unpromising or futile.

Accordingly, this charge must be deferred to arbitration and will be dismissed. Such dismissal is without prejudice to the Charging Party's right, after arbitration, to seek a repugnancy review by PERB of the arbitrator's decision under the Dry Creek criteria. See SEERA section 3514.5; Board Rule 32661; Los Angeles Unified School District (6/30/82) PERB Decision No. 218; Dry Creek Joint Elementary School District, supra.

If you feel that there are any factual inaccuracies in this letter or any additional facts which would require a different conclusion than the one explained above, please amend the charge accordingly. This 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 must be filed with PERB. If I do not receive an amended charge or withdrawal from you before August 28, 1986, I shall dismiss your charge without leave to amend. If you have any questions on how to proceed, please call me at (916) 322-3198.

Sincerely,

Robert Thompson
Regional Attorney

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The employer is willing to arbitrate and will waive any contractually-based procedural defenses if a prima facie case is found **and** the matter is deferred to arbitration. This is the practice in the private sector. (Bunker Hill Company (1973) 208 NLRB No. 17, 85 LRRM 1264; Southwestern Bell Telephone Company (1974) 212 NLRB No. 10, 87 LRRM 1446; Raymond International, Inc. (1975) 218 NLRB No. 39, 89 LRRM 1461; Pilot Freight Carriers (1976) 224 NLRB No. 46; 92 LRRM 1338; U.S. Postal Service (1976) 225 NLRB No. 33, 93 LRRM 1089; Southern Florida Hotel and Motel Association (1979) 245 NLRB No. 49, 102 LRRM 1578.)

The State employer submits that SEERA § 3514.5(a) was not intended by the California Legislature to codify the changing policies developed by the NLRB in its own case law regarding deferral to grievance-arbitration proceedings and awards. Moreover, the federal precedents requiring the waiver of defenses do not apply to the State employer because of the specific statutory deferral language of § 3514.5(a). Yet, it is not necessary to test this position at the present time. While preserving its position, the State Employer is willing, in this particular case only, to waive timeliness and procedural defenses that may rise in the grievance should PERB determine a prima facie showing has been made by the charging party.

In Collyer Insulated Wire (1971) 192 NLRB 337, 77 LRRM 1931, and subsequent cases, the NLRB articulated standards under which deferral is appropriate in prearbitral

nonadmission to prison sites where prisoners are located at present would irreparably harm the public interest of assuring peace in California's penal institutions.

WHEREFORE, it is urged that the request for injunctive relief in the above-captioned matter must be rejected in its entirety.

DATED: August 6, 1986

Respectfully submitted,

TALMADGE R. JONES
Chief Counsel

By _____
EDMUND K. BREHL
Labor Relations
Counsel

Attorneys for
Respondents