**STATE OF CALIFORNIA**
**DECISION OF THE**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

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| SOUTHWEST TEACHERS ASSOCIATION, CTA/NEA<br><br>Charging Party,<br><br>v.<br><br>SOUTH BAY UNION SCHOOL DISTRICT<br><br>Respondent. | Case No. LA-CE-2750<br><br>Request for Reconsideration<br>PERB Decision No. 791<br><br>PERB Decision No. 791a<br><br>April 19, 1990 |

Appearances: Reich, Adell & Crost by Marianne Reinhold, Attorney, for Southwest Teachers Association, CTA/NEA; Brown and Conradi by Clifford D. Weiler, Attorney, for South Bay Union School District.

Before Hesse, Chairperson; Craib and Camilli, Members.

## DECISION

CRAIB, Member: This case is before the Public Employment Relations Board (PERB or Board) on a request for reconsideration by the South Bay Union School District (District) of the lead opinion and concurrence in South Bay Union School District (1990) PERB Decision No. 791. The District alleges five prejudicial errors of fact, six errors of law, and requests reconsideration of the remedy. It further requests that all five Board members participate in the reconsideration and that the Board reopen the record to admit the declaration of a District assistant superintendent.

## DISCUSSION

In PERB Decision No. 791, a majority of the panel held that restrictions on an exclusive representative's right to file and

process grievances in its own name was a nonmandatory subject of bargaining.[1] The majority thus concluded that, by insisting to impasse on a restriction of the Southwest Teachers Association's right to file grievances in its own name, the District violated the Educational Employment Relations Act (EERA or Act), section 3541.5, subdivision (c).[2]

The Board has promulgated a regulation which sets out the parameters for requests for reconsideration. PERB Regulation 32410, subdivision (a) provides, in pertinent part, that:

> Any party to a decision of the Board itself may, because of extraordinary circumstances, file a request to reconsider the decision within 20 days following the date of service of the decision. . . . The grounds for requesting reconsideration are limited to claims that the decision of the Board itself

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[1]While a majority of the panel concluded that restrictions on an exclusive representative's right to file grievances in its own name is a nonmandatory subject of bargaining, the two members did so using differing legal analyses. In the lead opinion, Member Craib utilized a modified version of the test set out in Anaheim Union High School District (1981) PERB Decision No. 177, at pages 4-5. (See South Bay lead opinion at pp. 13-14.) In the concurrence, Member Camilli found that, pursuant to section 3543.1, subdivision (a), an exclusive representative has a nonwaivable statutory right to file and process grievances in its own name. (See concurrence at pp. 24-25.)

[2]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.5, subdivision (c) provides:

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

> contains prejudicial errors of fact, or newly discovered evidence or law which was not previously available and could not have been discovered with the exercise of reasonable diligence.

With this standard in mind, we will discuss the District's arguments in support of its request for reconsideration.

The District first asserts that the lead opinion contains a prejudicial error of fact on page 4, where the opinion states that the District refused to change its position on Article 13.415, the contract provision which limits the Association's right to grieve.[3] The District contends that it did, indeed, change its original position on the language of section 13.415. The District offered to modify the previous contract language to include a clause that would have required the Association's consent before a matter could be taken to advisory arbitration. However, the proposed modification did not alter the limitation on the Association's right to file and process a grievance in its own name. The lead opinion's bad faith bargaining analysis did not turn on a finding that the District took an inflexible position in bargaining but, rather, on the District's insistence on the inclusion of a nonmandatory subject in the contract. This argument, therefore, is rejected.

The District next argues that it did not insist to impasse; rather, it contends the Association insisted to impasse because

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[3]The lead opinion erroneously refers to section 13.425 on page 4. The appropriate contract section, 13.415, was appropriately cited on page 3. This citation error is not pertinent to the District's argument.

the Association sought to change an existing provision in the contract. The District argues that the Association had compromised on this issue in the past and could have done so during negotiations. Furthermore, the District contends that the Association requested the impasse determination. This argument, too, must fail. First of all, this is not a factual issue. The question is not who actually requested an impasse determination, nor is it a question of whether the issue was addressed in the parties' previous contract. At the point of impasse, the parties must relinquish all nonmandatory subjects of bargaining and a failure to do so gives rise to a bad faith bargaining charge. Insisting to impasse that a nonmandatory subject be included in the contract is a per se violation of the duty to bargain in good faith. (Lake Elsinore School District (1986) PERB Decision No. 603.) Once the Association communicated its refusal to include the nonmandatory subject and the parties entered impasse procedures, the District was obligated to relinquish this item. (See NLRB v. Wooster Division of Borg-Warner (1958) 356 U.S. 342 [42 LRRM 2034, 2037 (an employer's good faith in negotiating on mandatory subjects "does not license [it] to refuse to enter into agreements on the ground that they do not include some proposal which is not a mandatory subject of bargaining"); see also, Morris, The Developing Labor Law, p. 847 ("Either party may bargain about a permissive topic as if it were a mandatory subject without losing the right, at any time before agreement is

reached, to take a firm position that the matter shall not be included in a contract between the parties.").)

The District's third argument alleges that the lead opinion failed to consider that the parties' bargaining history reflected that they had always considered the issue of the Association's right to grieve in its own name to be part of grievance procedures and, hence, a mandatory subject of bargaining. Whether the parties' past bargaining history reflects that they considered the matter to be a part of grievance procedures is irrelevant. Therefore, omission of the parties' prior collective bargaining history was not prejudicial. Whether a subject is within the scope of representation is a legal determination that must be made by the Board. Errors of law are not a proper ground for reconsideration pursuant to Regulation 32410, subdivision (a).

In its fourth argument, the District contends that there was no factual support for the conclusion in the lead opinion and the concurrence that a limitation on the Association's right to grieve inhibits the Association's duty to represent. This is not a factual finding but a legal conclusion interpreting section 3543.1, subdivision (a) and, hence, not subject to Regulation 32410, subdivision (a).

The District's final factual argument alleges that the Board failed to find that the Association has a right to represent its members within existing contractual mechanisms. This argument is inapposite. No factual finding was necessary on this issue in

the lead opinion. Whether the Association can represent its members who file grievances does not address the issue of whether the Association's right to grieve in its own name is a mandatory subject of bargaining. The argument more appropriately addresses the analysis in the concurrence; however, no factual finding on this issue was necessary to reach the result in the concurrence. The focus of the concurrence is on collective action. Whether the Association can grieve on behalf of individuals does not address the Association's right to take collective action in its own name.

The District also argues that the remedy improperly required it to accept the Association's proposal on "Association Rights." It contends that the "proper" remedy for a bargaining violation is for a bargaining order. If the existing order is to remain, the District seeks an additional order to expressly require the parties to bargain over procedures for Association grievances. It contends that issues have arisen over the statute of limitations on Association grievances, the level at which an Association grievance should be filed, and the factual underpinnings of the grievance. To bolster its argument that the existing order is causing confusion, the District submits the declaration of an assistant superintendent and moves to reopen the record to admit this declaration.

First, the remedy adopted is virtually identical to that proposed by the administrative law judge (ALJ); therefore, the District was on notice of the possibility of this type of remedy

when it filed its exceptions. Secondly, the alleged problems are more appropriately addressed in compliance proceedings. The procedures for processing Association grievances, like the procedures for processing other grievances, remain a mandatory subject of bargaining. The Association's grievances should be processed in the same manner currently required by the existing contract. Nothing in the Board's order suggests otherwise. If the Association fails to adequately comply with appropriate procedures, the District is entitled to take the same measures it would take with any other grievance. We, therefore, decline to modify the order and to reopen the record to admit the declaration of a District assistant superintendent.[4]

The District also alleges six errors of law in the lead and concurring opinions. These are purely legal issues and, hence, not proper grounds for a request for reconsideration under PERB Regulation 32410, subdivision (a).

Finally, the District incorporates all of the arguments it raised in its initial exceptions to the ALJ's proposed decision. It does so for the benefit of the Board members who did not participate in the original decision. The District recognizes that it does not have a right to have full Board participation (California State University (SUPA) (1984) PERB Decision No. 351a-H, at p. 3); however, it argues that, because the decision

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[4]The declaration is neither relevant nor necessary to the resolution of the case. Furthermore, this information was available at the time that the exceptions were filed. It is, therefore, not newly discovered nor evidence which was not previously available. (PERB Reg. 32410, subd. (a).)

contained three divergent analyses, the full Board should participate in order to prevent conflicting results when the issue is addressed in similar cases currently pending before the Board. Section 3541, subdivision (c) permits any Board member to participate in any case pending before the Board. As in all cases, all Board members had an opportunity to participate in this case. The request for full Board consideration is, therefore, denied.

ORDER

The South Bay Union School District's request for reconsideration of PERB Decision No. 791, its request for full Board participation, and its request to reopen the record are hereby DENIED.

Member Camilli joined in this Decision.

Chairperson Hesse's dissent begins on page 9.

Hesse, Chairperson, dissenting: Contrary to the majority's conclusion that the South Bay Union School District's (District) argument on reconsideration that the Southwest Teachers Association (Association) insisted to impasse is not a factual issue, I find that the issue of whether the District or Association insisted to impasse to be pure factual issue. The majority argues that the District, by failing to relinquish the nonmandatory subject once the Association communicated its refusal to include the nonmandatory subject in the collective bargaining agreement, engaged in bad faith bargaining. To reach this conclusion, one must examine the facts of this case.

As stated in my dissent in South Bay Union School District (1990) PERB Decision No. 791, at pages 29-36, I find that there was no evidence presented that the District insisted to impasse on the Association's agreement to a counterproposal on a nonmandatory subject. Rather, the record shows that the Association, not the District, insisted to impasse on the inclusion of the initial grievance rights proposal.

Pursuant to PERB Regulation 32410(a),[1] I would grant the District's request for reconsideration on the basis that the majority erroneously found that the District insisted to impasse.

[1]See page 2 of majority opinion for text.