STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT,	)	
Charging Party,	)	Case No. SF-CO-394
v.	)	PERB Decision No. 854
SAN RAMON VALLEY EDUCATION ASSOCIATION, CTA/NEA,	)	December 7, 1990
Respondent.	)	

Appearances: Lozano, Smith, Smith & Woliver by Loren A. Carr, Attorney for San Ramon Valley Unified School District; Ramon E. Romero, Attorney, for San Ramon Valley Education Association, CTA/NEA.

Before Hesse, Chairperson; Shank and Camilli, Members.

DECISION

HESSE, Chairperson: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the San Ramon Valley Education Association, CTA/NEA (Association) of an administrative law judge's (ALJ) denial of a motion to dismiss and defer the complaint to binding arbitration. The complaint alleges that the Association has failed and refused to bargain in good faith by: (1) engaging in a two-day strike on April 19 and 20, 1990 without formal notice to the District; and (2) sponsoring a third day of strike on April 27, 1990, thereby engaging in an intermittent strike.

We have reviewed the entire record, including the ALJ's Order (attached), Association's appeal and San Ramon Valley Unified School District's (District) response, and affirm the

ALJ's denial of the Association's motion to dismiss and defer the complaint to binding arbitration.

ASSOCIATION'S APPEAL

In its argument that the conduct in the complaint is arguably prohibited by the collective bargaining agreement (CBA), the Association refers to its Unfair Practice Charge No. SF-CE-1383 filed against the District. In Unfair Practice Charge No. SF-CE-1383, the Association alleges that the District unlawfully issued notices of suspension to all bargaining unit members who participated in the strike on April 19, 20 and 27, 1990. After receiving a warning letter, wherein the regional attorney dismissed and deferred the unfair practice charge to binding arbitration, the Association withdrew the unfair practice charge, without prejudice, and filed a grievance. An arbitration on this grievance was scheduled to begin on September 12, 1990. The Association states that the arbitrator will examine the specific language of the CBA to decide whether: (1) the District violated the CBA by issuing notices of suspension to bargaining unit members who participated in the strike on April 19, 20 and 27, 1990; and (2) the bargaining unit members' participation in the strike was protected under the CBA.

In support of its position that the strike conduct on April 19, 20 and 27, 1990 is arguably prohibited by the CBA, the Association cites to the following provisions of the CBA: Article XXV, Discipline Less Than Dismissal; Article IV, Nondiscrimination; Article VII, Employee Rights; and Article X,

Grievance Procedure. Article XXV provides for a comprehensive disciplinary policy and procedure which authorizes the District to discipline bargaining unit members only for "just cause" and requires progressive discipline "except for conduct which is of such a nature that it injures or threatens to injure the safety of pupils or other employees, or causes substantial disruption of the educational program." Article IV prohibits the District from discriminating against bargaining unit members who participate in "legitimate activities" of the Association. Article VII specifically protects the right of Association bargaining unit members to participate in "legitimate activities" of the Association. Finally, Article X defines a "grievance" as "an alleged violation, misinterpretation, or misapplication of the term of the contract which directly affects a member(s) of the bargaining unit."

The Association asserts that a strike which causes "substantial disruption of the educational program" is arguably prohibited by the CBA because the District may be authorized to discipline bargaining unit members who engaged in such conduct. In summary, the arbitrator will decide whether the strike of April 19, 20 and 27, 1990 constituted either a "substantial disruption of the educational program" or "legitimate activity" of the Association. The Association asserts that the CBA arguably protects the strike if it is a "legitimate activity" of

the Association or may prohibit the strike if it is a "substantial disruption of the educational program."[1]

Further, the Association criticizes the ALJ's order stating that the ALJ failed to comprehend the Association's argument. While the ALJ focused on whether the conduct, i.e. failing to negotiate in good faith, is arguably prohibited by the CBA, the Association contends that a strike is arguably protected by Articles IV and VII of the CBA. The Association also contends that a strike is arguably prohibited by Article XXV because it may authorize the District to discipline bargaining unit members who engaged in a strike that causes a "substantial disruption of the educational program."

In addition, the Association states that the ALJ has added another prong to the Board's deferral test, articulated in Lake Elsinore School District (1987) PERB Decision No. 646, by focusing upon an artificial distinction between "striking" and "bad faith bargaining." Specifically, the Association asserts that striking is the conduct alleged to be unlawful and that the ALJ erroneously found that a matter cannot be deferred to arbitration if the parties' CBA is silent as to the commitments by either party to bargain in good faith.

Finally, the Association asserts that the formal hearing in this case should be stayed pending the arbitration of the

---

[1]In deciding this appeal, the Board does not reach the issue of whether the parties may include a provision in the CBA expressly sanctioning strike activities as protected conduct.

grievance or, in the alternative, that the Board should stay the arbitration of the grievance pending the Board's final decision. At the very least, the Association asserts the Board should stay its formal hearing pending its decision on this appeal.[2]

DISTRICT'S OPPOSITION

Initially, the District argues that pursuant to section 3541.5 of the Educational Employment Relations Act (EERA)[3] and San Diego Teachers Association v. Superior Court (1979) 24 Cal.3d 1, PERB has initial exclusive jurisdiction to determine whether the strike was an unfair practice. As PERB, and not an arbitrator, has jurisdiction to determine whether the Association's strike conduct violated EERA, the District concludes that it is clear that PERB has exclusive jurisdiction over this dispute.

The District also asserts that there is no provision in the CBA which covers the issue of whether the Association committed an unfair practice by failing or refusing to bargain in good faith. Rather, the Articles quoted by the Association all relate to individual employee rights and have no bearing on the Association's conduct.

It is also important, argues the District, to distinguish the issues involved in the complaint from those presented in the

[2]On September 10, 1990, the Board, on its own motion, stayed the hearing in case no. SF-CO-394 pending its decision on the Association's appeal. (San Ramon Valley Unified School District (1990) PERB Order No. Ad-212.)

[3]EERA is codified at Government Code section 3540 et seq.

arbitration. The arbitration involves the issue of whether the District's proposed suspension of individual employees violates the CBA. In contrast, the unfair practice case involves the issue of whether the Associations's conduct violated its duty to bargain in good faith. As there is no provision in the CBA which covers the failure or refusal to bargain in good faith, the District concludes that deferral is not appropriate.

DISCUSSION

In Lake Elsinore School District, supra, PERB Decision No. 646, the Board held that section 3541.5(a) of EERA[4]

[4]Section 3541.5(a) of EERA states:

> (a) 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 the 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 the 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

established that an unfair practice charge must be dismissed and deferred to final and binding arbitration if the allegations in the unfair practice charge are directly covered by the provisions of the collective bargaining agreement between the parties.[5] The Board held that, by its choice of prohibitory language in section 3541.5(a) of EERA, the Legislature plainly expressed that the parties' contractual procedures for binding arbitration, if covering the matter at issue, preclude the Board's exercise of jurisdiction. Irrespective of respondent's willingness to waive procedural defenses in the grievance-arbitration process, PERB has no legislative authority to exercise its jurisdiction until or unless the grievance process is exhausted, either by arbitration award or settlement, or if futility is demonstrated. (Eureka City School District (1988) PERB Decision No. 702.)

To determine whether the allegations in an unfair practice charge must be deferred to arbitration, the Board must first examine the applicable language in the CBA. In the present case, the Association argues that four provisions of the CBA warrant

---

this subdivision to have been tolled during the time it took the charging party to exhaust the grievance machinery.

Subsequent to the Board's decision in Lake Elsinore School District, supra, section 3541.5(a) of EERA was amended effective January 1, 1990.

[5]While the District is correct that PERB has initial exclusive jurisdiction to determine whether a strike is an unfair practice, section 3541.5(a) of EERA also precludes PERB from exercising its jurisdiction when the conduct is also prohibited by the provisions of the CBA, and the CBA has a provision for binding arbitration.

deferral to arbitration. One of these provisions is Article X, Grievance Procedure, which defines "grievance" and provides that the decision of the arbitrator shall be final and binding.[6] The remaining provisions involve the disciplinary policy (Article XXV), Nondiscrimination (Article IV), and Employee Rights (Article VII.)

In essence, the Association argues that since the issues in the arbitration were deferrable,[7] the allegations in the present unfair practice charge are also deferrable. However, the fact that the issues in the arbitration were deferred by a regional attorney when filed as allegations in an unfair practice charge does not mean that the allegations in the present unfair practice charge must also be deferred. The issues and allegations are not identical. The arbitration involves allegations against the District that it issued notices of suspension to certain bargaining unit members in violation of the CBA. In determining whether the District was justified in issuing the suspension notices, the arbitrator will decide whether: (1) the bargaining

[6]There is no dispute that the CBA includes a provision that the decision of the arbitrator shall be final and binding upon the parties. (Article X, Section G(3).)

[7]On April 30, 1990, the allegations in Unfair Practice Charge No. SF-CE-1383, involving the District's threat to suspend bargaining unit members who participated in a strike, were deferred to arbitration. The regional attorney determined that Articles IV(A) and VII of the parties' CBA covered the dispute raised by the unfair practice charge. Upon receipt of this letter, the Association withdrew Unfair Practice Charge No. SF-CE-1383, without prejudice, and filed a grievance on behalf of all bargaining unit members who received suspension notices.

unit members' participation in the strike violated the CBA because it caused a "substantial disruption of the educational program;" or (2) the bargaining unit members' participation in the strike was a "legitimate activity" of the Association.

The allegations in the present unfair practice charge do not involve the employees' conduct in striking, or the District's conduct in issuing suspension notices. Rather, the issue is the Association's conduct. Specifically, whether the strike of April 19, 20, and 27, 1990 constitutes bad faith bargaining in violation of section 3543.6(c) of EERA. While the Association argues that a strike which causes "substantial disruption of the educational program" may be prohibited by the CBA, and a strike which is a "legitimate activity" of the Association may be protected by the CBA, the applicable provisions of the CBA do not address the issue of whether a strike is evidence of bad faith bargaining. Rather, Articles IV and VII involve a determination of whether certain activities by individual employees are protected. Similarly, Article XXV authorizes the District to discipline individual employees for specific activities. The Board finds it is significant that the applicable provisions of the CBA do not involve the Association's conduct, and that the CBA is silent in regard to strike conduct or the parties' duty to bargain in good faith.[8]

---

[8]Some CBAs do contain provisions that the parties shall meet and negotiate in good faith. In Calipatria Unified School District (1989) PERB Order No. Ad-193, the parties' CBA contained a provision setting forth the negotiation procedures, including a provision that the District shall meet and negotiate in good

Finally, the Association's argument that the ALJ failed to comprehend its argument and erroneously added a third prong to the Board's deferral test in Lake Elsinore School District, supra, PERB Decision No. 646 are without merit.

Accordingly, as the Association's strike conduct or its duty to bargain in good faith are not covered by the CBA, the Board finds that the present dispute is not deferrable to binding arbitration and that the complaint should not be dismissed.

ORDER

The Board hereby: (1) DISSOLVES the order for stay of hearing (PERB Order No. Ad-212); (2) DENIES the Association's request for stay; (3) DENIES the appeal of the ALJ's Order denying the Association's motion to dismiss and defer the complaint to binding arbitration; and (4) ORDERS the ALJ to schedule a hearing on the merits of the complaint in Case No. SF-CO-394.

Members Shank and Camilli joined in this Decision.

---

faith with the Association on negotiable items. However, the Board did not defer the complaint, as the allegations involved in the unfair practice charge alleged that the District failed or refused to participate in good faith in the impasse procedures.

8TATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT,	)	
Charging Party,	)	Case No. SF-CO-394
V.	)	ORDER
SAN RAMON VALLEY EDUCATION ASSOCIATION, CTA/NEA,	)	
Respondent.	)	

Loren Carr, Lozano, Smith, Smith & Woliver for San Ramon Valley Unified School District; Ramon E. Romero, attorney, for San Ramon Valley Education Association, CTA/NEA.

INTRODUCTION

On March 30, 1990, the San Ramon Valley Unified School District (District) filed an unfair practice charge against the San Ramon Valley Education Association, CTA/NEA (Association). The charge was amended twice, the last amended charge being filed on April 25, 1990.* A regional attorney of the Public Employment Relations Board (PERB or Board) issued a complaint on May 29, alleging that certain actions by the Association violated Educational Employment Relations Act (EERA) section 3543.6(c).[2]

A timely answer was filed by the Association on June 19, and was amended on July 3. In its answer, the Association alleged

---

[1] Unless noted otherwise, all dates are 1990.

[2] The EERA is codified at Government Code 3540 et. seq. Section 3543.6(c) reads, in relevant part:

> It shall be unlawful for an employee organization to:
>
> (c) Refuse or fail to meet and negotiate in good faith with a public school employer of any of the employees of which it is the exclusive representative.

that the complaint should be dismissed as the alleged offenses listed in the complaint should be deferred to binding arbitration.

On August 1, the Association filed a Motion to Dismiss Complaint and Defer to Binding Arbitration. The District filed timely opposition to the Motion on August 8. The formal hearing in this matter is scheduled for August 16 arid 17.[3]

DISCUSSION

The complaint in this case alleges that the Association violated its duty to bargain in good faith.[4] The conduct at issue is striking. Specifically, on April 19, 20 and 27, the employees represented by the Association engaged in a work stoppage, providing no prior notice to the District of the strike. The District alleges such action violates the duty to bargain in good faith. The Association contends that this matter is arguably a violation of the collective bargaining agreement, and is subject to binding arbitration.

Under EERA section 3541.5(a)(2)[5] and the Board's decision in Lake Elsinore School District (1987) PERB Decision No. 646, PERB

---

[3] An Informal Conference did not result in settlement of the dispute.

[4] See note 1 supra.

[5] . . . except that 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. . . .

has no jurisdiction to hear an unfair practice complaint if (1) the conduct alleged to have violated EERA also violated the parties' collective bargaining agreement; and (2) the agreement provides for binding arbitration. The latter requirement has indisputably been met as Article X, Section G(3) of the contract provides that where a grievance proceeds to arbitration the arbitrator's decision shall be final and binding.[6]

The key issue here, however, is whether the conduct that is subject of the complaint, i.e. failing to negotiate in good faith, is also prohibited by the contract.

The Association alleges that striking is arguably prohibited by two separate section of the contract. Article IV, Section A, NONDISCRIMINATION reads:

> A. Regarding the administration of the provisions of this Agreement, neither the District nor the Association shall discriminate against any office or employee of the District in violation of the law; on the basis of race, color, creed, age, sex, national origin, political affiliation, domicile, martial status, physical handicap, or membership or participation in the legitimate activities of a recognized employee organization. (Emphasis added.)

Article VII, EMPLOYEE RIGHTS likewise reads:

> All employees shall have the right to become members and participate in legitimate activities of employee organizations. Conversely, all employees shall have the right not to be become members or not to participate in such organizational activities.

> 3. The decision of the arbitrator shall be final and binding.

The Association alleges that the issue of whether striking is a "legitimate activity" of the recognized employee organization is at the heart of this dispute, and since contract interpretation is a matter for arbitration, the issue should be deferred.

The Association's argument, however, is not persuasive. The District's charge alleges a violation of duty to bargain in good faith. The conduct of striking is not the final issue. Nor is it merely to be determined whether such conduct is a legitimate activity of an employee organization. Rather, this case must resolve whether the Association's conduct, either per se or in the totality of the circumstances, evidenced bad faith bargaining. The contract is silent as to commitments by either party to bargain in good faith. Thus, this matter cannot be deferred.

Furthermore, the Association misreads the collective bargaining agreement. The sections cited above, EMPLOYEE RIGHTS and NONDISCRIMINATION, deal with employee and Association rights and protection. Striking, if it is not a "legitimate activity," is not prohibited by the contract. Instead, employees who engage in activity that is not "legitimate" merely lose the protection of these sections. Such an argument would be raised by the District in response to an unfair filed by the Association. This dispute, however, involves the District's rights vis-a-vis the Association's conduct. Thus, the matter is still not covered by contract, and is not deferrable.

Pursuant to California Administrative Code, title 8, section 32305, this Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. See California Administrative Code, title 8, section 32300. A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing ". . .or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . . ." See California Administrative Code, title 8, section 32135. Code of Civil Procedure section 1013 shall apply. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. See California Administrative Code, title 8, sections 32300, 32305 and 32140.

ORDER.

The Motion to Dismiss the Complaint and Defer to Arbitration is hereby DENIED.

August 8, 1990

MARTHA GEIGER
Administrative Law Judge