SUPERCEDED by amendment to EERA section 3540.1, subdivision (k), Stats. 1999, Ch. 828

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

NORTH ORANGE COUNTY REGIONAL OCCUPATIONAL PROGRAM,	)	
Employer,	)	Case No. LA-R-943
and	)	PERB Decision No. 857
REGIONAL OCCUPATIONAL PROGRAM EDUCATIONAL ASSOCIATION OF NORTH ORANGE COUNTY CTA/NEA,	)	December 17, 1990
Employee Organization.	)	

Appearances: Parker & Covert by Margaret A. Chidester and Val R. Fadely, Attorneys, for North Orange County Regional Occupational Program; Charles R. Gustafson, Attorney, for Regional Occupational Program Educational Association of North Orange County CTA/NEA.

Before Shank, Camilli and Cunningham, Members.

DECISION

SHANK, Member: This case is currently before the Public Employment Relations Board (PERB or Board) on exceptions filed by the North Orange County Regional Occupational Program (NOCROP) to a proposed decision by an administrative law judge (ALJ).[1] In that decision, the ALJ determined that NOCROP is a public school employer within the meaning of Government Code section 3540.l(k) and that the unit of certificated employees sought by the Regional Occupational Program Educational Association of North

[1]This case was first before the Board on a request to excuse the late filing of NOCROP's exceptions which were filed in the Los Angeles Regional Office. In PERB Decision No. 807 (issued 5/15/90), as modified by an ERRATA issued 11/2/90, the Board excused the late filing and accepted the exceptions as timely filed.

Orange County CTA/NEA (ROPEA) is appropriate for purposes of meeting and negotiating.

FACTS

NOCROP was established through the execution of a joint powers agreement among two union school districts and three unified school districts. NOCROP is governed by a board of trustees (Trustees) comprised of seven members, which includes two representatives of each of the union high school districts and one representative of each of the unified school districts. Each representative is an elected board member from one of these districts, and is appointed to a four-year term as a NOCROP Trustee. NOCROP Superintendent Thomas Kurtz was hired by the Trustees; and subordinate managers are hired by the superintendent, subject to the approval of the Trustees. Employer/employee relations policies are recommended by the superintendent and adopted by the Trustees.

NOCROP's annual revenues exceed $13 million, of which approximately $10.5 million is derived from average daily attendance money from the state through the member school districts. The balance of the revenue is derived from grants, contracts, and subcontracts with public and private entities.

NOCROP's office is located in the City of Anaheim in space leased from the Anaheim Unified School District. The adjoining land is the only real property owned by NOCROP. Classes are taught in NOCROP-owned facilities as well as in leased facilities, donated facilities, and facilities of private

employers, including community classrooms (e.g., store fronts and shopping centers). Classes are also taught on public high school campuses and in vocational and post-secondary facilities.

NOCROP employs certificated personnel who provide training in vocational skills. Unlike certificated instructors in the member districts, NOCROP's personnel teach no basic skills but, rather, focus on specific vocational skills. The credentials of these certificated instructors, consistent with the Education Code,[2] differ from the credentials of certificated personnel at the member districts. A vocational credential for a full-time NOCROP instructor requires a minimum of five years of experience in the area of expertise, a high school diploma or its equivalent, and the completion of 18 semester units of classes in methodology. A credential for a part-time instructor requires the same, albeit with fewer semester units. Although many NOCROP instructors possess college degrees, college degrees are not required for certification.

Among the NOCROP certificated employees are the following full time positions: 78 instructors; 5 vocational counselors; and 6 project instructors. Also certificated are 66 part-time instructors who work less than 30 hours per week, and one job developer.

NOCROP instructors teach diverse subjects in a wide variety of settings and arrangements. For example, one full-time

[2]See sections 44260, 44260.1, and 52323 of the Education Code.

instructor teaches automobile mechanics for NOCROP in a classroom at a high school of one of the member districts. Another full-time instructor works with two different programs in the automotive field, including a "community-based program," which is held at a car dealership. Other instructors work in "special projects," including projects involving contracts with other government agencies. In addition, pursuant to "reverse link" instruction agreements, as specified, NOCROP provides appropriately credentialed NOCROP instructors to serve as instructors in programs offered by the school districts. Furthermore, NOCROP also entered into agreements with various joint apprenticeship committees to provide training for apprentices in skilled trades. And, finally, a similar training arrangement has been made with private employers.

On August 18, 1988, ROPEA filed a request for recognition as the exclusive representative of a comprehensive unit of certificated employees of NOCROP. On September 13, 1988, NOCROP filed a response to the petition in which it asserted that the Board lacks jurisdiction over this request for recognition because a regional occupational program is not a "public school employer" as defined by Government Code section 3540.l(k). NOCROP stated its intention to deny recognition in the event that PERB found the proof of support sufficient. Thereafter, the proof of support was determined to be sufficient and NOCROP was so advised. On October 17, 1988, NOCROP filed a denial of recognition with PERB. NOCROP's stated reasons for the denial

included doubt as to the appropriateness of the proposed unit as well as NOCROP's previously stated position that it was not a public school employer.

Citing Joint Powers Board of Directors, Tulare County Organization for Vocational Education, Regional Occupational Center and Program (1978) PERB Decision No. 57, as PERB precedent, the ALJ concluded that NOCROP is a public school employer within the meaning of Government Code section 3540.l(k),[3] and that the unit of certificated employees sought by ROPEA is appropriate for purposes of meeting and conferring under the Educational Employment Relations Act (EERA).[4]

NOCROP set forth numerous exceptions to the proposed decision. The critical issue here, as advanced by NOCROP, is whether NOCROP is a "public school employer" within the meaning of Government Code section 3540.l(k). Because we conclude that the resolution of this particular issue is dispositive of the case, we have limited our response and discussion below to NOCROP is exceptions which relate to that particular issue.

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[3]Government Code section 3540.l(k) states:

> (k) "Public school employer" or "employer" means the governing board of a school district, a school district, a county board of education, or a county superintendent of schools.

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

DISCUSSION

Preliminarily, based on the rationale set forth in California State University (San Diego) (1989) PERB Decision No. 718-H (see also discussion in Lake Elsinore School District (1988) PERB Decision No. 696, concerning deferral to arbitration), it is important to recognize at the outset that this Board has only such jurisdiction and powers as have been conferred on it by statute. (Association For Retarded Citizens v. Department of Developmental Services (1985) 38 Cal.3d 384, 391-392 and Fertig v. State Personnel Board (1969) 71 Cal.2d 96, 103.) Further, this Board acts in excess of its jurisdiction if it acts in violation of the statutes conferring or limiting its jurisdiction and powers. (Abelleira v. District Court of Appeal (1941) 17 Cal.2d 280, 288-291; Kennaley v. Superior Court (1954) 43 Cal.2d 512, 514; and Graves v. Commission on Professional Competence (1976) 63 Cal.App.3d 970, 976, hg. den.) Moreover, where the Board is without jurisdiction, it cannot acquire jurisdiction by the parties' consent, agreement, stipulation or acquiescence, nor by waiver or estoppel. (Schlyen v. Schlyen (1954) 43 Cal.2d 361, 375; Keithley v. Civil Service Board of City of Oakland (1970) 11 Cal.App.3d 443, 448, hg. den.; Summers v. Superior Court (1959) 53 Cal.2d 295, 298; and Sampsell v. Superior Court (1948) 32 Cal.2d 763, 773, 776.) Finally, the absence of jurisdiction cannot be overcome by the established practices or customs of this Board, nor by Board regulation. (J.R. Norton Co. v. Agricultural Labor Relations Board (1979) 26

Cal.3d 1, 29; Morris v. Williams (1967) 67 Cal.2d 733, 737, 748; and California State Restaurant Association v. Whitlow, Chief, Division of Industrial Welfare (1976) 58 Cal.App.3d 340, 347, hg. den.)

It is, therefore, necessary to turn to the statutes to determine if the Board has the requisite jurisdiction. In construing a statute, we begin with the fundamental rule that a court "should ascertain the intent of the Legislature so as to effectuate the purpose of the law." (Moyer v. Workmen's Compensation Appeals Board (1973) 10 Cal.3d 222, 230.) Further, it is a fundamental maxim of statutory construction that, where no ambiguity exists, the intent of the Legislature in enacting a law is to be gleaned from the words of the statute itself, according to the usual and ordinary import of the language employed. Thus, where the language of a statute is clear and unambiguous, case law holds that the construction intended by the Legislature is obvious from the language used. (Noroian v. Department of Administration, Public Employees' Retirement System (1970) 11 Cal.App.3d 651, 654, hg. den.; McQuillan v. Southern Pacific Co. (1974) 40 Cal.App.3d 802, 805-806; Hoyme v. Board of Education (1980) 107 Cal.App.3d 449; Great Lakes Properties. Inc. v. City of El Segundo (1977) 19 Cal.3d 152, 155; and People v. Boyd (1979) 24 Cal.3d 285, 294.)

Turning to the specific statute involved here, Government Code section 3540.1 contains definitions of various terms for purposes of Chapter 10.7 of (commencing with 3540) of Division 4

of Title 1 (EERA). Subdivision (k) of section 3540.1 states that "[p]ublic school employer or employee means the governing board of a school district, a school district, a county board of education, or a county superintendent of schools."

On its face, therefore, the definition of "public school employer" or "employer" clearly does not include a joint powers agency, or a joint powers agreement governing a regional occupational program or a regional occupational center.

For this Board to interpret the statute to include entities not expressly referred to in the definition would violate the rule which prohibits an administrative agency from altering or amending a statute or enlarging its scope (Association for Retarded Citizens v. Department of Developmental Services 38 Cal.3d 384, 391).

Moreover, the familiar rule of statutory construction dictates that where a statute enumerates things upon which it is to operate, it is to be construed as excluding from its effect, all those not expressly mentioned (Capistrano Union High School District v. Capistrano Beach Acreage Co. (1961) 188 Cal.App.2d 612, 617). This rule is, of course, subordinate to the primary rule that the intent of the Legislature shall prevail over specific rules of statutory construction (Banergie v. Bank of America (1978) 21 Cal.3d 527, 540). In the context presented here, the plain meaning of the language employed by the Legislature clearly indicates that the intent of the Legislature was to include only those entities specifically named in

subdivision (k) of section 3540.1. Where the language of a statute is clear and unambiguous, the construction intended by the Legislature is obvious from the language used (Novoian v. Department of Administration, Public Employees' Retirement System, supra).

In contrast, where the Legislature intended a particular body of statutes to apply to both school districts and joint power entities, it has expressly stated such intention. Thus, for example, where the Legislature intended for a regional occupational center established pursuant to Chapter 9 (commencing with Section 52300) of Division 9 of Title 2 of the Educational Code by two or more school districts in accordance with a joint powers agreement to be treated the same as school districts for purposes of the Public Employee's Retirement System, the Legislature has found it necessary to expressly provide for that result by enacting Section 20580.01 to the Government Code. Thus, Section 20580.01, reads in pertinent part, as follows:

> 20580.01. A regional occupational center established pursuant to Chapter 9 (commencing with Section 52300) of Division 4 of Title 2 of the Education Code by two or more school districts by a joint powers agreement shall be deemed a school district for purposes of this part. . . .

Similarly, the Legislature has provided, with respect to regional occupational centers specifically, that "[f]or purposes of receiving advances of funds from the county treasury only, a regional center shall be deemed to be a school district." (Education Code, Section 52320, emphasis added.) The Legislature

has also provided that with respect to the issuance and sale of bonds for the construction and other capital expenditure for a regional occupational center undertaken by two or more school districts pursuant to a joint powers agreement, the bonds shall be issued and sold in the manner provided by law for the issuance and sale of bonds of a high school district (Education Code, Section 52319).

Therefore, the Legislature has in certain identified instances seen the necessity to expressly provide that school districts and joint power entities operating a regional occupational center or program are to be given the same meaning for certain limited purposes. Absent a finding of this express language, courts would be reluctant to enlarge the scope of language which is clear on its face (See Novoian v. Department of Administration, Public Employees' Retirement System, supra).[5]

Moreover, the provisions contained in Chapter 9 (commencing with Section 52300) of Part 28 of Title 2 of the Education Code governing regional occupational centers and programs clearly and consistently recognize distinctions between programs or centers established and maintained by school districts and those established and maintained by joint power agencies. Thus, for example, Section 52321 of the Education Code describes "regional

[5]In a different context, we note that the Legislature has defined "school districts" for purposes of state-mandated costs to mean any school district, community college district, or county superintendent of schools (Government Code section 17519). Conspicuously absent from this listing are joint power agencies.

occupational center or program established and maintained by school districts or joint powers agencies pursuant to Section 52301" (Emphasis added.)- The function of the word "or" is to mark an alternative such as "either this or that" (Houge v. Ford (1955) 44 Cal.2d 706, 712). Thus, the Legislature in Section 52321 recognizes a legal distinction between centers or programs maintained by joint power agencies and those maintained by school districts.

If the term "school districts" includes joint powers agencies, the addition of the language "or joint power agencies" following the term "school districts" in Section 52321 and related sections in Chapter 9 (commencing with Section 52300) of the Education Code would be meaningless language. In this respect, it is a cardinal rule of statutory construction that every word in a statute is presumably intended to have some meaning and that a construction making some words surplusage is to be avoided. (In re Marriage of Galis (1983) 149 Cal.App.3d 147, 153.) Here the reference to "school districts or joint powers agencies" manifests an intent to apply the provisions to entities in the alternative. Again, a recognition of a legal distinction.

With respect to the establishment and maintenance of a regional occupational center or program by two or more school districts pursuant to a joint powers agreement, Section 52301 of the Education Code expressly provides for that authorization in accordance with Article 1 (commencing with Section 6500) of

Chapter 5 of Division 7 of Title 1 of the Government Code. The governing board of a regional occupational program or center established after 1965, such as NOCROP, by two or more school districts pursuant to a joint powers agreement is required, pursuant to the Legislative mandate set forth in subdivision (e) of Section 52310.5 of the Education Code, to consist of at least one member of the governing board of each of the school districts cooperating in the regional occupational program or center with each member selected by the governing board of the school district represented by that member.

Section 6503.5 of the Government Code recognizes that an agreement creating a joint powers agency results in the creation of an agency or entity which is separate from the parties to the agreement (the individual school districts) and is responsible for the administration of the agreement. The separate and distinct joint powers agency or entity shall, within 30 days after the effective date of the agreement, cause a notice of the agreement to be prepared and filed with the Secretary of State (Government Code section 6503.5). (See also 66 Ops Cal.Atty.Gen. 183, 185.)

A further indication that a regional occupational center or program maintained by a joint powers agency is separate and distinct from the participating school districts is found in the fact that such a joint powers agency receives its separate, annual operating funds from each of the participating school

districts based on specified units of average daily attendance (Government Code section 52321).

It is also significant that at the time of the enactment of EERA, which, as enacted, included the current form of the definition of "public school employer," former Section 7451 of the Education Code[6] expressly authorized the establishment and maintenance of a regional occupational center or program by two or more school districts pursuant to the joint powers statutes. In this respect, it must be assumed that the Legislature, when passing a statute (e.g., EERA), was aware of existing related laws and that the statute (e.g., EERA) was enacted with full knowledge of the state of the law at the time of its enactment fin re Misener (1985) 38 Cal.3d 543, 552; Fuentes v. Workers' Compensation Appeals Board (1976) 16 Cal.3d 1, 7). Therefore, we can only assume that the Legislature's failure explicitly to include joint powers agencies within the definition of "public school employer" under Government Code section 3540. l(k) was intentional.

A review of the facts in this instant case with the relevant statutes, clearly indicates that NOCROP is a joint powers agency formed and maintained in accordance with the pertinent statutes. Accordingly, it is a separate and distinct entity in law.

Turning to our prior precedent, this Board has concluded that a construction which would exclude joint power agencies from

[6]Former Section 7541 of the Education Code was the predecessor to current Section 52301 of the Education Code.

the definition of "public school employer" is contrary to the legislative intent in enacting EERA (Tulare County, supra PERB Decision No. 57) because that construction would have the effect of denying these employees the rights set forth in EERA. The Board went on to say, as follows:

> The ROC and ROP programs offered by TCOVE are educational programs of the public school system. These programs may be offered by a single large district or jointly by several smaller districts. The fact that smaller districts such as those in the instant case are able to effectively implement the legislatively prescribed ROC/ROP programs only by combining their resources in no way removes the programs from the parameters of the public school system. . . . (Tulare County, supra, at p. 6.)

It is true that a regional occupational center operated by a joint powers agency possesses many of the same characteristics as a school district and are a part of the overall public school system. However, in the words of dissenting Member Gonzales in Tulare County, supra, starting at page 11:

> Yet, TCOVE is an employer with different characteristics in its formation, funding and authority, which the Board can only suppose the Legislature reasonably determined should not be defined as a "public school employer" within the meaning of section 3540.l(k). Words may not be inserted into a statute under the guise of statutory interpretation. Kirkwood v. Bank of America (1954) 43 Cal.2d 333, 341. It is the function of the Board to construe and apply the EERA as enacted, and not to add thereto or detract therefrom. People v. Moore (1964) 229 Cal.App.2d 221, 222. The Board should not sit as a super-legislature to determine the wisdom, desirability or propriety of statutes enacted by the Legislature. Horman Estate (1971) 5 Cal.3d 62, 77. I do not think the Board can say that failure to find TCOVE an

employer will "nullify the essence of the statute."

In the case of Hacienda La Puente Unified School District (1988) PERB Decision No. 685 (Petition for Writ of Review denied March 22, 1989), this Board, based in substantial part, on the principle that California has long recognized that the power to rewrite statutes, no matter how laudable the goal, does not belong to the courts, refused to hold that for purposes of former Government Code section 3543.5(a)[7] applicants for employment were included within the term "employees." The Hacienda Board concluded that the unambiguous nature of the statute in issue precluded the Board from usurping the duty of the Legislature, and that the policy reasons for a contrary result, which would lead to including applicants in EERA, are best directed to the legislative branch.[8] Therefore, this Board has shown a reluctance to expand the scope of EERA where, as is the case here, the terms of the statute are unambiguous (see State

[7]At the time Hacienda, supra, was decided, Section 3543.5 read, in relevant part, as follows:

> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. (Emphasis added.)

[8]Following the issuance of the Hacienda decision, the Legislature amended subdivision (a) of Section 3543.5 by adding the following closing sentence to that subdivision: "For purposes of this subdivision, "employee" includes an applicant for employment or reemployment" (Ch. 313, Stats. 1989).

Personnel Board v. Fair Employment and Housing Commission (1985) 39 Cal.3d 422.

In this respect, the court in Regents of University of California v. Public Employment Relations Board (1985) 168 Cal.App.3d 937, 944-945, has also showed a reluctance to allow the Board to rewrite a statute to suit the Board's notion of what the Legislature must have, in the opinion of the Board, intended to say. As the court pointed out, the Legislature would be rendered nearly powerless to make changes in the statutes if the courts permit the Board to interpret statutes to suit the Board's favored construction (see Regents of University of California v. Public Employment Relations Board, supra 945).

Accordingly, based in substantial part, on the rationale set forth in our more recent decisions of Hacienda La Puente Unified School District, supra, PERB Decision No. 685 and California State University (San Diego), supra, PERB Decision No. 718-H recognizing that the Board is without power to expand the scope of its own jurisdiction where the Legislature has failed to provide that authority, and upon a closer examination of all relevant statutes concerning the matter at issue, we now feel compelled to overrule Tulare County, supra, PERB Decision No. 57 insofar as it holds that a regional occupational center or program operated by a joint powers agency is a public school employer pursuant to Government Code section 3540.l(k). Accordingly, unless or until the Legislature amends that section to include programs operated by a joint powers agency within the

definition of a public school employer, there is no jurisdiction for this Board to resolve the dispute in the instant case.

ORDER

ROPEA's petition requesting recognition is DENIED.

Member Camilli joined in this Decision.

Member Cunningham's dissent begins on page 18.

Cunningham, Member, dissenting: I disagree with the conclusion that the Public Employment Relations Board does not have jurisdiction over the North Orange County Regional Occupational Program (NOCROP), because it is not a "public school employer" within the meaning of Government Code section 3540.l(k). I believe Joint Powers Board of Directors, Tulare County Organization for Vocational Education, Regional Occupational Center and Program (1978) PERB Decision No. 57 was correctly decided, and that we should, therefore, assume jurisdiction over the instant dispute.

In arriving at my conclusion, I rely on the analysis set forth by the Court of Appeal in People v. Hacker Emporium, Inc. (1971) 15 Cal.App.3d 474. A fundamental principle emphasized in that case is that the legislative intent underlying a statutory scheme is of primary importance. A literal interpretation or application of a statute which will nullify such intent constitutes an improper construction of the statute. (Id., at pp. 477-478.) Further, as the court stated:

> "Statutes must be given a reasonable and common sense construction in accordance with the apparent purpose and intention of the lawmakers—one that is practical rather than technical, and that will lead to wise policy rather than to mischief or absurdity." (45 Cal.Jur.2d, Statutes, § 116, pp. 625-626; Buchwald v. Superior Court (1967) 254 Cal.App.2d 347, 354-355 [62 Cal.Rptr. 364].) (People v. Hacker Emporium, Inc. (1971) 15 Cal.App.3d 474, p. 478; emphasis added.)

The proper statutory interpretation is that which promotes, rather than defeats, the legislative purpose and policy-underlying a statutory scheme. (People v. Hacker Emporium, Inc., supra, 15 Cal.App.3d 474, 478; see also People v. Rojas (1975) 15 Cal.3d 540, 551-552 [542 P.2d 229]; People v. Newble (1981) 120 Cal.App.3d 444, 450 [174 Cal.Rptr. 637]; Worthington v. Unemployment Insurance Appeals Board (1976) 64 Cal.App.3d 384, 388 [134 Cal.Rptr. 507].) Finally, and I believe of primary consideration in this instance, we should avoid any statutory construction which affords an opportunity to evade a statutory mandate and accomplish indirectly what cannot be accomplished directly pursuant to the statutory scheme. (People v. Hacker Emporium. Inc., supra, 15 Cal.App.3d 474, p. 478.)

In this case, a literal interpretation of the Educational Employment Relations Act (EERA) section 3540.l(k) leads to the unreasonable result that NOCROP employees lose all of the rights guaranteed to public school employees under the EERA simply because several traditional school districts (clearly "public school employers") have chosen to create a joint powers entity leading to the establishment of a regional occupational program. It seems ludicrous that, if a school district establishes its own vocational education program, its certificated employees would be protected by EERA; however, if that same district joins with another to create a similar program under a joint powers agreement, its employees are not entitled to the same protection.

The express purpose of EERA is to promote improved labor relations within the public school systems by, inter alia:

> . . . providing a uniform basis for recognizing the right of public school employees to join organizations of their own choice, to be represented by the organizations in their professional and employment relationships with public school employers . . . and to afford certificated employees a voice in the formulation of educational policy. . . .
> (Gov. Code, sec. 3540; emphasis added.)

In view of this stated purpose, providing traditional school districts with a means of denying certificated NOCROP employees of all representational and other statutory rights, in my view, flies in the face of sound decision-making. A technical construction of section 3540.l(k) could be construed as the type of "absurd result" which the courts view with extreme disfavor.

As a policy matter, by allowing school districts to evade their collective bargaining obligations in the context of vocational education, I fear that we would be allowing a gross injustice to be inflicted upon this group of employees, as well as doing a gross disservice to vocational education students. By not affording these employees the same set of rights afforded to their counterparts within the traditional school districts, as well as to classified employees, we send a message that implies that they are somehow of a lesser status than traditional school district employees. This could discourage talented people from pursuing careers as vocational educators and, in turn, could interfere with the establishment of quality vocational education

programs. Those students choosing to enroll in vocational education programs are harmed as a result because they are unable to get the best possible vocational education within such a system. Likewise, in the long run, California's citizens suffer because we could lack competent, qualified plumbers, electricians, auto mechanics, painters, etc. Consequently, I believe the only reasonable construction and application of section 3540.l(k), in keeping with the overall policy and purpose of EERA, is that NOCROP, an arm of several public school employers, is itself a public school employer and, therefore subject to this agency's jurisdiction.