

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



CALIFORNIA SCHOOL EMPLOYEES	)	
ASSOCIATION AND ITS DESERT	)	
SANDS CHAPTER #106,	)	
	)	
Charging Party,	)	Case No. LA-CE-3473
	)	
v.	)	PERB Decision No. 1102
	)	
DESERT SANDS UNIFIED SCHOOL	)	May 10, 1995
DISTRICT,	)	
	)	
Respondent.	)	

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Appearances: California School Employees Association by William C. Heath, Attorney, for California School Employees Association and its Desert Sands Chapter #106; Breon, O'Donnell, Miller, Brown & Dannis by David G. Miller, Attorney, for Desert Sands Unified School District.

Before Blair, Chair; Garcia and Johnson, Members.

DECISION

GARCIA, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the California School Employees Association and its Desert Sands Chapter #106 (CSEA) of a Board agent's partial dismissal of its unfair practice charge (attached), refusal to issue complaint, and deferral to arbitration. In its charge, CSEA alleged, in part, that the Desert Sands Unified School District (District) retaliated against the CSEA chapter president for participating in protected activities in violation of section 3543.5(a) and (b) of the Educational Employment Relations Act (EERA).<sup>1</sup> After a

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<sup>1</sup>EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. EERA section 3543.5 states, in pertinent part:

review of the record, the Board hereby affirms and adopts the Board agent's partial dismissal in accordance with the following discussion.

BACKGROUND

In his partial dismissal letter, which incorporated by reference his earlier warning letter, the Board agent cited section 3541.5(a)<sup>2</sup> of the EERA and Lake Elsinore School District (1987) PERB Decision No. 646 (Lake Elsinore) as mandating that the retaliation allegation be deferred to arbitration and dismissed. The Board agent also rejected CSEA's claim that resort to the grievance procedure is futile.

CSEA filed an appeal that restates the arguments it made before the Board agent in various ways. For example, CSEA argues

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It shall be unlawful for a public school employer to do any of the following:

(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. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

<sup>2</sup>EERA section 3541.5(a)(2) states that PERB shall not:

(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. . . .

that it should be excused from the contractual grievance procedure filing deadline since the District allegedly occupied a stronger position than CSEA at the bargaining table. Alternatively, they allege the 10-day deadline is too short, and PERB should interpret EERA section 3541.5 so as to guarantee availability of a decision on the merits of a timely-filed unfair practice charge for six months in all cases, regardless of the time limit agreed to by the parties. Therefore, PERB should find futility in all cases where the time limit is "so short that it tends to interfere with the right to obtain a decision on the merits with the exercise of reasonable diligence."

The District filed an opposition to CSEA's appeal on several points. First, the District explains its agreement with the Board agent's conclusion that the retaliation allegation was properly dismissed and deferred to arbitration pursuant to the parties' collective bargaining agreement (agreement). Secondly, the futility exception has only been applied in limited cases, for example when the integrity of the arbitration process itself was at issue,<sup>3</sup> or when the arbitrator would lack authority to award a contractual remedy because the employee organization had no right to file a grievance on its own behalf.<sup>4</sup> The contractual grievance filing deadline is the result of a collectively

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<sup>3</sup>California State University (1984) PERB Decision No. 392-H.

<sup>4</sup>Inglewood Unified School District (1991) PERB Order No. Ad-222.

negotiated agreement between the parties. Thus, the District argues that:

The parties have divested PERB of jurisdiction in this matter by the terms and conditions of the collectively negotiated agreement. . . . PERB's jurisdiction . . . should [not] be extended by the failure of a party to act.

#### DISCUSSION

CSEA's futility argument is essentially a restatement of their arguments that failed before the Board agent. The Board agent addressed the futility argument thoroughly in the partial dismissal letter, yet CSEA now urges the Board to find "futility" by taking apart the jurisdictional statute and putting it back together in various creative ways, with no persuasive legal rationale for doing so.

For example, CSEA urges us to find futility because the District failed to waive the 10-day time limit; therefore, if CSEA were to request arbitration now, the District may raise the procedural defense of Untimeliness, which, according to CSEA, would amount to futility. CSEA acknowledges that since Lake Elsinore, PERB has held that the waiver or nonwaiver of procedural defenses to arbitration is irrelevant to the issue of deferral under EERA. However, in this appeal CSEA argues that rule should not apply whenever the contractual grievance time limit is shorter than the six-month limit selected by the Legislature as appropriate for unfair practice charges. Apparently under CSEA's proposal, regardless of the contractual

time limit, so long as a party files a grievance within six months, PERB could find futility and issue a complaint:

PERB should interpret the futility exception to the limitation on its jurisdiction so as to protect a party's right to a decision on the merits of a timely-filed unfair practice charge. [CSEA's appeal, p. 8.]

CSEA's argument, of course, conflicts with Eureka City School District (1988) PERB Decision No. 702, where the Board held that PERB has no authority to exercise its jurisdiction to issue a complaint until or unless the grievance process is exhausted or futility is demonstrated, irrespective of respondent employer's unwillingness to waive procedural defenses such as timeliness.

Furthermore, California case law directs courts to refrain from considering disputes until the parties to the dispute have exhausted internal remedies under the terms of their grievance agreement. For example, in Cone v. Union Oil Co. (1954) 129 Cal.App.2d 558 [277 P.2d 464], the Court of Appeal held that:

It is the general rule that a party to a collective bargaining contract which provides grievance and arbitration machinery for the settlement of disputes within the scope of such contract must exhaust these internal remedies before resorting to the courts in the absence of facts which would excuse him from pursuing such remedies. [Citations.] . . . Such procedures, which have been worked out and adopted by the parties themselves, must be pursued to their conclusion before judicial action may be instituted unless circumstances exist which would excuse the failure to follow through with the contract remedies. [Id. at pp. 563-564.]

That policy has been codified by EERA section 3541.5(a)(2)<sup>5</sup> and as early as 1982, in Chaffey Joint Union High School District (1982) PERB Decision No. 202, the Board held that:

EERA clearly indicates that the Legislature intended the grievance procedure to be a preferred method of settling job disputes and improving employment relations [Id. at p. 8, citing EERA section 3541.5(a)(2)].

Finally, expanding the Board's jurisdiction in the fashion urged by CSEA is beyond the Board's power. The jurisdictional statute directs the Board to defer its jurisdiction in accord with the grievance agreement of the parties and does not authorize the Board to substitute terms and conditions of the agreement. . CSEA's failure to exercise the grievance process in accord with the terms and conditions it agreed to may preclude further pursuit of the grievance process, including arbitration, but that does not create futility.

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<sup>5</sup>EERA section 3541.5 provides, in pertinent part:

(a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not . . . .

(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.

ORDER

The Board hereby AFFIRMS the Board agent's partial dismissal of the unfair practice charge in Case No. LA-CE-3473.

Chair Blair and Member Johnson joined in this Decision.

## PUBLIC EMPLOYMENT RELATIONS BOARD



L06 Angeles Regional Office  
3530 Wilshire Blvd., Suite 650  
Los Angeles, CA 90010-2334  
(213)736-3127

January 24, 1995

William C. Heath, Deputy Chief Counsel  
California School Employees Association  
2045 Lundy Avenue  
San Jose, California 95131

Re: PARTIAL DISMISSAL AND REFUSAL TO ISSUE COMPLAINT (DEFERRAL TO ARBITRATION), Unfair Practice Charge No. LA-CE-3473, California School Employees Association and its Desert Sands Chapter #106 v. Desert Sands Unified School District

Dear Mr. Heath:

In the above-referenced charge, the California School Employees Association and its Desert Sands Chapter #106 (CSEA or Association) alleges in part that the Desert Sands Unified School District (District) retaliated against Association President Bertha Bastidas (Bastidas). This conduct is alleged to violate Government Code sections 3543.5(a) and (b) of the Educational Employment Relations Act.

I indicated to you, in my attached letter dated January 12, 1995, that certain allegations contained in the above-referenced charge were 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. You were further advised that, unless you amended these allegations or withdrew them prior to January 19, 1995, they would be dismissed. This deadline was later extended.

On January 23, 1995, I received from you a Second Amended Charge. This amended charge specifically alleges that the District has not waived or extended the ten-day limit for filing a grievance. This fact, although it had not previously been specifically alleged, was noted in my January 12 letter.

In a letter accompanying the amended charge, you argue that resort to the grievance procedure is now futile, because the ten-day limit has passed and has not been waived. Since Lake Elsinore School District (1987) PERB Decision No. 646, however, PERB has held that the waiver or non-waiver of procedural defenses to arbitration is irrelevant to deferral under EERA. You argue that the parties cannot, by agreement, divest PERB of its jurisdiction, but this is not quite true. Under EERA section 3541.5(a), the parties can "divest" PERB of jurisdiction by

LA-CE-3473  
January 24, 1995  
Page 2

agreeing to a grievance procedure that covers the dispute and culminates in binding arbitration. What neither party can do is extend PERB's jurisdiction by the party's own inaction. (Lake Elsinore School District, supra: Eureka City School District (1987) PERB Decision No. 646.) CSEA's failure to file a grievance within the ten-day period thus does not give PERB jurisdiction which it otherwise would not have.

I am therefore dismissing those allegations which are subject to deferral to arbitration based on the facts and reasons contained in this letter and my January 12 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. (Cal. Code of Regs., tit. 8, sec. 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 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing. (Cal. Code of Regs., tit. 8, sec. 32135). Code of Civil Procedure section 1013 shall apply. 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 (20) calendar days following the date of service of the appeal. (Cal. Code of Regs., tit. 8, sec. 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 Cal. Code of Regs., tit. 8, sec. 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.



## PUBLIC EMPLOYMENT RELATIONS BOARD



Los Angeles Regional Office  
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(213)736-3127

January 12, 1995

William C. Heath, Deputy Chief Counsel  
California School Employees Association  
2045 Lundy Avenue  
San Jose, California 95131

Re: PARTIAL WARNING LETTER (DEFERRAL TO ARBITRATION), Unfair  
Practice Charge No. LA-CE-3473, California School Employees  
Association and its Desert Sands Chapter #106 v. Desert  
Sands Unified School District

Dear Mr. Heath:

In the above-referenced charge, the California School Employees Association and its Desert Sands Chapter #106 (CSEA or Association) alleges in part that the Desert Sands Unified School District (District) retaliated against Association President Bertha Bastidas (Bastidas). This conduct is alleged to violate Government Code sections 3543.5(a) and (b) of the Educational Employment Relations Act.

My investigation of this charge reveals the following relevant facts.

The charge alleges that during the spring of 1994 Bastidas, in her capacity as Association President, negotiated with the District concerning the approval of a charter school petition and opposed the District's unilateral approval of the petition. The charge further alleges that in retaliation, on April 20, 1994, District Food Services Manager Joy Woods ordered Bastidas to "refrain from contacting any employees during their work hours regarding C.S.E.A. issues."

There is a collective bargaining agreement in effect between the Association and the District for the term November 1, 1992, through October 31, 1995. Article IV ("Employee Rights") states in full as follows:

The District and the Association recognize the right of employees to participate in lawful employee organization activities and the equal alternative to refrain from participating in employee organization activities.

LA-CE-3473  
January 12, 1995  
Page 2

Article XXVI ("Grievance/Arbitration Procedure") provides for binding arbitration of grievances. The charge states that "resort to the grievance process, at this point, would be futile since the time limit for filing a grievance is ten days." This ten-day limit, established by Article XXVI, section C.2., has not been waived by the District.

Based on the facts stated above, the retaliation allegation must be deferred to arbitration and dismissed.

Section 3541.5(a) of the Educational Employment Relations Act states, in pertinent part, that PERB shall not:

Issue a complaint against conduct also prohibited by the provisions of the [collective bargaining agreement in effect] 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.

In Lake Elsinore School District (1987) PERB Decision No. 646, PERB held that this section established a jurisdictional rule requiring that a charge be dismissed and deferred if: (1) the grievance machinery of the agreement covers the matter at issue and culminates in binding arbitration; and, (2) the conduct complained of in the unfair practice charge is prohibited by the provisions of the agreement between the parties. PERB Regulation 32620(b)(5) (Cal. Code of Regs., tit. 8, sec. 32620(b)(5)) also requires the investigating Board agent to dismiss a charge where the allegations are properly deferred to binding arbitration.

These standards are met with respect to the retaliation allegation in this case. First, the grievance machinery of the agreement covers the dispute raised by the allegation and culminates in binding arbitration. Second, the conduct complained of in the allegation, that the District retaliated against Bastidas because of her lawful activities as Association President, is arguably prohibited by Article IV of the agreement.

In Eureka City School District (1988) PERB Decision No. 702, PERB rejected the argument that PERB has jurisdiction when arbitration is no longer available due to the charging party's inaction and/or the respondent's unwillingness to waive procedural defenses, such as time limits.

Accordingly, the retaliation allegation must be deferred to arbitration and will be dismissed. Such dismissal is without prejudice to the Charging Party's right, after arbitration, to

LA-CE-3473  
January 12, 1995  
Page 3

seek a repugnancy review by PERB of the arbitrator's decision under the Dry Creek criteria. (See PERB Reg. 32661 [Cal. Code of Regs., tit. 8, sec. 32661]; Los Angeles Unified School District (1982) PERB Decision No. 218; Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81a.)

If 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. The 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 filed with PERB. If I do not receive an amended charge or withdrawal from you before January 19, 1995, I shall dismiss the retaliation allegation without leave to amend. If you have any questions, please call me at (213) 736-3542.

Sincerely,

Thomas J. Allen  
Regional Attorney