STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

INGLEWOOD TEACHERS ASSOCIATION, CTA/NEA, Charging Party, v. INGLEWOOD UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-3021 Administrative Appeal PERB Order No. Ad-222 June 24, 1991

Appearances: California Teachers Association by Deborah S. Wagner, Attorney, for Inglewood Teachers Association, CTA/NEA; Littler, Mendelson, Fastiff & Tichy by Jaffe D. Dickerson, Attorney, for Inglewood Unified School District.

Before Hesse, Chairperson; Camilli and Carlyle, Members.

DECISION

CAMILLI, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Inglewood Unified School District (District) of a PERB administrative law judge's (ALJ) denial of its motion to dismiss the complaint of the Inglewood Teachers Association, CTA/NEA (Association) alleging a violation of the Educational Employment Relations Act (EERA) section 3543.5(a), (b) and (c).[1] The District's motion to

[1]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 reads, in pertinent part:

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

dismiss is based upon the grounds that: (1) the charge was not timely filed; and (2) the subject matter of the complaint is subject to binding arbitration under the parties' collective bargaining agreement (CBA or Agreement), and must be deferred to that process.

After careful review of the entire record in this matter, the Board finds dismissal of the complaint to be inappropriate, in accord with the discussion that follows.

PROCEDURAL BACKGROUND

Complaint

The complaint alleged that prior to May 18, 1990, the District's policy concerning evaluation procedures was governed by Article XV of the CBA which provides:

> a. "Unit members to be evaluated during a particular school year shall . . . [be] advised of the criteria upon which the evaluation is to be based . . . no later than October 31, of the year in which the evaluation is to take place." (Paragraph A, section 2.)
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> b. "The unit member being evaluated and the evaluator shall meet no later than October 31, to discuss and agree upon the objectives to be achieved during the evaluation period." (Paragraph A, section 3.)

> 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.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

> c. "Prior to the adoption and authorization of any forms relating to the evaluation procedure, the District [Respondent] shall afford the Association [Charging Party] notice and an opportunity to consult regarding the forms. Only adopted and authorized forms shall be used by the District." (Paragraph A, section 15.) (Complaint, p. 4.)

The complaint further alleged that on or about May 18, 1990, the District, through its agent Principal Arnold Butler (Butler), changed this policy by attaching a document entitled "Expected Teacher Behaviors and Performance Requirements" (ETBPR) to performance evaluations, without affording the Association an opportunity to negotiate the decision to implement the change in policy nor the effects thereof. This conduct is alleged to constitute a failure and refusal by the District to bargain in good faith, in violation of EERA section 3543.5(c). The Association further alleged that, by its conduct, the District denied the Association its right to represent unit members, in violation of EERA section 3543.5(b), and interfered with the rights of bargaining unit employees to be represented by the Association, in violation of EERA section 3543.5(a).[2]

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[2]By order dated October 30, 1990, PERB's chief ALJ issued a partial dismissal of paragraphs 3 through 18 of the complaint in this case, based upon charging party's withdrawal of that portion of the complaint. The withdrawn portions of the complaint alleged the District discriminated and interfered with the rights of unit members Janet Faison (Faison) and Cheryl Bell (Bell) under the Act, and also denied the charging party its right to represent unit members, in violation of EERA sections 3543.5(a) and (b), respectively.

Motion to Dismiss

The District contends the charge is untimely as the two complainants, Bell and Faison, had actual and constructive knowledge of the ETBPR in early September 1990, when they were presented with a copy of the document by Butler at a faculty meeting. Furthermore, Bell expressed her concerns about the document in a discussion with the District's Assistant Superintendent, Althea Jenkins, in September of 1989. The charge was filed on August 27, 1990, more than six months later.

In addition, the District urges the Board to defer this matter to binding arbitration under Lake Elsinore School District (1987) PERB Decision No. 646 (affd. nonpub. opn. Elsinore Valley Education Association, CTA/NEA v. PERB/Lake Elsinore School District (July 28, 1988) E005078, 4th Dist. Court of Appeal) (Lake Elsinore) because written performance requirements are contained in the employee evaluation procedures of Article XV of the CBA, and the grievance procedure of Article VII of the Agreement allows the Association to grieve in its own name and provides for binding arbitration.

Article XV of the CBA, entitled Evaluation Procedure reads, in pertinent part, as follows:

> 2. Probationary and temporary unit members shall be evaluated each school year. Permanent (tenured) unit members shall be evaluated at least every other school year. If a unit member is scheduled to be evaluated during a particular school year, but is granted a leave of absence for one (1)

> semester or longer, such evaluation shall take place during the first year of return to duty. Unit members to be evaluated during a particular school year shall receive in service regarding the evaluation procedures, advised of the criteria upon which the evaluation is to be based, and notified of the identity of their evaluator, if it is other than the unit members [sic] immediate supervisor, no later than October 31, of the year in which the evaluation is to take place.
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> . . . . . .
>
> 16. Any grievance arising under this Article shall be limited to a claim that the procedures set forth in this Article have been violated.

Article VII of the Agreement contains the grievance procedure. Level III of the procedure provides for final and binding arbitration. Article VII, section 5 defines grievant as follows:

> A grievant or an aggrieved person is any person(s) in the bargaining unit as defined in this Agreement. The Association may be the grievant on Association rights, Payroll Deductions, Negotiation Procedures and Zipper.

The Association opposed the District's motion on both grounds. Concerning the timeliness issue, the Association notes that while the District claims that both Faison and Bell had notice of the ETBPR, the charge in this case was filed by the Association in its own name on behalf of all teachers in the bargaining unit. Furthermore, the Association disputes the facts relied upon by the District in support of its motion, contending the District engaged in conduct expressing ambivalence regarding both the proposed use of the document and the date it would be

implemented. As a result, the Association contends its first indication that the District considered the ETBPR to be in effect was when copies of the document were attached to the final evaluation of both Bell and Faison after the end of the school year.

Regarding the deferral issue, the Association asserts two arguments in support of its claim that it is barred from filing a grievance in this matter. First, the Association contends that under the definition of grievant in Article VII, section 5 of the CBA (see p. 5, supra), it is restricted from filing a grievance as it is not a "person(s) in the bargaining unit as defined in this agreement." (Emphasis added.) In addition, this same section limits the right of the Association to grieve in its own name to matters concerning four specific Articles of the contract: Association Rights (Article XXII), Payroll Deductions (Article XVIII), Negotiations Procedures (Article XXIII), and Zipper (Article XXV).

The Association further argues that the subject matter of this dispute is not covered by the grievance machinery of the CBA based on Article XV, section 16 (see p. 5, supra), which states that grievances concerning evaluation procedures "shall be limited to a claim that the procedures set forth in this Article have been violated." The Association claims that the ETBPR is not part of the evaluation procedures, and therefore the subject matter of this dispute is not covered by the grievance machinery of the CBA.

Order Denying Motion to Dismiss

With regard to the timeliness issue, the ALJ found that the statute of limitations began to run from the date the Association knew or should have known of the alleged unilateral change. (Victor Valley Community College District (1986) PERB Decision No. 570.) In the present case, the parties dispute the facts from which one could determine the actual date that the Association knew about the document. However, it is well established that the facts alleged and presented by the Association must be regarded as true. (San Juan Unified School District (1977) EERB Decision No. 12.[3]) Based on the Association's allegations in its unfair practice charge, the ALJ found that the Association had until on or about November 18, 1990 to file its unfair practice charge. As the charge was filed on August 27, 1990, the ALJ deemed it to be timely.

Regarding the issue of deferral, the ALJ noted that Article XV, section 15 requires the District to consult with the Association "prior to the adoption and authorization of any forms relating to the evaluation procedure."[4] The ALJ determined the

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[3]Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board.

[4]Article XV, section 15 of the parties' CBA reads, in pertinent part:

> Prior to the adoption and authorization of any forms relating to the evaluation procedure, the District shall afford the Association notice and an opportunity to consult regarding the forms. Only adopted and authorized forms shall be used by the District. The current adopted and authorized

ETBPR is a form relating to the evaluation procedure because it relates to the "criteria upon which the [employee's] evaluation is to be based." (Article XV, section 2.) The ALJ concluded that implementation of the document without prior consultation with the Association is arguably prohibited by Article XV of the Agreement.

Concerning the Association's standing to utilize the grievance machinery of the Agreement, the ALJ found that although the Association has the right to file grievances in its own name under the grievance procedure of Article VII, this right is expressly limited to four Articles. As Article VII does not grant the Association the right to grieve Article XV, the ALJ found the Association is without the right to file a grievance under this section.

Appeal of Denial of Motion to Dismiss

The District appeals the ALJ's order denying the District's motion to dismiss and defer to arbitration. The District contends that the ALJ erred in: (1) determining that the subject matter of the charge was not covered by the binding arbitration procedures of Article VII of the Agreement; (2) ignoring the evidence of a consistent past practice that the Association was allowed to, and did, file grievances in its own name; (3) finding that deferral was not appropriate because the Agreement did not require either party to submit a dispute to arbitration; and (4) finding that the charge was timely because the Association had no

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forms are attached hereto as Appendix D.

notice that the ETBPR was "implemented" until after the end of the school year.

The Association opposes the District's appeal, and supports the ALJ's denial of the motion to dismiss. With regard to the deferral issue, the Association claims the matter at issue is not subject to the grievance procedure of the CBA. The Association claims that while the Agreement allows the Association to grieve in its own name, the right to grieve is limited to four distinct provisions of the Agreement. The Association also cites to the portion of the Agreement concerning evaluations, which mandates that only the procedural aspect of an evaluation is subject to the grievance machinery in support of its claim that the matter at issue is not subject to the grievance machinery, as it is not procedural in nature. Finally, the Association contends that the Board decisions in South Bay Union School District (1990) PERB Decision No. 791 and Chula Vista City School District (1990) PERB Decision No. 834 do not stand for the proposition that an Agreement by an Association to limit its right to file a grievance to specific contract provisions is unenforceable. Therefore, the Association argues it has no standing to file a grievance regarding the ETBPR.

Concerning the timeliness issue, the Association disputes the District's statement of the facts. The Association states it did not receive notice that the ETBPR had been implemented until after the end of the school year, when the documents were attached to Faison's and Bell's evaluations. Furthermore, the

Association argues that because a factual dispute exists, the matter at issue should not be determined without a full evidentiary hearing. (Saddleback Community College District (1984) PERB Decision No. 433.)

DISCUSSION

Timeliness of the Charge

PERB Regulation 32646 states:

> (a) If the respondent believes that issuance of the complaint is inappropriate either because the dispute is subject to final and binding arbitration, or because the charge is untimely, the respondent shall assert such a defense in its answer and may move to dismiss the complaint, specifying fully the legal and factual reasons for its motion. The motion and all accompanying documents shall be served on the charging party. The charging party may respond to the respondent's motion within 10 days after service or within a lesser period of time set by the Board agent. The Board agent shall inquire into the issues raised by the motion, and shall dismiss the complaint and charge if appropriate. If the Board agent sustains the motion, the dismissal may be appealed to the Board itself in accordance with section 32635.
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> (b) If the Board agent determines that the defenses raised by the respondent pursuant to section 32646(a) do not require dismissal of the complaint, the Board agent shall deny the respondent's motion, specifying the reasons for the denial. The Board agent's denial of respondent's motion to defer an unfair practice charge to final and binding arbitration may be appealed to the Board itself in accordance with the appeal procedures set forth in section 32635. (Emphasis added.)

Under PERB Regulation 32646, although a Board agent determination to sustain a motion to dismiss the complaint on the grounds of deferral to arbitration or untimeliness is appealable to the

Board itself, only a Board agent's decision to deny a motion to dismiss on the basis of deferral to arbitration is appealable to the Board itself. Conspicuously absent from PERB Regulation 32646 is a right of appeal to the Board itself from a denial of a motion to dismiss on the grounds of untimeliness. Statutes are to be given a reasonable and common sense interpretation consistent with the apparent intention of the lawmakers. (DeYoung v. City of San Diego (1983) 147 Cal.App.3d 11, 18 [194 Cal.Rptr. 722].) In addition, significance is to be attributed to every part of an act to achieve harmony in accord with the legislative purpose. (Id.) Reading PERB Regulation 32646 in a reasonable and common sense manner, giving meaning to every portion thereof, it is clear that a Board agent's denial of a motion to dismiss on the grounds of untimeliness, at this point in time (i.e., after a complaint has issued and before hearing), is not appealable to the Board itself.[5]

Because PERB Regulation 32646 does not allow for an appeal of a denial of a motion to dismiss on the basis of timeliness, the issue of timeliness is not properly before the Board, and will not be addressed herein.

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[5]The Board has previously held that the six-month time period for filing a charge is jurisdictional and nonwaivable. (California State University (San Diego) (1989) PERB Decision No. 718-H.) Therefore, a motion to dismiss on the ground of untimeliness may be raised during or after the evidentiary hearing.

Deferral to Arbitration

In determining whether a charge or portion thereof must be deferred to arbitration, the Board must initially ascertain whether the disputed issue is covered by the parties' contractual grievance procedures, and whether those procedures culminate in binding arbitration. (Lake Elsinore, p. 32; Los Angeles Unified School District (1990) PERB Decision No. 860, p. 3.) Although the Board has no authority to enforce a collective bargaining agreement, the Board does have the authority to interpret a contract to determine if an unfair practice has been committed. (Grant Joint Union High School District (1982) PERB Decision No. 196; California State University, Hayward (1991) PERB Decision No. 869-H, Proposed Decision, p. 30.)

The Board finds, as did the ALJ, that the ETBPR is a document relating to the "criteria upon which the evaluation is to be based" and that it is susceptible to an interpretation that it is a "form relating to the evaluation procedure." Article XV, section 15 of the CBA requires the District to consult with the Association regarding forms relating to the evaluation procedure in advance of their adoption and authorization. As a result, the District's failure to consult with the Association in this case is arguably prohibited by the parties' Agreement.

Even if the subject matter is subject to the grievance procedure, a matter is not covered by the grievance machinery of the CBA under the theory enunciated in Lake Elsinore unless the

Association has standing to grieve. (Inglewood Unified School District (1990) PERB Decision No. 821; Los Angeles Unified School District (1990) PERB Decision No. 803.) In this case, the Association claims that it has no standing to grieve a violation of Article XV of the CBA because its right to file a grievance in its own name is limited to four articles of the Agreement, and Article XV is not among them.

The Board has held that the exclusive representative has a statutory right to file grievances in its own name under EERA section 3543.1(a). (South Bay Union School District (1990) PERB Decision No. 791, affd. in South Bay Union School District v. Public Employment Relations Board (1991) 228 Cal.App.3d 502 (South Bay); Chula Vista City School District (1990) PERB Decision No. 834 (Chula Vista); Mt. Diablo Unified School District (1990) PERB Decision No. 844, app. pending (Mt Diablo).) The majority of the Board has not spoken regarding the issue of whether the exclusive representative's right to file a grievance in its own name is a waivable or nonwaivable statutory right. However, the concurring opinion in South Bay concluded that the Association's right to file a grievance in its own name is a nonwaivable statutory right.

The Court of Appeal affirmed the Board's decision in South Bay and referred to the Board's subsequent decisions in Chula Vista and Mt. Diablo, as well as the concurrence in South Bay. In discussing whether the Association's right to file a grievance is a statutory right, the court stated:

> The core reasoning of current PERB authority (illustrated by the concurring opinion in this case and the subsequent opinions in Chula Vista and Mt. Diablo) passes over the linguistic difficulties of section 3543.2, subdivision (a), however, relying instead on specific statutory authority which it finds, independent of section 3543.2, subdivision (a), to establish a nonnegotiable direct right of grievance filing in the Association. (South Bay Union School District v. Public Employment Relations Board, supra, at p. 508.)

The court's reference to "a nonnegotiable direct right of grievance filing in the Association" may indicate that, in addition to finding the Association's right to file a grievance in its own name is a statutory right, the court would find this right to be nonwaivable.

If the Association's right to file a grievance in its own name was determined to be a nonwaivable statutory right, then, despite the language in the CBA, the Association would have a statutory right to file a grievance in its own name. The Board could, therefore, determine that deferral to arbitration is appropriate. However, an arbitrator derives his authority from the provisions of the parties' Agreement, and the award is legitimate only to the extent it draws its essence from the CBA. The arbitrator does not have the authority to look outside of the CBA to grant the Association the right to grieve this matter. (Alexander v. Gardner-Denver Company (1974) 415 U.S. 36 [39 L.Ed. 2d 147, 94 S.Ct. 1011], Steelworkers v. Enterprise Wheel & Car Corp. (1960) 363 U.S. 593 [4 L.Ed. 2d 1424, 80 S.Ct. 1358]. As

the CBA in this case does not give the Association standing to grieve the subject matter at issue, an arbitration award determining this issue would be an award in excess of the scope of submission, and may be unenforceable. (Id.)

As a result, the Association's only forum for this matter is PERB. Denying the Association its right to allege a violation of EERA would be against EERA's purpose and policy to promote the improvement of personnel management and employer-employee relations within the public school systems and the State of California (EERA section 3540) and guarantee employee organizations the right to represent their members in their employment relations with public school employers (EERA section 3541.5(a)). Further, section 3541.5(a) provides "[a]ny employee, employee organization, or employer shall have the right to file an unfair practice charge . . ." Finally, section 3543.5(c) provides that it shall be unlawful for a public school employer to refuse or fail to meet and negotiate in good faith with an exclusive representative. If the Board were to dismiss and defer the complaint to arbitration, then the Association would be precluded from protecting its statutory rights under EERA. Thus, as the Association has no right to grieve Article XV under the provisions of the collective bargaining agreement, the conduct is not arguably covered under the CBA, and the complaint cannot be deferred to binding arbitration.

ORDER

The motion to dismiss and defer the complaint to binding arbitration is hereby DENIED.

Chairperson Hesse joined in this Decision.

Member Carlyle's concurrence begins at page 17.

Carlyle, Member, concurring: I agree with the result reached in this case. However, I believe that it is unnecessary for the Public Employment Relations Board (PERB or Board), in reaching this determination, to discuss South Bay Union School District v. Public Employment Relations Board (1991) 228 Cal.App.3d 502 for the proposition that a court may find the Inglewood Teachers Association, CTA/NEA's (Association) right to file a grievance in its own name to be a nonwaivable statutory right.

Whether or not an association's right to file a grievance in its own name is a waivable or nonwaivable statutory right was not before the court, nor before the Board, in this case. In either event, the arbitrator would not be in a position to render a decision as he/she would be restricted by the terms of the contract. Therefore, PERB is the only forum where the Association would have the fair opportunity of pursuing their rights under the Educational Employment Relations Act.