STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

FREMONT EDUCATION ASSOCIATION, CTA/NEA,	)	
Charging Party,	)	Case No. SF-CE-1557
v.	)	Request for Reconsideration PERB Order No. Ad-248
FREMONT UNION HIGH SCHOOL DISTRICT,	)	
Respondent.	)	PERB Order No. Ad-248a
	)	November 23, 1993

Appearances: California Teachers Association by Ramon E. Romero, Attorney, for Fremont Education Association, CTA/NEA; Zampi and Associates by Joseph P. Zampi and Gerald B. Determan, Attorneys, for Fremont Union High School District.

Before Blair, Chair; Hesse and Caffrey, Members.

DECISION

BLAIR, Chair; This case is before the Public Employment Relations Board (PERB or Board) on a request for reconsideration filed by the Fremont Unified School District (District) of the Board's decision in Fremont Union High School District (1993) PERB Order No. Ad-248 (Fremont). In that decision the Board denied the District's motion to dismiss the unfair practice complaint and defer the matter to arbitration under section 3541.5(a)(2) of the Educational Employment Relations Act (EERA).[1]

[1]EERA is codified at Government Code section 3540 et seq. Section 3541.5 states, 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 do either of the following:
>
> (2) Issue a complaint against conduct also prohibited by the provisions of the agreement

The District alleged that its collective bargaining agreement with the Fremont Education Association, CTA/NEA (Association) prohibits the conduct complained of in the Association's unfair practice charge and, consequently, the matter must be deferred to the arbitration process. In its request for reconsideration,[2] the District asserts that it discovered new evidence which was not previously available and which supports its position. We find that the alleged new evidence is not determinative in this case.

DISCUSSION

In Fremont, the Board determined that it was not appropriate to defer the Association's unfair practice charge to arbitration because the parties agreement does not prohibit the alleged unlawful conduct of employer discrimination against employees. The District argued that Article 1.2 and Article 2, sections 2.3 and 2.3.2 incorporated EERA into the parties' agreement[3] and

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> 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.

[2]The District also requested a stay of the hearing.

[3]The District cited Article 1.2 of the collective bargaining agreement which states:

> This Agreement is entered into pursuant to Chapter 10.7, Sections 3540 through 3549 of the Government Code.

because EERA prohibits an employer from discriminating against employees for engaging in protected activity, the subject matter of this unfair practice is covered by the contract.

The District now submits a grievance subsequently filed by the Association on September 3, 1993, concerning an alleged unilateral change as evidence that the Association agrees with the District's argument. Specifically, the District refers to the following statement in the Association's grievance:

> The District has failed to comply with its duty and responsibility to abide by the laws of the State of California in the area of collective bargaining. (Article 2, Subsection 2.3)

On this basis, the District asserts that since both parties to the agreement believe that it incorporates rights granted by EERA, the unfair practice charge which alleges a violation of EERA should be deferred to arbitration.

The grounds for requesting reconsideration are set forth in PERB Regulation 32410(a)[4] which states, in pertinent part:

> The grounds for requesting reconsideration are limited to claims that the decision of the Board itself contains prejudicial errors of fact, or newly discovered evidence or law which was not previously available and could not have been discovered with the exercise of reasonable diligence.

In addition, the District cited Article 2, sections 2.3 and 2.3.2 which states that the District's powers, rights, and authority to dismiss employees are "subject to the provisions of the law."

[4]PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

The District alleges that because the Association filed the grievance after the District's time had run for filing an appeal, this constitutes newly discovered evidence in accord with Regulation 32410. Although the grievance was not previously available to the District, it does not satisfy the requirements of Regulation 32410 as the statements in the grievance constitute the Association's statement of a legal opinion that the District violated state laws. A party's opinion about the legality of an act is not admissible evidence.[5] The District's characterization of a specific statement extracted from an Association grievance does not constitute new supporting evidence to justify its request for reconsideration.

The thrust of the District's argument is that the grievance demonstrates that both parties to the agreement (the District and the Association) interpret it as incorporating rights granted by EERA. Consequently, the District argues, PERB is in no position to find that the parties intended any other interpretation.

In Fremont, the Board found that "[t]he plain meaning of the provisions cited [Article 1.2 and Article 2, sections 2.3 and 2.3.2] require that the incorporation theory be rejected." The Association's statement in its September 3 grievance is not sufficient to alter the plain meaning of these contract

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[5]McCormick on Evidence (1972), p. 28, ". . . courts do not permit opinion on a question of law, . . ."

provisions. Based on the evidence presented, this charge is inappropriate for deferral to arbitration.[6]

ORDER

The request for reconsideration in Fremont Union High School District (1993) PERB Order No. Ad-248 and request for stay of the proceedings in Case No. SF-CE-1557 are DENIED.

Members Hesse and Caffrey joined in this Decision.

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[6]Member Hesse considered and addressed the newly discovered evidence in Fremont Union High School District (1993) PERB Order No. 248, concurring opinion, footnote 8, p. 17.