OVERRULED by Yuba City Unified School District (1995) PERB Decision No. 1095

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS CHAPTER #568,	)	
Charging Party,	)	Case No. LA-CE-2894
v.	)	PERB Decision No. 880
SAN DIEGO COUNTY OFFICE OF EDUCATION,	)	May 21, 1991
Respondent.	)	

Appearance: Littler, Mendelson, Fastiff & Tichy by William Wood Merrill, Attorney, for San Diego County Office of Education.

Before Hesse, Chairperson; Shank and Camilli, Members.

DECISION

CAMILLI, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the San Diego County Office of Education (County or COE) from a PERB administrative law judge's (ALJ) denial of its Motion to Dismiss the complaint based upon deferral to a prior arbitration award.

The California School Employees Association and its Chapter #568 (CSEA or Association) filed a charge on August 22, 1989, alleging violations of the Educational Employment Relations Act (EERA) section 3543.5(a) and (b).[1] A complaint was issued on

[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(a) and (b) state:

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

June 1, 1990, alleging COE violated EERA section 3543.5(a) and (b) by changing the shift of six employees (night custodians) because of their attempt to receive a shift differential payment under the parties' collective bargaining agreement (CBA or Agreement).[2] On June 19, 1990, the County filed its answer, and alleged as an affirmative defense that the unfair practice charge was improperly before PERB because all allegations contained therein were a matter of contract interpretation and charging

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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 guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
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> (b) Deny to employee organizations rights guaranteed to them by this chapter.

CSEA originally alleged a violation of section 3543.5(c), but on June 1, 1990, the Los Angeles Regional Office of PERB received a letter from CSEA which, although it was called a first amended charge, expressed a desire to withdraw, without prejudice, the allegation of a violation of section 3543.5(c).

[2]It is alleged that the Association asserted the employees' right to receive a shift differential under the newly negotiated Article 15.2.2 of the CBA, which reads:

> Notwithstanding section 15.2.1 above, when at least 1/2 of an employee's regularly assigned work shift is between 9 p.m. and 6 a.m. inclusive, he shall receive a shift differential of seven and one-half percent (7 1/2%) in addition to his hourly rate of pay for the entire shift.

It is further alleged that COE, in retaliation for this protected activity, and in violation of EERA sections 3543.5(a) and (b), subsequently changed the employees' shift such that the employees would not be entitled to a shift differential under the agreement.

party had failed to exhaust its contractual remedies. On that same day, COE also filed a motion to dismiss under EERA section 3541.5[3] and PERB Regulation 32646.[4] In the motion to dismiss,

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[3]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:
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> (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.

[4]PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB Regulation 32646 states, in pertinent part:

> (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.
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> (b) If the Board agent determines that the defenses raised by the respondent pursuant to

the County argued that the charge should be deferred to arbitration as all allegations contained therein are subject to final and binding arbitration under the parties' CBA. A grievance was alleged to be currently pending on these matters.

On August 29, 1990, the ALJ issued an order denying respondent's motion to dismiss complaint. On September 12, 1990, COE filed an appeal of the ALJ's order denying its motion, a request for a stay of the hearing and a request for an expedited appeal. In its appeal, the County stated, for the first time, that an arbitration award had been issued on August 24, 1990. Until this appeal, the ALJ was unaware of the issuance of the arbitration award.

On September 12, 1990, with the appeal, the County filed a motion for reconsideration of the order denying motion to dismiss and a request for continuance of the hearing. On September 14, 1990, the ALJ issued an Order denying the County's motion and its request for a continuance of the hearing.

On September 14, 1990, COE filed with the Board itself a motion for prehearing determination that collateral estoppel applies to the prior arbitration award and also a request for continuance of hearing. On September 18, 1990, the Board, on its

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> 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.

own motion, ordered a stay of the hearing pending resolution of this appeal. (San Diego County Office of Education (1990) PERB Order No. Ad-213.)

The ALJ's orders and the parties' papers, both in support of and in opposition to the motion, analyzed this case as a pre-arbitration deferral matter. The ALJ issued two orders, utilizing a pre-arbitration analysis in both. In the order denying respondent's motion to dismiss complaint, the ALJ concluded that the section (b) violation was not deferrable, as the parties' Agreement neither prohibited the conduct alleged to deny the Association's right to represent its members nor allowed the Association to enforce its own contractual rights by filing a grievance. (State of California (Department of Parks and Recreation) (1990) PERB Decision Nos. 810-S and 810a-S (Parks and Recreation); State of California (California Department of Forestry and Fire Protection) (1989) PERB Decision Nos. 734-S and 734a-S (Forestry and Fire Protection); Temple City Unified School District (1989) PERB Decision No. 782; Temple City Unified School District (1989) PERB Order No. Ad-190.)

The ALJ found that the (a) violation was not deferrable because the Association could not assert the bargaining unit members' protected rights by filing a grievance. The ALJ's analysis of the (a) violation takes into account the fact that the grievance, although it asserted the rights of individual employees, was filed in the name of the Association. The ALJ rejected COE's argument that, under South Bay Union School

District (1990) PERB Decision No. 791, affirmed sub nom., South Bay Union School District v. Public Employment Relations Board (1991) 228 Cal.App.3d 502 [___ Cal.Rptr.___]; and Chula Vista City School District (1990) PERB Decision No. 834, employee organizations have a statutory right to file grievances in their own name notwithstanding contractual language. The ALJ distinguished those cases on the basis that: (1) both cases determined only that the employer's insistence to impasse on a proposal rejecting the exclusive representative's right to file a grievance in its own name, a non-mandatory subject of bargaining, violated EERA section 3543.5(c); and (2) neither case presented the question of deferral of an exclusive representative's charge that retaliation conduct violated employee rights. In addition, the ALJ questioned whether the arbitrator had the power to go outside the contract and rely on the Association's statutory right to file the grievance in its own name as asserting bargaining unit employees' rights to be free from reprisals under EERA section 3543.5(a).

In the order denying respondent's motion for reconsideration, the ALJ responded to the arbitration award, but nonetheless utilized pre-arbitration deferral cases and concepts to analyze the issues. Preliminarily, the ALJ noted that the arbitrator, in finding the employer's conduct did not constitute a reprisal, failed to cite or rely upon section 27.2 of the CBA, entitled "Nondiscrimination." This provision prohibits a broad range of discrimination, including discrimination against

bargaining unit members for participation in legal Association activities.[5]

As concerned the (a) violation, the ALJ found that although the award discussed the issue of reprisal against the employees and concluded that there was no violation, the arbitrator did not discuss the issue of the employees' assertion of their rights through the Association such as is alleged in the complaint before PERB. Furthermore, the award did not contain an analysis of CSEA's right to assert the rights of its members to the statutory protections of EERA section 3543.5(a). The ALJ concluded that the conduct alleged in the complaint is neither prohibited by the Agreement nor a matter covered by the grievance machinery of the CBA, and therefore dismissed the motion.

As concerned the (b) violation, the ALJ found that the allegation that COE denied the Association's representational rights is not deferrable because the Agreement does not prohibit the alleged conduct (i.e., the denial of the Association's right

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[5]Section 27.2 states:

> The Office and the CSEA agree that the provisions of this Agreement shall apply to all members of the bargaining unit without discrimination, and in carrying out their respective obligations under this Agreement, neither party will discriminate against any employee because of such individual's race, color, national origin, ancestry, religion, socioeconomic status, marital status, or membership in legally constituted organizations, sex (including sexual harassment), handicap or age, or participation or non-participation in legitimate Union activities.
> (Emphasis added.)

to represent its members). The ALJ based her conclusion on the following facts: (1) the Association cannot enforce its own contractual rights through the grievance procedure; (2) the "Association rights" section of the collective bargaining agreement (Article IV) does not address protected employee rights; and (3) the nondiscrimination section of the collective bargaining agreement applies only to employees. The ALJ stated that the Board has deferred a section (a) charge alone where the contract prohibits only the violation of employee rights and not those of the Association. (Parks and Recreation; Forestry and Fire Protection.)

Based upon a review of the entire record, the Board hereby reverses the ALJ's orders on both motions for the reasons set forth below.

DISCUSSION

Where an arbitration award has issued which covers a matter at issue in a complaint before PERB, the determination as to whether the complaint should be dismissed in whole or in part should be based upon a post-arbitration repugnancy analysis as opposed to a pre-arbitration deferral analysis. Under section 3541.5(a)(2) of EERA,[6] where an arbitration award has been reached pursuant to the grievance machinery of the parties' CBA, the Board's jurisdiction to review such award is "solely for the purpose of determining whether it is repugnant to the purposes of this chapter." Furthermore, the Board's jurisdiction in this

[6]See footnote 3, supra.

regard is discretionary, as opposed to the mandatory jurisdictional requirement concerning pre-arbitration deferral matters. (EERA sec. 3541.5(a)(2), supra.) In Lake Elsinore School District (1987) PERB Decision No. 646, (July 28, 1988, affd. nonpub. opn., 4th Dist. Court of Appeal) (Lake Elsinore) the Board stated:

> In reading section 3541.5 as a whole, while the first proviso is intended to operate as a jurisdictional limitation on the Board's authority to issue a complaint where the matter is covered by the parties' grievance procedures and binding arbitration, the statute goes on to vest the Board with discretionary jurisdiction to (1) review such arbitration and settlement awards for repugnancy and (2), if the Board finds repugnancy, to issue a complaint. (Lake Elsinore, supra, PERB Decision No. 646, at pp. 25-26.)

In accord with the above, the first determination in a case such as this should be whether the arbitration award covers the matter at issue. If so, the Board must utilize a post-arbitration repugnancy analysis to determine whether, in its discretion, the Board should exercise jurisdiction.

1. Alleged violation of EERA section 3543.5(a).

In Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81a, the Board adopted the standard enunciated by the National Labor Relations Board (NLRB) in the cases of Spielberg Manufacturing Company (1955) 112 NLRB 1080 [36 LRRM 1152] (Spielberg) and Collyer Insulated Wire (1971) 192 NLRB 837 [77 LRRM 1931] (Collyer) for post-arbitration deferral. The

Spielberg/Collyer standards for determining whether deferral should apply are as follows:

> 1. The matters raised in the unfair practice charge must have been presented to and considered by the arbitrator;
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> 2. The arbitral proceedings must have been fair and regular;
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> 3. All parties to the arbitration proceedings must have agreed to be bound by the arbitral award; and
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> 4. The award must not be repugnant to the National Labor Relations Act, as interpreted by the NLRB.
> (Dry Creek Joint Elementary School District, supra, p. 4.)

In Olin Corporation (1984) 268 NLRB 573 [115 LRRM 1056] (Olin), the NLRB stated: "It hardly needs repeating that national policy strongly favors the voluntary arbitration of disputes." (Olin, supra, p. 574.)[7] The NLRB then stated:

> . . . we adopt the following standard for deferral to arbitration awards. We would find that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. [Fn. omitted.] In this respect, differences, if any, between the contractual and statutory standards of review should be weighed by the Board as part of its determination under the Spielberg standards of whether an award is "clearly repugnant" to the Act. . . . Unless the award is "palpably

[7]See also the U.S. Supreme Court cases referred to as "the Steelworkers Trilogy," Steelworkers v. American Manufacturing Company (1960) 363 U.S. 564 [46 LRRM 2414]; Steelworkers v. Warrior and Gulf Navigation Company (1960) 363 U.S. 574 [46 LRRM 2416; Steelworkers v. Enterprise Wheel and Car Corporation (1960) 363 U.S. 593 [46 LRRM 2423].

> wrong," [Fn. omitted.] i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, we will defer.
> (Id., p. 574.)

The NLRB further stated that it:

> . . . would require that the party seeking to have the Board [NLRB] reject deferral and consider the merits of a given case show that the above standards for deferral have not been met. Thus, the party seeking to have the Board [NLRB] ignore the determination of an arbitrator has the burden of affirmatively demonstrating the defects in the arbitral process or award. [Fn. omitted.][8]
> (Id., p. 574.)

To determine whether the arbitration award meets the standards enunciated in Spielberg and Olin, we must first look to the award. The facts at issue in the arbitration were as follows. Six custodians asserted that the County violated the CBA when it changed their shift to begin one hour earlier in order to avoid having to pay a shift differential required under the Agreement. The County became aware of the asserted applicability of the contractual provisions only when the employees sought to enforce their rights under the contract to receive the shift differential payment. It was claimed that the COE was "guilty of failing to negotiate in good faith and imposing reprisals and discriminating against the custodians for gaining a night shift differential." It was further claimed the County "changed the custodians' hours to deny them wage, hour and

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[8]In determining the appropriate burden of proof, the NLRB overruled its previous decision in Suburban Motor Freight (1980) 247 NLRB 146 [103 LRRM 1113].

working conditions acquired during negotiations." The grievance also stated that "the nexus" between the negotiations and the County's actions was well established.

The arbitrator stated the pertinent issues before him as follows:

> . . . did the County Office/Employer violate Articles I, II, VIII, X or XV of the collective bargaining agreement?
>
> If so, what is the appropriate remedy?[9]

The arbitrator characterized the Association's position as claiming that the employer violated the collective bargaining agreement by failing to negotiate in good faith and imposing reprisals against the grievants for asserting their contract rights.

The arbitration award states, in pertinent part:

> While I did not find as very persuasive the Employer's arguments that the decision to change the hours was based upon earlier considerations or of other business conditions nevertheless I do not agree that because the hours were changed as a result of the demand for shift differential that this constituted a violation of the Agreement. To the contrary, as articulated by the Employer, I found persuasive that the decision to change the hours was predicated on the basis of economics, i.e. to save money.
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> . . . the complaints and grievances by the custodians brought to light an additional economic liability which had not been contemplated by either party under this agreement.

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[9]The cited provisions of the Agreement concern the following: Art. I, Agreement; Art. II, Recognition; Art. VIII, Transfer/Reassignment; Art. X, Hours of Employment; Art. XV, Salary.

> . . . the evidence does demonstrate that there was a legitimate budgetary concern, as a result of the unintended result of this language, and also the absence of any other intent by the Employer to have retaliated against these individuals seeking their benefits. On this record I am satisfied that the change was made, not as a form of reprisal or punishment but rather by an attempt by the Employer to reduce the unexpected additional cost of the 2.5% extra shift differential. Since this was an unintended result of the negotiated language, as acknowledged by the Union witnesses also, I could not find that the Employer's actions constituted improper action on its part or more particularly a violation of the collective bargaining agreement. Simply put, the Employer consistent with its obligations under Article X, gave the requisite notice and then made the change in the schedule.

Under the standards set forth in Spielberg and Olin, the Board finds that the issue decided in the arbitration award is factually parallel to the unfair labor practice issue before us.[10] In the arbitration award, the arbitrator stated the issue, in part, to be whether the County imposed reprisals and discriminated against the custodians for attempting to gain a night shift differential. The arbitrator found that the County's actions did not constitute a reprisal, but, rather, were in keeping with its rights and obligations under the parties' CBA.

We note that section 27.2 of the Agreement, prohibiting discrimination, was not cited in the grievance or the arbitration award as one of the sections alleged to be violated.

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[10]We note that no party contends that the arbitration proceedings were not fair and regular, or that the parties did not agree to be bound by the award.

Nonetheless, the Board finds that the issue decided by the arbitrator is factually parallel to the unfair labor practice alleged in the complaint.

In Teledyne Industries, Inc. (1990) 300 NLRB No. 99 [___ LRRM ___], the NLRB addressed a case similar to the case currently before the Board. In Teledyne Industries, Inc., supra, the NLRB rejected the NLRB judge's determination that the arbitration award was repugnant to the purposes of the National Labor Relations Act (NLRA). In that case, the arbitrator found persuasive the employer's response to the claim of reprisal/discrimination. The employer claimed that the employee was insubordinate and had broken work rules and was discharged for that reason and not because of his union activities. The NLRB judge refused to defer to the arbitration award, stating that the arbitrator had not been presented with an issue under the NLRA and therefore the issues were not parallel. The judge also determined that the arbitrator had decided significantly different issues because he was never asked to review the employee's discharge in light of the nondiscrimination clause under the applicable contract.[11]

In that case, the NLRB found that the contractual issue was factually parallel to the unfair labor practice issue. The factual questions the arbitrator decided were: (1) whether the verbal warning issued to the employee, which precipitated the

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[11]The applicable contract provision was a general nondiscrimination clause very similar to the one at issue in the case before us. (See fn. 4, supra.)

conference room "disciplinary" meeting, was proper; and (2) whether and to what degree the employee's insubordinate conduct during the meeting warranted his discharge. The NLRB found:

> . . . the factual questions considered by the arbitrator are virtually coextensive with those that would be considered by the Board [NLRB] in a decision on the statutory question regardless of whether the General Counsel's theory of the violation was that Goodwin's discipline was motivated by his assertedly protected union conduct at the toolshed with Jones or during the conference room meeting, or by his status as a union steward.
> (Teledyne Industries, supra, p. 7.)

The case before us is strikingly similar to that of Teledyne Industries, Inc., supra. In the present case, the County responded to the allegation of discrimination by stating that the alleged adverse action (i.e., changing the custodians' shifts) was not a violation of the contract, but was in accord with the parties' Agreement, and, was not motivated by discrimination. The ALJ in this case accepted the employer's version of the facts as true, as did the NLRB judge in the Teledyne case, and therefore found there was no violation of the contract.

Under the standards enunciated in Novato Unified School District (1982) PERB Decision No. 210 (Novato), the elements which must be proven in a discrimination action are: (1) that the employee engaged in protected activity; (2) that the employer had knowledge of such participation; (3) that the employer took adverse action against the employee; and (4) that the action was motivated, or would not have been taken, but for the protected activity.

The arbitrator's determination, which credited the County's justification for its action, took into consideration the same factual issues which the Board would consider under a Novato analysis. Therefore, the Board finds that the issues decided by the arbitration award are factually parallel to the allegations of the complaint.

The Board further finds that the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice charge. The evidence relevant to the contract violation alleged in the arbitration, including evidence of the County's justification for its action, is the same evidence which would be relevant to a claim of discrimination/reprisal before PERB.

Furthermore, the Board cannot find, based upon the entire record before us, that the award is "palpably wrong" i.e., that the arbitrator's decision is "not susceptible to an interpretation consistent with the Act." (Olin, supra, p. 574.) Accordingly, the Board finds that the arbitration award is not repugnant to EERA, and, therefore, defers to the award, and affirms the dismissal of the charged violation of EERA section 3543.5(a).

2. Alleged violation of EERA section 3543.5(b).

The allegation of a violation of section 3543.5(b) was not raised before the arbitrator nor decided in the arbitration award. Although the arbitration award refers to the "Association's position," there was no evidence taken, nor determination made, concerning the alleged violation of the

Association's right to represent its members under EERA section 3543.5(b). Thus, with respect to the EERA section 3543.5(b) allegation, a pre-arbitration analysis applies.

In the pre-arbitration deferral cases of Forestry and Fire Protection and Parks and Recreation, the Board held:

> . . . where conduct allegedly violates both employee and employee organization rights, and the parties' collective bargaining agreement only prohibits the violation of employee rights, only the employee charge should be deferred.
> (Parks and Recreation, supra, p. 6, citing Forestry and Fire Protection, supra.)

The analysis applied by the majority in Parks and Recreation is instructive for purposes of determining the propriety of deferring the 3543.5(a) charge while remanding the (b) charge to an ALJ for hearing. In that case, the CBA defined "grievance" to include a dispute between the Association and the State "involving the interpretation, application, or enforcement of the express terms of this Contract." (Emphasis added.) While the CBA did contain express terms incorporating, in essence, the employee rights guaranteed by section 3519(a) of the Ralph C. Dills Act (Dills Act),[12] the CBA did not incorporate the language

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[12]Ralph C. Dills Act is codified at Government Code section 3512 et seq. In Parks and Recreation, the parties' Memorandum of Understanding, section 2.6, provided:

> The state and CAUSE shall not impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees or otherwise interfere with, restrain or coerce employees because of the exercise of their rights under the Ralph C. Dills Act or any right given by this contract.

of the Dills Act section 3519(b), making it unlawful for the state to deny rights to employee organizations. Thus, the right the Association was asserting before PERB under section 3519(b) of the Dills Act (the right to be free from interference in representing its members at investigatory interviews) was not specifically grievable by the Association under the CBA. Consequently, while the section 3519(a) charge was properly deferrable, the requirement for deferral that the "grievance machinery of the agreement . . . cover the matter at issue" was not satisfied in Parks and Recreation with regard to the 3519.5(b) charge. The fact that the same facts gave rise to both the 3543.5(a) and (b) violations did not compel a result that both charges should have been deferred in Parks and Recreation. The conduct underlying the (a) violation was a denial of the employee's right to have a representative at an investigatory interview; the grievance procedure in the CBA was specifically available to the employee to remedy that interference with an employee right. The conduct underlying the (b) violation was the denial of the Association's right to represent the employee at an investigatory interview; the grievance procedure was not specifically available to the Association to remedy a denial of that right.

In the instant case, the charged violation of Association rights was based on the fact that the alleged reprisals against member employees followed the Association's attempt to enforce a contractual provision. The CBA does not provide the Association

with access to binding arbitration to litigate the Association's protected right to represent its members. (Dills Act, section 3515.5; EERA, section 3543.1.)

Since, in this case, the arbitration award covers only the (a) allegation, and does not concern the (b) allegation, and the contract does not provide the Association with a remedy for the alleged violation of its own rights, the Board will not defer the (b) allegation, but will remand to the Chief ALJ to allow for a hearing on the (b) violation.

CONCLUSION

As to the alleged violation of EERA section 3543.5(a), because the Board finds that the arbitration award covers the matter at issue and is not repugnant to the purposes of the EERA, the Board will defer to the arbitration award.

As concerns the alleged violation of EERA section 3543.5(b), the Board finds that this issue was not raised and decided by the arbitration award. Furthermore, the Board has held that where conduct is alleged to violate both employee and employee organization rights, and the parties' collective bargaining agreement covers only employee rights, only the allegation concerning employee rights is deferred to arbitration. Therefore, the Board will not defer to the arbitration award nor dismiss the alleged violation of EERA section 3543.5(b).

ORDER

The motion to dismiss as to the alleged violation of EERA section 3543.5(a) is GRANTED. As to the alleged violation of

EERA section 3543.5(b), the motion to dismiss is DENIED, and the case is REMANDED to the Chief Administrative Law Judge to proceed to a hearing in accord with PERB rules and regulations.

Member Shank joined in this Decision.

Chairperson Hesse's concurrence begins on page 21.

Hesse, Chairperson, concurring: While I agree with the majority's analysis and conclusion regarding the alleged violation of section 3543.5(a) of the Educational Employment Relations Act (EERA or Act)[1], I write separately to express my reasons for refusing to defer the alleged violation of section 3543.5(b).

As stated by the majority, the alleged violation of section 3543.5(b) was not raised or considered in the arbitration. Accordingly, this alleged violation is properly remanded to the Chief Administrative Law Judge (Chief ALJ) to proceed to a hearing. However, the Public Employment Relations Board's (PERB or Board) deferral of the alleged section 3543.5(a) violation and remand of the alleged section 3543.5(b) violation raises an important issue.

The Board must resolve the dilemma of multiple forums where the alleged violation of section 3543.5(a) should be dismissed and deferred to arbitration, while the alleged violation of section 3543.5(b) should be heard by PERB. Presently, there are two PERB cases involving this same issue in a pre-arbitration deferral situation. In State of California (California Department of Forestry and Fire Protection) (1989) PERB Decision No. 734-S (Forestry and Fire Protection), the Board dismissed the alleged violation of section 3519(a) of the Ralph C. Dills Act

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

(Dills Act)[2], and ordered the General Counsel to issue a complaint alleging a violation of section 3519(b) of the Dills Act. However, in Forestry and Fire Protection, the Board was confronted with two employer statements which allegedly interfered with the employees' rights and employee organization's rights. The Board found one of the alleged statements was directed toward the employee organization and, therefore, stated a prima facie case of interference with the employee organization's rights in violation of section 3519(b) of the Dills Act. With regard to the alleged violation of section 3519(a) of the Dills Act, the Board found that the other statement interfered with the employees' rights. As the collective bargaining agreement covered the dispute raised by this allegation, and culminated in binding arbitration, the Board dismissed and deferred this allegation to arbitration.

In State of California (Department of Parks and Recreation) (1990) PERB Decision No. 810-S (Parks and Recreation), the Board dismissed the alleged violation of section 3519(a), and ordered the General Counsel to issue a complaint on the alleged violation of section 3519(b). In Parks and Recreation, the unfair practice charge alleged that the Department of Parks and Recreation (Department) violated section 3519(a) and (b) of the Dills Act by denying one of its members the right to representation at a meeting with a department superintendent. Pursuant to Lake

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[2]Ralph C. Dills Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

Elsinore School District (1987) PERB Decision No. 646 and Forestry and Fire Protection, the Board held "where conduct allegedly violates both employee and employee organization rights, and the parties' collective bargaining agreement only prohibits the violation of employee rights, only the employee charge should be deferred."

In State of California (Department of Parks and Recreation) (1990) PERB Decision No. 810a-S, the Department requested reconsideration of PERB Decision No. 810-S. As the request did not claim that the Board's decision contained prejudicial errors of fact or newly discovered evidence or law, the Board denied the request for reconsideration. However, I wrote a dissent to PERB Decision No. 810a-S. In my dissent, I found that the Board agent properly dismissed and deferred to arbitration, the allegations that the Department violated section 3519(a) and (b) of the Dills Act by denying representation at an investigatory interview. Pursuant to Lake Elsinore School District, supra, PERB Decision No. 646, I concluded that the alleged conduct (the Department's denial of representation at an investigatory interview) was arguably prohibited by the parties' collective bargaining agreement, which had a grievance procedure culminating in binding arbitration.[3] I concluded the fact that the same conduct may constitute a violation of section 3519(b), in addition to section 3519(a), cannot be used to defeat the jurisdictional bar of

[3]The collective bargaining agreement also included a provision defining the exclusive representative as a grievant.

section 3514.5(a)(2). As the same conduct was alleged to violate section 3519(a) and (b) of the Dills Act, the Board's issuance of a complaint alleging a violation of section 3519(b) was contrary to the mandatory language of section 3514.5(a)(2) of the Dills Act and contrary to the Board's holding in Lake Elsinore School District, supra, PERB Decision No. 646. In essence, the Board issued a complaint against conduct arguably prohibited by the collective bargaining agreement.

Finally, I also distinguished Parks and Recreation from the Board's decision in Forestry and Fire Protection. In Forestry and Fire Protection, the Board was confronted with two alleged employer statements. One statement allegedly interfered with the employees' rights, while another statement allegedly interfered with the employee organization's rights. With regard to the alleged statement directed toward the employee organization, the Board found the allegation constituted a prima facie case of interference with the employee organization's rights in violation of section 3519(b) of the Dills Act. The Board dismissed the alleged statement directed toward the employees' rights as this conduct was arguably prohibited by the parties' collective bargaining agreement. Thus, unlike Parks and Recreation, the Board did not find the same conduct was arguably prohibited by the parties' collective bargaining agreement and also constituted a prima facie violation of the Dills Act.

Unlike pre-arbitration deferral, where deferral is mandatory, the present case involves post-arbitration deferral

where the Board has discretionary jurisdiction. (See EERA section 3541.5(a) and Lake Elsinore School District, supra, PERB Decision No. 646, pp. 25-26.) Although the arbitration and the PERB proceeding may involve the same conduct, the issues are different. The arbitration involved reprisal/discrimination against the employees, while the PERB hearing will involve interference with the employee organization's rights. Further, the California School Employees Association and its Chapter #568's (Association) only forum is PERB. As the collective bargaining agreement did not provide the Association with the right to grieve, the arbitrator did not adequately consider the allegations in the unfair practice charge.[4] Denying the Association its right to allege a violation of section

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[4]One could argue that since the Association has a statutory right to grieve, the Association has an additional forum under the collective bargaining agreement. In a pre-arbitration deferral case, this argument could result in deferral if the conduct was arguably prohibited by the collective bargaining agreement. However, many, if not all, arbitrators would refrain from entertaining the exclusive representative's grievance where such grievances were not included in the collective bargaining agreements. If an arbitrator did entertain such a grievance, the arbitrator would be acting in excess of his authority. (See San Jose Federation etc. Teachers v. Superior Court (1982) 132 Cal.App.3d 861, 865 [183 Cal.Rptr. 410]; Shulman, Reason, Contract, and Law in Labor Relations (1955) 68 Harvard Law Review 99, 1016; Elkouri & Elkouri, How Arbitration Works (4th ed. 1985) pp. 373-375.)

In a post-arbitration deferral case, the Board has discretionary jurisdiction to review the arbitration award to determine whether it is repugnant to the purposes of EERA. In the present case, the Association did not file the grievance and was not a party to the arbitration. As the Association's rights were not considered by the arbitrator, I would not defer the Association's allegations that the San Diego County Office of Education violated section 3543.5(b).

3543.5(b) of EERA would be against the EERA's purpose and policy to promote the improvement of personnel management and employer-employee relations within the public school systems in 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 provides, in pertinent part: "[i]t shall be unlawful for a public school employer to . . . [d]eny to employee organizations rights guaranteed to them by this chapter." If the Board were to dismiss and defer the entire unfair practice charge to arbitration, then the Association would be precluded from protecting its statutory rights under EERA. Thus, even though the PERB proceedings on the alleged violation of section 3543.5(b) may involve the same conduct as the arbitration (i.e., alleged violation of section 3543.5(a)), I find it would better serve the policies and purposes of EERA to split the (a) and (b) allegations and allow the Association to proceed on its alleged violation of section 3543.5(b) than deny the Association its only forum to protect its statutory rights.

In conducting the PERB hearing, I would suggest that the parties be required to introduce the transcripts from the arbitration hearing into the PERB record. If the transcripts are available, then the administrative law judge (ALJ) or hearing

officer would allow the parties to present witnesses and introduce evidence to supplement the arbitration transcripts in order to establish the alleged violation of section 3543.5(b). Such a requirement would promote judicial economy. In order to determine whether any supplemental witnesses or evidence is necessary, the ALJ or hearing officer should have the opportunity to review the arbitration transcripts before the formal hearing.[5] The Chief ALJ or ALJ could require the parties to submit a copy of the arbitration transcripts at the informal hearing (settlement conference). If the transcripts are unavailable, then the ALJ or hearing officer would allow the parties to litigate the alleged violation of section 3543.5(b) in its entirety. Even if some duplication or waste of resources occurred by conducting both an arbitration and PERB hearing, I believe it is PERB's ultimate responsibility to administer the EERA. If PERB were to allow the alleged (b) violation to effectively disappear, then PERB would be derelict in its duties and responsibilities under EERA.

Additionally, I would find that PERB is not bound by the arbitration decision.[6] In the past, the Board held the

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[5]This procedure was successfully utilized by the ALJ and parties in Regents of the University of California (Einheber) (1991) PERB Decision No. 872-H.

[6]The doctrine of collateral estoppel precludes a party to an action from relitigating in a second proceeding, matters litigated and decided in a prior proceeding. Generally, collateral estoppel effect will be granted to an administrative decision where it was made by an agency (1) acting in a judicial capacity, (2) to resolve properly raised disputed issues of fact where (3) the parties had a full opportunity to litigate those

(b) violation was the "derivative" of the (a) violation in cases involving allegations of (a) and (b) violations. (See North Sacramento School District (1982) PERB Decision No. 264.) This practice has been discontinued. Rather, the two violations are independent. (The Regents of the University of California (California Nurses Association) (1989) PERB Decision No. 722-H, p. 10; Santa Paula School District (1985) PERB Decision No. 505, pp. 52-54; see also Novato Unified School District (1982) PERB Decision No. 210, p. 21 and Coast Community College District (1982) PERB Decision No. 251, pp. 19-24.) Therefore, the fact the arbitrator found the employer did not engage in any reprisal or discrimination against the employees does not necessarily mean the Board will dismiss the alleged (b) violation.

In conclusion, despite the fact that the PERB proceeding on the alleged violation of section 3543.5(b) will involve some of the same conduct, witnesses and evidence as in the arbitration hearing, I would remand the alleged violation of section 3543.5(b) to the Chief ALJ to proceed to a hearing. With regard to the alleged violation of section 3543.5(a), I would find that the arbitrator's decision and award regarding the alleged

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issues. (People v. Sims (1982) 32 Cal.3d 468 [186 Cal.Rptr. 77].) However, arbitrators' awards are not judicial opinions and are not bound by the restrictions of the judicial process. (Stead Motors of Walnut Creek v. Automotive Machinists Lodge No. 1173 (9th Cir., 1989) 886 F.2d 1200 [132 LRRM 2689] cert. den. (1990) 110 S.Ct. 2205; see also Regents of the University of California (Berkeley) (1985) PERB Decision No. 534-H.)

As an arbitrator's award does not qualify as an administrative decision by an agency acting in a judicial capacity, the doctrine of collateral estoppel is inapplicable.

reprisal and discrimination was not repugnant to EERA. Therefore, I would dismiss this allegation due to the existence of the arbitration award.