STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA CORRECTIONAL PEACE OFFICERS ASSOCIATION,	)	
Charging Party,	)	Case No. S-CE-363-S
v.	)	PERB Decision No. 749-S
STATE OF CALIFORNIA, DEPARTMENT OF THE YOUTH AUTHORITY,	)	June 28, 1989
Respondent.	)	

Appearances: Shelley Lytle, Senior Hearing Representative, for California Correctional Peace Officers Association; Department of Personnel Administration by Joan Branin, Legal Counsel, for State of California, Department of the Youth Authority.

Before Hesse, Chairperson; Craib and Camilli, Members.

DECISION

HESSE, Chairperson: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the charging party, California Correctional Peace Officers Association (CCPOA or Association) of the Board agent's dismissal.[1] The Association alleges that the Board agent

[1]The Association filed its appeal on October 17, 1988. On January 6, 1989, nearly three months after its initial appeal, PERB received CCPOA's Request to Amend. The facts alleged in its Request to Amend involve the ratification process of the 1987-88 collective bargaining agreement. CCPOA does not state any reasons for its delay in filing the Request to Amend or that it was previously unaware that the 1987-88 collective bargaining agreement had not been ratified at the time the initial appeal was filed.

Due to the long delay and the fact that the status of the ratification process should have been known to CCPOA at the time of the initial appeal, the Board will not consider CCPOA's Request to Amend in its determination of this case. However, the Board notes that the fact that there was a memo indicating that

improperly decided that the allegations in the unfair practice charge must be deferred to arbitration under Lake Elsinore School District (1987) PERB Decision No. 646.

For the reasons stated below, the Board affirms in part and reverses in part the Board agent's dismissal.

FACTS

On November 19, 1987, CCPOA filed an unfair practice charge alleging that the California Department of the Youth Authority (CYA) violated section 3519(a) of the Ralph C. Dills Act (Dills Act) by ordering that Bob Weaver, an institutional parole agent at DeWitt Nelson Youth Training Center (DeWitt), not be permitted to work overtime in reprisal for engaging in protective activity; specifically, the filing of a grievance on May 13, 1987.[2] On May 13, 1987, Weaver filed a grievance against the management at

the 1985-87 collective bargaining agreement remained in effect until ratification of the 1987-88 collective bargaining agreement does not repudiate the express terms of the 1987-88 collective bargaining agreement, which state, in pertinent part:

> 18.03 Settlement Agreement
>
> All provisions of this Memorandum of Understanding shall become effective on July 1, 1987. except those specifically designated by other dates. . . .
>
> 18.04 Term
>
> a. This Agreement shall remain in full force and effect from July 1, 1987 through June 30, 1988.

[2]For purposes of the Board's review of the Board agent's dismissal, the Board, like the Board agent, assumes that the charging party's allegations in its unfair practice charge are true. (San Juan Unified School District (1977) EERB Decision No. 12. Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board.)

DeWitt for denying parole agents the use of overtime. On or about June 1, 1987, Weaver prevailed on the May grievance, and overtime hours for parole agents were returned. Subsequent to winning the grievance, Weaver was informed by an assistant superintendent at Dewitt that he was not permitted to work any overtime. On June 16, 1987, Weaver filed a grievance that the denial of overtime use violated Article XII, section 12.05 and Article V, section 5.03 of the collective bargaining agreement between CCPOA and the state. On October 28, 1987, CYA denied the June grievance at the fourth response level.

On February 5, 1988, CCPOA filed an amended unfair practice charge, which incorporated the original unfair practice charge allegations filed on November 19, 1987, and additionally alleged that DeWitt had discriminated against Weaver in reprisal for the filing of the May and June grievances regarding overtime. On August 18, 1987, Weaver filed a grievance regarding the receipt of the memorandum changing Weaver's work schedule. The grievance alleged that the work schedule change violated Article XI, section 11.14 of the 1985-87 collective bargaining agreement.[3] Commencing August 31, 1987, Weaver's work schedule was changed from working 8:00 a.m. to 5:00 p.m., Monday through Friday, to working one late night every week with the hours of 1:00 p.m. to 10:00 p.m.

[3]Article XI, section 11.14 is identical in both the 1985-87 and 1987-88 collective bargaining agreements.

On September 30, 1988, pursuant to the Board's decision in Lake Elsinore School District, supra, PERB Decision No. 646, the Board agent dismissed the entire unfair practice charge. Specifically, the Board agent stated that Article V, section 5.03 of the collective bargaining agreement, with the effective dates of July 1, 1987 through June 30, 1988, directly covered the allegations of discrimination or reprisal, and that the collective bargaining agreement culminated in binding arbitration.

DISCUSSION

The present appeal involves alleged discriminatory conduct by the state against Weaver due to his engaging in protected activity (the filing of a grievance on May 13, 1987). In Lake Elsinore, the Board held that section 3541.5(a) of the Educational Employment Relations Act (EERA), which contains language identical to section 3514.5(a) of the Dills Act, established a jurisdictional rule requiring that an unfair practice charge be dismissed and deferred to final and binding arbitration if the allegations in the unfair practice charge are directly covered by the provisions of collective bargaining agreement between the parties. The Board held that, by its choice of prohibitory language in section 3541.5(a) of EERA, the Legislature plainly expressed that the parties contractual procedures for binding arbitration, if covering the matter at issue, precludes the Board's exercise of jurisdiction. Irrespective of respondent's willingness to waive procedural

defenses in the grievance-arbitration process, PERB has no legislative authority to exercise its jurisdiction until or unless the grievance process is exhausted either by arbitration award or settlement or futility is demonstrated.[4] (Eureka City School District (1988) PERB Decision No. 702, p. 7.)

In determining whether the allegations in an unfair practice charge must be deferred to arbitration, the Board must first examine the applicable language in the collective bargaining agreements. In the present case, there are two applicable collective bargaining agreements: (1) collective bargaining agreement with the effective dates of July 1, 1985 through June 30, 1987; and (2) collective bargaining agreement with the effective dates of July 1, 1987 through June 30, 1988. Both collective bargaining agreements have identical provisions for final and binding arbitration. However, the Protected Activity provisions differ. Article V, section 5.03 of the 1985-87 collective bargaining agreement states:

> The state and the union shall not 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 the State Employer-Employee Relations Act (SEERA).
>
> Requested remedy for violation of this section shall be addressed through the Public Employment Relations Board (PERB) and shall not be subject to the grievance and arbitration procedure contained in this Agreement.

[4]In this case, futility was not raised by either party.

In contrast, Article V, section 5.03 of the 1987-88 collective bargaining agreement states:

> The state and the union shall not 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 the State Employer-Employee Relations Act (SEERA).
>
> Requested remedy for violation of this section shall either be through the Public Employment Relations Board (PERB) or through the arbitration procedure contained in this agreement. In either case, there shall be only one bite of the apple and a decision in one forum shall act as collateral estoppel in the other forum, except if one forum defers to the other.

The allegations in the unfair practice charge of reprisal against Weaver regarding the overtime issue, which were also addressed in a grievance filed on June 16, 1987, are not directly covered by the applicable collective bargaining agreement. The 1985-87 collective bargaining agreement contains language which specifically states that the imposition of reprisals on employees or discrimination against employees because of their exercise of rights guaranteed by the Dills Act shall not be subject to the grievance and arbitration procedures of the collective bargaining agreement. Consequently, the allegations that the state discriminated against Weaver by prohibiting any overtime as a result of his protected activity are not covered by the Protected Activity provision of the collective bargaining agreement. (Article V, section 5.03.)

The amended unfair practice charge includes allegations that the state changed Weaver's work schedule in retaliation for his protected activity (the filing of grievances on May 13 and June 16, 1987). Weaver received a memorandum dated August 5, 1987, informing Weaver of a change in his work schedule, effective August 31, 1987. On August 18, 1987, Weaver filed a grievance regarding this change in his work schedule. The 1987-88 collective bargaining agreement contains language that the state and CCPOA shall not impose or threaten to impose reprisals on employees or discriminate against employees because of their exercise of rights guaranteed by the Dills Act. This provision further states that the parties shall request a remedy for a violation either through PERB or through the arbitration procedure contained in the collective bargaining agreement. As the provisions of the collective bargaining agreement prohibit the alleged conduct in the unfair practice charge, the Board must defer this allegation in the amended unfair practice charge to final and binding arbitration.

The protected activity provision in the 1987-88 collective bargaining agreement also states that a decision in one forum shall act as collateral estoppel in the other forum, except if one forum defers to the other. Pursuant to Lake Elsinore, the Board does not have jurisdiction to issue a complaint against conduct prohibited by the parties' collective bargaining agreement prior to the exhaustion of the agreements final and binding arbitration machinery. Further, where the Board is

without jurisdiction, it is well established that the Board cannot acquire jurisdiction by the parties' consent, agreement, stipulation, or acquiescence, nor by waiver or estoppel. (See Lake Elsinore, supra, PERB Decision 646, p. 19.) Thus, the fact that the above provision provides that the parties choose between PERB and the grievance-arbitration procedure in the collective bargaining agreement does not confer jurisdiction on PERB where the allegations are also covered by the grievance-arbitration procedures in the collective bargaining agreement.

In conclusion, pursuant to Lake Elsinore, the Board dismisses the unfair practice allegations regarding the change in Weaver's work schedule. As the unfair practice charge allegations regarding the denial of overtime are not covered by the 1985-87 collective bargaining agreement, the Board reverses the Board agent's dismissal and remands these allegations to the General Counsel to issue a complaint.

ORDER

The Board hereby REVERSES the Board agent's dismissal regarding the denial of overtime allegations, and REMANDS these allegations to the General Counsel. The Board ORDERS the General Counsel to issue a complaint alleging a violation of section 3519(a) of the Ralph C. Dills Act. The Board hereby DISMISSES the allegations regarding the work schedule change.

Member Camilli joined in the Decision.

Member Craib's concurrence and dissent begins on page 9.

Member Craib, concurring and dissenting: I concur with my colleagues that a complaint should issue as to the allegations regarding the denial of overtime. However, I cannot agree with the dismissal of the charge which arises out of the change in Weaver's work schedule. The majority fails to address the chief difference between the facts in Lake Elsinore School District (1988) PERB Decision No. 646 and those currently before the Board.

In Lake Elsinore, the Public Employment Relations Board (PERB or Board) held that the jurisdiction of the Board to hear unfair labor practice charges, where the conduct complained of was also a violation of the parties' collective bargaining agreement, was limited. If the parties agreed that resolution of the dispute would be determined by binding arbitration, PERB must defer jurisdiction to the parties' arbitration procedure; thus, PERB was divested of its jurisdiction because of the parties' own agreement. Key to the analysis in Lake Elsinore was section 3541.5, subdivision (a) of the Educational Employment Relations Act which provides in pertinent part:

> [T]he board shall not . . . 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. . . .

Implicit in this holding is the recognition that absent the parties' agreement opting for binding arbitration which divests the Board of jurisdiction, PERB has a statutory obligation to

process an unfair labor practice regardless of whether the conduct is also prohibited by the collective bargaining agreement. In other words, PERB retains jurisdiction, absent the parties' agreement to the contrary. This is the critical factor in this case which the majority fails to address.

There is no disagreement that during the 1985-1987 contract, exclusive jurisdiction for processing discrimination claims was with PERB. The parties specifically provided that the

> [r]equested remedy . . . shall be addressed through the Public Employment Relations Board (PERB) and shall not be subject to the grievance and arbitration procedure contained in this Agreement.

This language did not confer jurisdiction over discrimination claims on PERB, but rather recognized that PERB has statutory obligation to process such claims. The parties merely removed discrimination claims from the grievance and arbitration process.

An election of remedies for discrimination claims was provided in the parties' 1987-1988 agreement. The party requesting a remedy for discrimination may seek redress either through PERB or the arbitration procedure in the agreement. The majority indicates that PERB does not have jurisdiction to issue a complaint prior to the exhaustion of binding arbitration and that the parties cannot confer jurisdiction on PERB, citing Lake Elsinore. (Majority Decision at p. 7.) Pursuant to Lake Elsinore, these statements are correct, but unfortunately, do not address the specifics of this case. If the requesting party does not elect arbitration as the forum in which to adjudicate the

alleged discrimination, PERB is not divested of jurisdiction. Only when the grievance machinery of the agreement exists and covers the matter at issue, must PERB defer jurisdiction to the arbitration procedure. In all other cases, PERB has a statutory obligation to process discrimination complaints. The majority has not explained why the parties cannot agree to retain their statutory right to seek redress for discrimination claims from PERB, as well as provide an alternative optional forum. By making binding arbitration an option, the parties have not elected to have their grievance and arbitration machinery cover every discrimination claim. Arguments to the contrary are without merit.

The parties have a right to expect this Board to fulfill its statutory duties which, in this case, requires that the Board process this charge.