STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

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| CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS INGLEWOOD CHAPTER 16, | ) | |
| Charging Party, | ) | Case No. LA-CE-2912 |
| v. | ) | PERB Decision No. 821 |
| INGLEWOOD UNIFIED SCHOOL DISTRICT, | ) | June 27, 1990 |
| Respondent. | ) | |

Appearance: Littler, Mendelson, Fastiff & Tichy by Jaffe D. Dickerson, Attorney, for Inglewood Unified School District.

Before Hesse, Chairperson; Shank and Cunningham, Members.

## DECISION

SHANK, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Inglewood Unified School District (District) from an administrative law judge's (ALJ) refusal to dismiss a complaint, filed by the California School Employees Association (CSEA or Association), and defer the underlying unfair practice charge to final and binding arbitration. We have carefully reviewed the entire record in this case, and reverse the ALJ's decision for the reasons discussed below.

## BACKGROUND

On November 27, 1989, PERB issued a complaint on behalf of the Association alleging that the District violated the

Educational Employment Relations Act (EERA) section 3543.5(a), (b), and (c)[1] by contracting out work of employees during a 3-week layoff in violation of the District's policy against contracting out. The complaint arose out of an unfair practice charge wherein CSEA alleged that the District violated an oral agreement prohibiting contracting out the duties of employees who were involved in a 3-week layoff. The Association further alleged the terms of this oral agreement were memorialized in a memorandum, issued by the District to its principals and department heads, entitled "Guidelines For The Three (3) Week Classified Layoff Without Pay For The 1988-1989 Fiscal Year." The pertinent language reads:

> No substitutes, contracted services, volunteer or additionally paid employees may be used in the lay-off position during the three (3) week lay-off.

On or about February 2, 1990, the District filed its "Answer and Motion to Dismiss and Defer to Binding Grievance Arbitration," in which the District alleged that:

(a) CSEA and the District were parties to a written collective bargaining agreement which contained a provision relating to subcontracting:

> 20.1 Restriction on Contracting Out: During the life of this Agreement, the District agrees that it will not use contracting out to reduce the number of employees or the number of assignments in the bargaining unit.

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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.

(b) The collective bargaining agreement contained a grievance procedure ending in binding arbitration which covered the dispute;

(c) CSEA's unfair practice charge admitted to both the existence of the grievance procedure and the invoking of the grievance procedure regarding the identical subject matter of the complaint; and

(d) Dismissal of the complaint and deferral to arbitration is required by PERB's ruling in Lake Elsinore School District (1987) PERB Decision No. 646.

On March 12, 1990, the ALJ denied the District's motion to dismiss, ruling that the parties' collective bargaining agreement did not cover the matter before him. The ALJ found that the District was charged with violating a policy against contracting out the work of employees who were on a 3-week layoff, but that the policy was not contained in the parties' collective bargaining agreement, nor was there any indication that it was incorporated in that agreement. The ALJ rejected the District's contention that Article XX section 20.1 of the parties' collective bargaining agreement was applicable, reasoning that CSEA was not alleging the District contracted out unit work to reduce the number of unit members or the number of assignments. He further found that, under the terms of the collective bargaining agreement, an arbitrator would be empowered to apply and interpret only the provisions of the collective bargaining agreement and not the provisions of the alleged separate

agreement and/or the policy in question. The ALJ then concluded that, since there had been no showing that the provisions of the separate agreement were subject to binding arbitration or that the collective bargaining agreement covered the matter at issue in the proceeding, the charge was not subject to dismissal and/or deferral.

On March 28, 1990, the District filed the instant appeal together with a request for a stay of hearing, then scheduled for April 3, 1990. The Board granted the stay of hearing in Inglewood Unified School District (1990) PERB Order No. Ad-205. In its appeal, the District primarily reiterates the arguments made in its motion. The Association filed no response to the appeal.

DISCUSSION

In Lake Elsinore School District, supra, PERB Decision No. 646, pp. 17-33,[2] the Board held that the mandatory language of EERA section 3541.5(a)(2) established a jurisdictional rule requiring that a charge be dismissed and deferred if the conditions set forth therein exist. Section 3541.5(a)(2) provides, in pertinent part, that:

> Any employee, employee organization or employer shall have the right to file an unfair practice charge, except that the board shall not . . . issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the

[2]The Court of Appeal affirmed the Board's Lake Elsinore decision in Elsinore Valley Education Association, CTA/NEA v. PERB (Lake Elsinore School District) (July 28, 1988) E5078 (nonpub. opn.).

> grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration. . . .
> (Emphasis added.)

Thus, in determining whether deferral is appropriate, we must first decide whether the conduct underlying the unfair practice charge is prohibited by the parties collective bargaining agreement. Article XX section 20.1 of the collective bargaining agreement, on its face, prohibits the District from "us[ing] contracting out to reduce the number of employees or the number of assignments in the bargaining unit." In finding that the conduct in question was not covered by this contract language, the ALJ reasoned that:

> [T]he Charging Party does not here allege that the Respondent contracted out unit work to reduce the number of unit members or the number of assignments. . . .

In its appeal, the District argues that its contracting out during the period of the layoff for services usually performed by unit employees does, at least temporarily, reduce the number of assignments in the unit and is thus covered by Article XX section 20.1. The District also points out that the filing and partial adjudication of a contract grievance by an employee, regarding the identical subject matter of the charge, constitutes prima facie evidence that the subject matter is covered by the contract's grievance provisions.

In Conejo Valley Unified School District (1984) PERB Decision No. 376,[3] the Board considered the National Labor Relations Board's decision in Roy Robinson Chevrolet (1977) 228 NLRB 828 [94 LRRM 1474], in which the NLRB deferred to arbitration a charge that the employer had closed part of its operation and discharged its employees without first bargaining with the union. The employer claimed that the contract gave it the authority to take such action without negotiating, relying on a provision that merely stated that the "employer shall have the exclusive right to hire, suspend and discharge his employees." Although the union had argued that the employer's interpretation of the contract language seemed improbable, the NLRB nevertheless deferred the matter, stating:

> As to the dissenters' argument that there is no contract provision which could even arguably give color to Respondent's conduct, we disagree. The Supreme Court said in United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 582-583, 46 LRRM 2416, that an order to arbitrate a particular grievance should not be denied "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." We believe that the dispute here falls within that standard and is therefore properly referable to the parties' arbitration procedure. (Conejo Valley, supra. at p. 6, emphasis in original, quoting Roy Robinson Chevrolet, supra.)

[3]Overruled on other grounds in Lake Elsinore School District, supra, PERB Decision No. 646, p. 31, footnote 13.

We cannot conclude that Article XX section 20.1 is not susceptible to an interpretation that would allow an arbitrator to resolve this dispute. We find that the District's contracting out during the 3-week layoff period is arguably prohibited by the language in Article XX section 20.1 of the parties collective bargaining agreement. The fact that the Association was aware that one of its members filed a grievance over the contracting out and that the District acted upon the grievance, confirms that CSEA at least recognized the possibility that the District's conduct violated the collective bargaining agreement.[4]

Having determined that the conduct underlying the unfair practice charge is arguably prohibited by the collective bargaining agreement, we must next decide whether the agreement provides for resolution of the dispute by final and binding arbitration. There is little question that the agreement, on its face (Article XVII, sec. 17.2), contains a grievance procedure that results in final and binding arbitration. Whether CSEA has standing under the agreement to utilize that procedure to resolve the instant dispute is less clear.

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[4]In its charge, CSEA admits the grievance procedure has been invoked in relation to the matter of the charge and that it ends in binding arbitration. Although the grievance was filed in the name of an individual rather than in the name of the Association, as noted infra, we find that, under the agreement, the Association, at least arguably, has the right to file a grievance in its own name challenging the contracting out.

Article XVII (entitled "Grievance Procedure"), section .17.1.1 of the parties' collective bargaining agreement defines "grievance" as follows:

> [A]ny complaint of an employee, employees, or CSEA involving the interpretation, application, or alleged violation of this Agreement....

Article XVII, section 17.1.5, which defines "grievant," provides, in pertinent part:

> The Association may be the grievant on Association rights, payroll deductions, negotiation procedures and zipper.

Article VI (entitled "Organizational Rights"), section 6.1 provides, in pertinent part:

> CSEA shall have the following rights in addition to the rights contained in any other portion of this Agreement: . . . [a list of rights follows, including, but not limited to a right of access, right to use mailboxes and bulletin boards, right to use institutional facilities, right to review employee's personnel files, etc.] (Emphasis added.)

As Article VI section 6.1 does not limit the Association's rights, but expressly states the Association has rights contained in other portions of the collective bargaining agreement, the Association arguably has the right to file a grievance based on a violation of Article XX section 20.1.

While the above contract provisions are somewhat ambiguous, for purposes of deciding the appropriateness of deferral in this case, we find that the Association arguably has the right to file a grievance in its own name to challenge the District's alleged

violation of Article XX section 20.1 of the agreement.[5] Accordingly, the complaint should be dismissed under EERA section 3541.5(b) for lack of jurisdiction.[6]

ORDER

For the above stated reasons, the Board hereby REVERSES the denial of the motion to dismiss and defer and DISMISSES the complaint issued in Case No. LA-CE-2912.

Chairperson Hesse and Member Cunningham joined in this Decision.

[5]We note too that the District has taken the position that the instant dispute is subject to the grievance procedure.

[6]As we decide that the charge is deferrable, we do not address the District's contention that the allegations in the complaint fail to constitute a change in policy or past practice and are, therefore, insufficient to state a prima facie case of unilateral change.