STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA CORRECTIONAL PEACE OFFICERS ASSOCIATION,	)	
Charging Party,	)	Case No. S-CE-509-S
v.	)	Administrative Appeal
STATE OF CALIFORNIA (DEPARTMENT OF CORRECTIONS),	)	PERB Order No. Ad-231-S
Respondent.	)	April 9, 1992

Appearances: Roy J. Chastain, Labor Relations Counsel, for State of California (Department of Corrections); Jeffrey A. Diamond, Staff Legal Counsel, for California Correctional Peace Officers Association.

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 State of California (Department of Corrections) (Corrections) to the PERB administrative law judge's (ALJ) denial of its motion to dismiss the complaint in this matter. The California Correctional Peace Officers Association (CCPOA) opposed the appeal of this motion, and requested oral argument. Oral argument was heard by the Board on March 10, 1992.

The Board has reviewed the entire record as it concerns the motion to dismiss, the ALJ's order denying the motion to dismiss, Corrections' appeal of the order denying the motion to dismiss, CCPOA's opposition to the appeal, and oral argument by both

parties. In accord with the following discussion, the ALJ's order denying the motion to dismiss is affirmed.

PROCEDURAL BACKGROUND

Complaint

The complaint in this matter alleges that David P. Prasinos (Prasinos) exercised rights guaranteed to him by the Ralph C. Dills Act (Dills Act or Act)[1] when he discussed a disciplinary action in which he was represented by CCPOA with other employees. It is further alleged that Corrections took adverse action against Prasinos by dismissing him from employment and that Prasinos was dismissed because he engaged in the above-described activity. Finally, the conduct engaged in by Corrections is alleged to have denied CCPOA its right to represent its members in violation of section 3519(b)[2] of the Dills Act.

Motion to Dismiss

On December 4, 1991, the Department of Personnel Administration (DPA), on behalf of Corrections, made a motion to dismiss the complaint on the grounds that: (1) the conduct alleged fails to state a prima facie violation of

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[1]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.

[2]Section 3519(b) provides in pertinent part:

> It shall be unlawful for the state to do any of the following:
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

section 3519(b); and (2) the conduct alleged is prohibited by the parties' collective bargaining agreement (CBA), which contains a grievance procedure culminating in binding arbitration, and therefore must be dismissed on the grounds that it is deferrable to arbitration.

Order Denying Motion to Dismiss

On December 10, 1991, the ALJ issued an order denying the motion to dismiss on three grounds: (1) the charge alleged a violation of section 3519(b) of the Dills Act, while the arguments in support of dismissal went to a section 3519(a) allegation; (2) the (b) charge was not covered by the CBA, rendering deferral inappropriate, and (3) the additional charges filed were not of sufficiently wide scope to necessitate granting a continuance to DPA to prepare for hearing.[3]

Appeal of Order Denying Motion to Dismiss

DPA, on behalf of Corrections, appeals the order denying its motion to dismiss, on the ground that deferral to arbitration is appropriate. DPA claims that the conduct complained of, dismissal of officer Prasinos for discussing prior disciplinary action taken against him, constitutes retaliation for engaging in protected activity. This conduct, DPA contends, is addressed by an allegation of a violation of section 3519(a).

DPA points out that the language of section 5.03 of the CBA mirrors section 3519(a) and mandates alleged violations of the

[3]The order stated that an oral motion would be considered during hearing if it became apparent that a continuance was, in fact, needed.

section be processed through the grievance procedure. The grievance procedure is contained in Article VI of the CBA, and culminates in final and binding arbitration.

Section 5.03 of the CBA states:

> a. 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 (Ralph C. Dills' Act).
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> b. The requested remedy for violation of this section shall be through the grievance and arbitration procedure contained in this Agreement, beginning at the departmental (third) level. The employee and/or association shall have thirty (30) days from the act or occurrence of violation or knowledge of the violation to file this type of grievance at the departmental level.
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> c. Should the grievance eventuate in arbitration, the Arbitrator's decision and award shall be final and binding on all the parties. The Arbitrator shall have full authority to grant any appropriate remedy; including, but not limited to, a remedy or award which a PERB Administrative Law Judge could grant.
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> d. If the Lake Elsinore decision is overturned by the Courts, Public Employee [sic] Relations Board or the Legislature, then this section may be re-opened.

DPA contends that the Board's majority opinions in State of California (California Department of Forestry and Fire Protection) (1989) PERB Decision No. 734-S (Forestry and Fire) and State of California (Department of Parks and Recreation) (1990) PERB Decision Nos. 810-S and 810a-S (Parks and Recreation) were incorrectly decided. The Board is urged to adopt the

position held by the dissent, on reconsideration, in Parks and Recreation. DPA claims the Board should focus on the conduct alleged, and not the rights claimed to have been violated, in determining whether a matter must be deferred to arbitration. DPA argues that the conduct alleged herein is the termination of Prasinos, which is prohibited by the CBA, and therefore must be dismissed and deferred to arbitration.[4]

Lastly, DPA contends that the Legislature did not intend the state be required to defend its actions in multiple forums, as would occur if this matter were not dismissed.

Opposition to Appeal of Order Denying Motion to Dismiss

CCPOA opposes the appeal on both procedural and substantive grounds. CCPOA argues that DPA's appeal is not properly before the Board because: (1) the order appealed is not a final order, in part because the ALJ retained jurisdiction as to certain matters, and is, therefore, not appealable; (2) the ALJ did not certify the order for appeal as required by PERB Regulation 32200[5]; and (3) the order is interlocutory in nature, and cannot be appealed under PERB Regulation 32646.

CCPOA disagrees with DPA's contention that the appropriate focus concerning the issue of deferral is on the conduct alleged. Instead, CCPOA would have the Board determine whether the CBA

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[4]DPA claims, and CCPOA does not rebut, that an allegation of retaliatory discharge for engaging in protected activity is currently before an arbitrator.

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

contains a grievance machinery which covers the matter at issue and culminates in binding arbitration.

Furthermore, CCPOA argues that arbitration is a matter of contract between the parties, and if a CBA does not contain grievance procedures which cover the matter at issue, PERB cannot defer to arbitration a matter which the parties did not agree to arbitrate.

DISCUSSION

Procedural Arguments

In its motion to dismiss, DPA argues that the complaint fails to state a prima facie case. The ALJ denied the motion to dismiss the complaint, and also refused to certify the issue to the Board itself. PERB Regulation 32200 states that the Board may not accept an appeal of a motion or interlocutory matter unless the Board agent joins in the request by certifying the matter to the Board.[6] Therefore, this matter is not properly before the Board.

With regard to CCPOA's argument that the appeal is not properly before the Board, the proper PERB Regulation governing an appeal of an ALJ's denial of a motion to dismiss and defer a

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[6]PERB Regulation 32200 states, in pertinent part:

> A party may object to a Board agent's interlocutory order or ruling on a motion and request a ruling by the Board itself. . . . The Board agent may refuse the request, or may join in the request and certify the matter to the Board. The Board itself will not accept the request unless the Board agent joins in the request. . . .

complaint to binding arbitration is PERB Regulation 32646, which 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.)

As PERB Regulation 32646(b) expressly provides for an appeal of a Board agent's denial of a motion to dismiss and defer a complaint to arbitration, CCPOA's contention that the order in this case is not appealable is without merit. (Inglewood Unified School District (1991) PERB Order No. Ad-222.)

Concerning CCPOA's claim that the order is not final, the order rules on DPA's motion to dismiss. The ALJ's ruling on the

motion to dismiss is, therefore, final, and the appeal is properly before the Board.

Deferral to Arbitration

In Lake Elsinore School District (1987) PERB Decision No. 646 (Lake Elsinore), the Board considered the language contained in section 3541.5 of the Educational Employment Relations Act (EERA)[7] which provides, in pertinent part:

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

The Board found that the above-cited language was intended by the Legislature 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.[8] The Board also stated, "In reaching this conclusion, this Board recognizes the strong policy in California in favor of arbitration and that provisions of EERA embody such a policy." (Lake Elsinore, id., p. 26.)

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[7]EERA is codified at Government Code section 3540 et seq.

[8]Identical language is found at section 3514.5(a) of the Dills Act, and the Board has held that Lake Elsinore applies to cases arising under the Dills Act. (Forestry and Fire (1989) PERB Decision No. 734-S, Warning letter, p. 2.)

In Parks and Recreation, supra, the Board found that a denial of an employees' right to representation constitutes a violation of section 3519(a) of the Dills Act, and that an employee organization has a concurrent right to represent employees at investigatory interviews. The parties' CBA contained a provision virtually identical to section 3519(a) of the Act, and also contained a grievance procedure which provided for binding arbitration. In applying Lake Elsinore to the facts and allegations before it, 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, PERB Decision No. 810-S, p. 6, citing Forestry and Fire, supra.)

In applying Lake Elsinore and its progeny to the case presently before the Board, we look to the parties' CBA to determine if the grievance machinery of the agreement covers the matter at issue and culminates in binding arbitration. If so, it shall be deferred to arbitration.

Section 5.03 of the CBA, supra, contains language virtually identical to section 3519(a) of the Dills Act, and, in fact, expressly refers to the Act. The CBA also provides that the "remedy for violation of this section shall be through the grievance and arbitration procedure contained in this

Agreement," supra. Article VI of the CBA contains a grievance procedure which culminates in final and binding arbitration.[9]

Although the CBA does contain a grievance procedure which culminates in binding arbitration, and which would cover an allegation of interference with or discrimination against employee rights, the grievance procedure in this case does not cover the matter at issue herein, i.e., an alleged denial to an employee organization of its rights under the Dills Act.[10] Based upon all of the above, and in accord with Lake Elsinore and its progeny, the allegations contained in the complaint in this matter are not deferrable to arbitration.

CCPOA's argument that the Board cannot make arbitrable that which the parties did not agree to arbitrate is well taken. Arbitration is a creature of contract. An arbitrator's authority is derived from and limited by the parties' agreement to arbitrate. California Code of Civil Procedure, section 1281.2; Meat Cutters Local No. 439 v. Olson Brothers, Inc. (1960) 186

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[9]Section 6.16 of the CBA states:

> a. The decision of the arbitrator shall be final and binding.
> b. The arbitrator shall have no authority to add to, delete, or alter any provisions of this Agreement, or any agreements supplementary thereto, but shall limit the decision to the application and interpretation of its provisions.

[10]The fact that the Association may be a named grievant, either as a result of CBA language or case law, is irrelevant. The matter at issue, an alleged denial of CCPOA's rights granted it by the Act, is not grievable under the CBA.

Cal.App. 2d 200 [8 Cal.Rptr. 789]; Unimart v. Superior Court (1969) 1 Cal.App. 3d 1039 [82 Cal.Rptr. 249]. In the present case, the CBA expressly states that an arbitrator must limit his or her decision to the application and interpretation of the provisions of the agreement. See footnote 9, supra. In this case, therefore, an arbitrator would not have the authority to determine whether the conduct alleged violated the rights granted to the Association by the Act. Focussing on conduct as the sole criterion on the issue of deferral serves only to ensure that the (b) allegation will never be addressed, as there is no forum for doing so. Therefore, the Board finds the policies of the Act are furthered by providing a forum for the adjudication of rights granted therein.[11]

In sum, the Board declines the invitation to overrule prior precedent and adopt the position taken by the dissent on reconsideration in Parks and Recreation.

ORDER

The Board AFFIRMS the ALJ's order denying the motion to dismiss the complaint, and REMANDS this case to the Chief

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[11]Although the Board recognizes the judicial inefficiency of litigating, in separate forums, matters which arise out of the same conduct, this can be alleviated by incorporating (b) allegations into a CBA along with (a) allegations, and making them subject to a grievance procedure which culminates in binding arbitration.

Administrative Law Judge to be processed in accordance with PERB regulations.

Member Carlyle joined in this Decision.

Chairperson Hesse's dissent begins on page 13.

HESSE, dissenting: As previously stated in Lake Elsinore School District (1987) PERB Decision No. 646 (Lake Elsinore), my dissent in State of California (Department of Parks and Recreation) (1990) PERB Decision No. 810a-S (Parks and Recreation), and my concurrence in California State University, San Diego (1991) PERB Decision No. 890-H, I find that the Public Employment Relations Board (PERB or Board) does not have jurisdiction over an unfair practice charge if: (1) the grievance procedure of the parties' collective bargaining agreement (CBA) culminates in binding arbitration; and (2) the conduct alleged in the unfair practice charge is arguably prohibited by the parties' CBA.[1]

Section 3514.5(a)(2) of the Ralph C. Dills Act (Dills Act) specifically states that the 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. (Emphasis added.)

Lake Elsinore interpreted the exact language in section 3541.5 of the Educational Employment Relations Act (EERA). Based on the statutory language, the Board found that if the conduct is arguably prohibited by the CBA and the grievance procedure culminates in binding arbitration, then PERB has no jurisdiction over the unfair practice charge.

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[1]As PERB Regulation 32646(b) expressly provides for an appeal of an administrative law judge's denial of a motion to dismiss and defer a complaint to binding arbitration, I agree with the majority that this appeal is properly before the Board.

This case involves the termination of an officer which resulted in alleged discrimination and interference violations of section 3519(a) and (b) of the Dills Act. While the section 3519(a) allegations are being litigated in binding arbitration, the section 3519(b) allegations are before PERB.

The alleged conduct is Department of Correction's termination of Officer David P. Prasinos. This conduct is alleged to violate section 3519(b) of the Dills Act. However, this conduct is arguably prohibited by the parties' CBA, which has a grievance procedure culminating in binding arbitration. (See section 5.03[2] and 6.01 through 6.17[3] of the CBA.) The fact that the same conduct may constitute a violation of section 3519(b) cannot be used to defeat the jurisdictional bar of section 3514.5(a)(2). (See Lake Elsinore, supra, PERB Decision No. 646.) By issuing a complaint alleging a violation of section 3519(b), the Board is issuing a complaint against conduct arguably prohibited by the parties' CBA.

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[2]Section 5.03(a) of the CBA states that:

> 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 (Ralph C. Dills' Act).

[3]Section 6.16(a) of the CBA states that "[t]he decision of the arbitrator shall be final and binding."

Further, the grievance and arbitration procedures allow California Correctional Peace Officers Association (CCPOA) to be a named grievant.[4] Section 6.02(a) defines grievance as:

> . . . a dispute of one or more employees or a dispute between CCPOA and the State involving the interpretation, application or enforcement of the provisions of this Agreement, or involving a law, policy or procedure concerning employment-related matters not covered in this Agreement and not under the jurisdiction of the State Personnel Board (SPB).

Section 6.02(c) defines a party as "CCPOA, an employee or the State." Based on the provisions of the CBA, the conduct is arguably prohibited by the parties' CBA and the grievance and arbitration procedures cover the matter. Therefore, I would dismiss and defer the unfair practice charge and complaint to binding arbitration.

Further, I disagree with the CCPOA's interpretation of State of California (California Department of Forestry and Fire Protection) (1989) PERB Decision No. 734-S (Forestry and Fire Protection). Consistent with my previous position, the present case is distinguishable from the Board's decision in Forestry and Fire Protection, supra, PERB Decision No. 734-S. 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

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[4]Even if the parties' CBA were silent on this issue, the Board has held that the exclusive representative has the statutory right to file grievances in its own name. (Chula Vista City School District (1990) PERB Decision No. 834, Mt. Diablo Unified School District (1990) PERB Decision No. 844, review denied.)

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. The Board did not find that this alleged statement also interfered with the employees' rights. Rather, the alleged threat was directed against the employee organization. Unlike Parks and Recreation, the Board did not find the same conduct was arguably prohibited by the parties' CBA and also constituted a prima facie violation of the Dills Act.

Finally, CCPOA's reliance on San Diego County Office of Education (1991) PERB Decision No. 880 (San Diego) is misplaced. San Diego involved a post-arbitration situation, wherein an arbitration award had issued. The Board majority found that the EERA section 3543.5(a) allegations were covered in the arbitration and the arbitration award was not repugnant to EERA. With regard to the EERA section 3543.5(b) allegations, the Board majority applied a pre-arbitration analysis and found that the CBA did not provide the exclusive representative with access to binding arbitration to litigate its right to represent its members. In reaching this conclusion, the Board majority relied on its earlier decisions in State of California (Department of Parks and Recreation) (1990) PERB Decision Nos. 810-S and Parks and Recreation, supra, PERB Decision No. 810a-S.

In my concurrence to San Diego, supra, PERB Decision No. 880, I agreed with the majority's analysis and conclusion regarding the alleged violation of EERA section 3543.5(a). For different reasons, I refused to defer the alleged violation of

EERA section 3543.5(b). As the case involved post-arbitration deferral, I concluded the Board had discretionary jurisdiction. Although the case involved the same conduct, but different issues (i.e., discrimination versus interference), PERB was the only forum available to the exclusive representative. Further, the CBA did not provide the exclusive representative with the right to file a grievance, and the arbitrator did not adequately consider the (b) allegations in the unfair practice charge. Based on EERA's purposes and policies, I decided to allow the exclusive representative to proceed on its alleged (b) violations rather than deny the exclusive representative its only forum to protect its statutory rights.

In the present case, the parties' CBA expressly allows CCPOA to file grievances in its own name, and there is no arbitration award. Accordingly, a pre-arbitration analysis applies. As the conduct is arguably prohibited by the parties' CBA and the parties' CBA grants CCPOA the right to file grievances, the grievance and arbitration procedures cover the matter at issue. Therefore, based on the Lake Elsinore deferral standard, I would dismiss and defer the instant unfair practice charge and complaint to binding arbitration.