STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, STATE CENTER CHAPTER 379, Charging Party, v. STATE CENTER COMMUNITY COLLEGE DISTRICT, Respondent.	Case No. S-CE-1565 Request for Reconsideration PERB Order No. Ad-255 PERB Order No. Ad-255a August 19, 1994

Appearance: Zampi and Associates by N. Joseph Trofemuk, Jr., Attorney, for State Center Community College District.

Before Caffrey, Carlyle and Garcia, Members.

DECISION

CAFFREY, Member: This case is before the Public Employment Relations Board (PERB or Board) on a request for reconsideration by the State Center Community College District (District) of the Board's decision in State Center Community College District (1994) PERB Order No. Ad-255 (State Center).[1] In that decision, the Board affirmed the Order of a PERB administrative law judge (ALJ) denying the District's motion to dismiss and defer to arbitration an unfair practice charge, which was filed against the District by the California School Employees Association, State Center Chapter 379 (CSEA).

[1]The District also requested a stay of the hearing scheduled in Case No. S-CE-1565, pending the Board's decision on this request for reconsideration.

DISCUSSION

PERB Regulation 32410(a) provides parties with the opportunity to request reconsideration of the Board's decision.[2] It states, in pertinent part:

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

The District argues that the Board's State Center decision contains prejudicial error of fact because the Board erred in its description of a provision within the parties' collective bargaining agreement (CBA). Specifically, the District asserts that the Board's description of a portion of CBA Article 6 as referencing "all state laws" is erroneous since the Article 6 provision actually references laws "mandatorily affecting classified employees." The District asserts that this language constitutes a narrow provision which should lead the Board to conclude that the charge should be dismissed and deferred, as it did in Los Angeles Community College District (1989) PERB Decision No. 761 (Los Angeles CCD). The District also finds prejudicial error of fact in Member Caffrey's conclusion in the lead opinion in State Center, that the CBA leaves CSEA without standing to file a grievance in its own name. Finally, the District asserts that there is prejudicial error of fact in

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

Member Garcia's conclusion in his State Center concurrence that further pursuit of this matter through the grievance procedure would be futile.

The District is correct that the Board's description of a portion of Article 6 of the parties' CBA is imprecise. The Article refers to laws mandatorily affecting classified employees and not all state laws. The Board, therefore, must consider whether this imprecision in its State Center decision represents prejudicial error of fact supporting the District's request for reconsideration.

In reviewing the Article 6 language in State Center, the Board cites Fremont Union High School District (1993) PERB Order No. Ad-248 (Fremont) in which the Board considered the impact of broad CBA provisions incorporating laws and rules by general reference on PERB's exercise of its jurisdiction. The gravamen of the Board's consideration of such provisions in both Fremont and State Center is that broad, passing references to the Educational Employment Relations Act (EERA),[3] and/or other general statutory references, are not sufficient to lead the Board to conclude that the parties agreed to incorporate all provisions of those laws into the CBA, whether or not they are specifically referred to or covered in the agreement, for purposes of subjecting them to the contract's grievance and arbitration procedures and removing them from PERB's jurisdiction. As stated in Fremont:

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

> The parties' failure to unambiguously include EERA protections in the agreement does not support an argument that they intended to convey those rights or to subject them to the contractual grievance procedure.

The District argues that reference in Article 6 to laws mandatorily affecting classified employees demonstrates that this is "a specific narrow provision" unlike the provision considered by the Board in Fremont. This argument is unpersuasive. The argued incorporation of numerous statutes, including EERA, into the CBA in their entirety in one sweeping sentence, hardly justifies a description of that sentence as "a specific narrow provision." As in Fremont, it is precisely because the provision is so expansive and non-specific that it does not lead the Board to conclude that the parties intended in this portion of Article 6 to incorporate the entire EERA into the CBA, and subject all alleged violations of EERA to the contract's grievance and arbitration procedure.[4]

Consequently, the District's reliance on Los Angles CCD is misplaced. In that case, the Board affirmed without discussion a Board agent's dismissal and deferral to arbitration of a charge

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[4]The Board notes that Article 6 of the parties' CBA is the contract's "Waiver Clause." In it, the parties agree that the CBA constitutes their "full and complete agreement." They "expressly waive and relinquish the right to bargain collectively" on any and all matters "whether or not specifically referred to or covered" in the CBA. To conclude that a single sentence within this article indicates the parties' intent to incorporate EERA and other statutes into the contract in their entirety, as the District argues, would be to expand the subjects covered by the CBA far beyond the apparent purpose of the parties who are limiting the CBA's coverage in this very article. Such a conclusion would be incongruous and illogical.

alleging discrimination against an employee because of his exercise of protected activity. The Board agent found that specific agreement in the parties' CBA to "comply with all federal and state laws regarding non-discrimination" was sufficient for the Board to conclude that the parties had intended to include in the CBA the specific non-discrimination protections of EERA, resulting in dismissal and deferral of the charge in that case. Here, there is no specific reference to any particular EERA protection or right within the Article 6 provision. Therefore, Los Angeles CCD is clearly distinguishable from the instant case.

In sum, as in Fremont, the CBA provision here is broad and general, and does not lead the Board to conclude that the parties intended the entire EERA to be incorporated into the CBA and subject to its grievance procedure. Therefore, the Board's description of the Article 6 language in State Center, while imprecise, does not alter the Board's analysis and does not constitute prejudicial error of fact.

The District also argues that Member Caffrey's finding that CSEA is without standing to file a grievance in its own name constitutes "another prejudicial erroneous statement of fact," citing Article 27 of the CBA which describes the grievance procedure. The District's argument is identical to a portion of the argument made in its original motion to dismiss and defer this case to arbitration, which the Board considered in denying the District's appeal of the ALJ's denial of that motion. The

Board has long held that a party's mere restatement of arguments previously made and considered by the Board does not constitute appropriate grounds for reconsideration. (Riverside Unified School District (1987) PERB Decision No. 622a; Tustin Unified School District (1987) PERB Decision No. 626a; California Faculty Association (Wang) (1988) PERB Decision No. 692a-H.) Furthermore, the Board majority concluded in State Center that the conduct complained of by CSEA in Case No. S-CE-1565 is not arguably prohibited by the parties' CBA. (Lake Elsinore School District (1987) PERB Decision No. 646 (Lake Elsinore).) Therefore, Member Caffrey's conclusion with regard to CSEA's standing to file a grievance is not dispositive of the Board's conclusion in State Center, and unavailing as the basis of a request for reconsideration of that decision.

Finally, the District objects to Member Garcia's separate finding that CSEA's withdrawal of its request for arbitration of its grievance under the CBA constitutes exhaustion of that process "and further pursuit through the grievance process would be futile." In State Center, the Board concluded that Case No. S-CE-1565 could not be dismissed and deferred to arbitration under Lake Elsinore. As a result, the Board did not reach the issue of futility, and similarly does not do so in rejecting the instant request for reconsideration.

ORDER

The request for reconsideration in State Center Community College District (1994) PERB Order No. Ad-255 and request for stay of the proceedings in Case No. S-CE-1565 are DENIED.

Member Carlyle's concurrence begins on page 8.

Member Garcia's concurrence begins on page 9.

CARLYLE, Member, concurring: I agree with Member Caffrey's admission that his language in describing a portion of Article 6 of the parties' collective bargaining agreement (CBA) is imprecise.

However, I see no need to arrive at a conclusion concerning whether or not such admitted imprecision constitutes prejudicial error of fact since I concurred separately "for the sole reason that the [State Center Community College] District has failed to demonstrate that the complained of conduct is arguably prohibited by the collective bargaining agreement (CBA)." The underlying rationale for my conclusion of this threshold and dispositive issue was that I was "unpersuaded on the correctness of the District's position for the same reasons found by the regional attorney and the [administrative law judge] ALJ on this first part of the 'dismiss and deferral test.'"

A review of said decisions by the regional attorney and the administrative law judge does not reveal similar imprecise language on the salient Article(s) and thus I would deny the State Center Community College District's request for reconsideration in State Center Community College District (1994) PERB Order No. Ad-255 and the attendant request for stay of the proceeding in Case No. S-CE-1565 on the grounds that the District has failed to meet its burden to have reconsideration granted as set forth in PERB Regulation 32410(a).[1]

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

GARCIA, Member, concurring: The State Center Community College District (District) requested reconsideration on several grounds, yet all involve a similar issue: what did the parties intend? I concur that the District's request for reconsideration should be denied. My reasons follow.

One ground for the request for reconsideration is that it was error to conclude that Article 6 of the parties' Agreement was not specific enough to cover the disputed conduct; if so, taking jurisdiction was improper. Member Caffrey's opinion in State Center Community College District (1994) PERB Order No. Ad-255 (State Center CCD) relied on Fremont Union High School District (1993) PERB Order No. Ad-248 (Fremont) to take jurisdiction because the prohibited conduct language was too broad; the District argues that the contract language is "clearly distinguishable" from that used in Fremont. As is evident in my original concurrence, I agree with the District's position that the contract language could prohibit the disputed conduct under the subjective rule of interpretation used by Member Caffrey; however, the chosen language would remain ineffective to show the parties clearly intended, by their agreement, to waive access to Public Employment Relations Board (PERB or Board) jurisdiction.

Review of Member Hesse's approach to contract interpretation in her concurrence in the Fremont decision explains why a broad statement is ineffective to accomplish waiver. Examining an issue of EERA incorporation similar to the present case, Member Hesse stated:

> The Board has granted deferral in cases where the parties have chosen to include the rights granted by statute in their contract and have done so by expressly repeating the statutory language or incorporating it by reference. In this case, however, while the parties were free to do so, their contract does not include or expressly incorporate the rights granted by EERA section 3543.5(a) and (b). While I do not adopt the reasoning of the ALJ suggesting that deferral will never be ordered absent the inclusion of EERA language in the parties' agreement, I find that the parties' failure to unambiguously include EERA provisions in the contract is a strong indication that they did not intend to convey those rights or subject them to the contractual grievance procedure. [Fremont, concurring opinion, p. 11; emphasis added.]

In summary, access to PERB is a right that can only be waived by conduct or statements that clearly waive the right.[1]

The District also identifies as prejudicial error of fact Member Caffrey's ruling that the Agreement does not allow CSEA to file a grievance in its own name. The District relies on Inglewood Unified School District (1990) PERB Decision No. 821 for the proposition that "PERB is to review the Agreement to see if the Union 'arguably' has the right to grieve in its own name." As I stated in my original concurrence with respect to the use of the word "arguably," the Board has improperly developed an undisciplined policy of subjectively interpreting contract

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[1]See San Francisco Community College District (1979) PERB Decision No. 105, holding that PERB:

> . . . will not readily infer that a party has waived its rights under EERA; we will find a waiver only when there is an intentional relinquishment of these rights, expressed in clear and unmistakable terms. [Fns. omitted.]

language even when there is no doubt as to the parties' intent. In my opinion:

> The danger in using that policy in all cases is that it invites a subjective approach to contract interpretation by PERB and in some cases appropriates the role of the arbitrator. Furthermore, it vitiates the ability of parties to negotiate grievance agreements, since almost anything can be 'arguably' prohibited [or, when standing to grieve is disputed, a party can almost always "arguably" have standing or not]. [State Center, concurrence, p. 15.]

Aside from PERB's use of an inappropriate "arguably" rule, also now employed by the District, I do not find that the District has identified a prejudicial error of fact on the standing issue. The "error" charged by the District is more accurately characterized as PERB's choosing an interpretation different from that desired by the District under a subjective rule that cuts both ways.

The third allegation of prejudicial error of fact identified by the District centers on my concurring opinion in the original case. First, I would like to note that I share the District's view that there is:

> . . . no authority allowing exhaustion of the grievance process by unilaterally withdrawing the grievance prior to settlement or arbitration award.

My opinion did not imply that parties can "forum shop" and invoke PERB jurisdiction in all cases by ignoring the grievance

agreement or impermissibly withdrawing from the process.[2] To clarify, the main point of my original concurrence was to emphasize that EERA permits the parties' collective bargaining agreement (CBA) to determine how disputes are resolved. The statutory right of the parties to defer PERB jurisdiction and waive immediate access to PERB can only come into being via a contract between the parties. Parties to a CBA have the right to develop the method by which they want to resolve disputes and the statute directs us to look at the terms of their agreement.

In this case, the parties clearly agreed to require the concurrence of the California School Employees Association, State Center Chapter 379 to take a case to arbitration; that concurrence was withdrawn, and therefore, the grievance process ended prior to settlement. The grievance process could go no further and was exhausted according to the terms of the CBA. It would be futile to pursue the process further.

That is not the same as the position the District erroneously attributes to my opinion: to the contrary, a party cannot unilaterally confer jurisdiction on PERB by withdrawing a

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[2]In its request for reconsideration, the District misconstrues my opinion as holding that a party could "exhaust the grievance process simply by [unilaterally] withdrawing its grievance after appealing to arbitration." Citing the Government Code, the District then states that, where there has been no exhaustion of the grievance machinery by settlement or binding arbitration, deferral is mandated. However, the District failed to note that under the terms of the CBA the grievance process could proceed no further without the concurrence of the union. In fact, to require otherwise would allow the District to impose mandatory arbitration.

grievance prior to settlement or arbitration award[3] if that action is not permitted under the contract. If, however, further pursuit of the grievance process would be futile under a particular contract, PERB has jurisdiction over the dispute.

In conclusion, I do not agree with the District's claim that my concurring opinion contains prejudicial error of fact pursuant to PERB Regulation 32410(a).

[3]Eureka City School District (1988) PERB Decision No. 702.