STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SAN FRANCISCO COMMUNITY COLLEGE DISTRICT FEDERATION OF TEACHERS, LOCAL 2121,	Case No. SF-CE-448
Charging Party,	Administrative Appeal
v.	PERB Order No. Ad-258
SAN FRANCISCO COMMUNITY COLLEGE DISTRICT,	August 3, 1994
Respondent.	

Appearances: Robert J. Bezemek, Attorney, for San Francisco Community College District Federation of Teachers, Local 2121; Liebert, Cassidy & Frierson, by Jeffrey Sloan and Leslie M. Mitchell, Attorneys, for San Francisco Community College District.

Before Carlyle, Garcia, and Johnson, Members.

DECISION

GARCIA, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the San Francisco Community College District Federation of Teachers, Local 2121 (Federation) of the deputy general counsel's administrative determination (attached), in which he declined to enforce an order pursuant to the Educational Employment Relations Act (EERA) section 3542(d).[1] That order was issued as part of the decision

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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. EERA section 3542(d) reads, in pertinent part:

> If the time to petition for extraordinary relief from a board decision has expired, the board may seek enforcement of any final

in San Francisco Community College District (1982) PERB Decision No. 278 (San Francisco).[2] The Board has reviewed the deputy general counsel's administrative determination, the Federation's appeal, the response filed by the District, and the entire record in this case. We concur in the deputy general counsel's decision not to enforce the 1982 order and hereby affirm the decision in accordance with the discussion below.

FEDERATION'S APPEAL

On appeal, the Federation argues that the Board should enforce the 1982 order because the language of that order "clearly states that the District must cease and desist from refusing to arbitrate all arbitrability questions." The Federation claims that the District was under the obligation to arbitrate since the contract language at issue has remained the same over the years. If the Board's order in San Francisco is to

> decision or order in a district court of appeal or a superior court in the district where the unit determination or unfair practice case occurred. The board shall respond within 10 days to any inquiry from a party to the action as to why the board has not sought court enforcement of the final decision or order. If the response does not indicate that there has been compliance with the board's final decision or order, the board shall seek enforcement of the final decision or order upon the request of the party. [Emphasis added.]

[2]On March 11, 1994, the Federation requested that the deputy general counsel enforce the 1982 order pursuant to EERA section 3542(d) because the San Francisco Community College District (District) refused to arbitrate certain grievances.

have its intended prospective effect, the District cannot refuse to arbitrate certain grievances in 1994. The District's action undermines the Board's authority and has led to a plethora of unnecessary litigation in a variety of forums. Finally, the Federation argues, "The proper place to resolve arbitrability questions under this collective bargaining agreement was arbitration in 1982, and is with arbitration today."

DISTRICT'S RESPONSE

In response, the District argues that enforcement of the 1982 order is inappropriate because the present case is substantively different than that presented to the Board in San Francisco. The District's position is that the order does not apply to the facts of this case because the conduct now complained of by the Federation (the District's refusal to arbitrate certain grievances based on contract language[3]) is entirely new and unrelated to that disputed in 1982 (the District's refusal to arbitrate other grievances based on an Education Code section). The contract interpretation issue was not considered in San Francisco, and the interpretation of that section is properly before the Superior Court, not PERB. The San Francisco decision addressed the limited question of whether the Education Code pre-empted the contractual grievance procedure

[3]The District refers to Article 22.C.1, regarding timeliness, which was not at issue in the prior decision. That section of the collective bargaining agreement states that a "[g]rievant who fails to comply with the established time limits at any step shall forfeit all rights for that grievance to further application of this Grievance Procedure."

with regard to employee suspensions, whereas the current case involves the arbitrability of the District's failure to reemploy probationary employees.

ISSUE

Should PERB exercise its discretionary authority to enforce the 1982 order?

DISCUSSION

EERA section 3542 grants PERB authority to use its discretion to enforce orders. For the reasons stated below, we affirm the deputy general counsel's decision not to use the 1982 order to join a dispute that is presently heading for resolution in two separate forums.[4]

First, the deputy general counsel and the Board have examined the facts and legal arguments involved in the earlier case versus the present dispute. Based on our review we agree with the deputy general counsel's conclusion that the two disputes differ significantly. Therefore, it is not appropriate to allow the 1982 order to dictate the outcome in a different case today.

Second, to enforce the 1982 order would allow it to overpower possible District defenses regarding issues not addressed in 1982. As the District properly argues in its

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[4]The two cases are San Francisco Community College District v. Helen Lew, et al., San Francisco Superior Court Case No. 958078, in which a preliminary injunction has been issued, and a pending PERB unfair practice charge, Case No. SF-CE-1699 (filed March 9, 1994).

response to the Federation's appeal, the prior order was based on a different factual issue and involved resolution of a different legal issue. To deprive the District of the ability to respond to new factual and legal issues today would potentially deny them a full and fair hearing. For that reason, it is also inappropriate to use an unrelated order to resolve the matter.

For the reasons stated above, we do not accept the Federation's contention that the Board's refusal to exercise its statutory discretion in this case will undermine the Board's authority to do so in other cases that involve different facts.

ORDER

We hereby AFFIRM the deputy general counsel's April 15, 1994 administrative determination in Case No. SF-CE-448.

Members Carlyle and Johnson joined in this Decision.

STATE OF CALIFORNIA PETE WILSON, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

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April 15, 1994

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Re: San Francisco Community College District Federation of Teachers, Local 2121 v. San Francisco Community College District
Request for Enforcement of PERB Decision No. 278

Dear Parties:

On March 11, 1994 I received a request for enforcement of San Francisco Community College District (1982) PERB Decision No. 278 from the San Francisco Community College District Federation of Teachers (Federation). The Federation asserts that the San Francisco Community College District (District) is violating the cease and desist order of PERB Decision No. 278 by declaring null and void lawfully negotiated provisions of the collective bargaining agreement and refusing to process grievances of bargaining unit members represented by the Federation. The Federation seeks PERB enforcement of the cease and desist order pursuant to Government Code Section 3542(d).[1]

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[1] Government Code Section 3542(d) reads in pertinent part:

> If the time to petition for extraordinary relief from a board decision has expired, the board may seek enforcement of any final decision or order in the district court of appeal or a superior court in the district where the unit determination or unfair practice case occurred. The board shall respond within 10 days to any inquiry from a party to the action as to why the board has not sought court enforcement of the final decision or order. If the response does not indicate that there has been compliance with the board's final decision or order, the board shall seek enforcement of the final decision or order upon the request of the

On March 14, 1994 I notified the parties by letter that (1) the District would have ten days to respond to the request and (2) the Federation would then have ten additional days in which to file a reply. On March 23, 1994 the District responded. It provided additional information on March 31, April 4, 7, 12, and 13. The Federation replied on March 30, 1994 and supplied additional information on March 21, April 6, 7, 8 and 11, 1994.

PERB Decision No. 278

In 1980, the Federation filed an unfair practice charge against the District alleging that it violated the EERA by refusing to process a grievance involving a suspension of an instructor. The District asserted that (1) the Education Code governed the matter at issue and (2) the Federation had failed to exhaust the grievance procedure and should have filed a motion to compel arbitration in the Superior Court under EERA Section 3548.7.[2]

The administrative law judge found that the District's position that the grievance procedure could not be used to process a suspension grievance based on the Education Code was without merit. The ALJ found that "to the extent the District refused to arbitrate Fuller's suspension grievance and honor those provisions which had not been found to be in conflict with the Education Code, it breached its obligation to negotiate in good faith in violation of Section 3543.5(c)." In the remedy section of the proposed decision the ALJ stated:

> . . . it has been found that the District refused to process a grievance to arbitration under the terms of the collective bargaining agreement. In doing so, the District unilaterally refused to recognize valid provisions in the negotiated agreement thus changing that agreement in violation of Sections 3543.5(a), (b) and (c). It is appropriate to order the District to cease and desist from all such activities in the future, and to recognize and honor the terms of the negotiated agreement in accordance with this proposed decision.

Accordingly, the ALJ's proposed order states that the District shall:

1. CEASE AND DESIST FROM:

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party. . .

[2] The grievance provisions of the 1978-1981 contract between the Federation and District are effectively identical to those contained in the contract presently in effect.

a. Refusing to negotiate in good faith with the exclusive representative, San Francisco Community College Federation of Teachers, Local 2121, CFT/AFT, AFL-CIO, under the Educational Employment Relations Act by unilaterally declaring lawfully negotiated provisions of a collective bargaining agreement null and void and refusing to process grievances of bargaining unit members, represented by the exclusive representative, under those provisions.

These provisions of the proposed decision were not appealed to the Board and thus became final as to the parties pursuant to the Board order in PERB Decision No. 278.

The Present Dispute

The underlying issues in this case concern Helen Lew, a probationary instructor in the Biology Department, and Raymond Chamberlain, a probationary instructor in the Chemistry Department. Both instructors were hired in August 1991 and were evaluated after their third and fourth semester of teaching by tenure review committees. Article 9(c) of the parties' present collective bargaining agreement[3] requires a third semester evaluation by the tenure review committee which must recommend to the district board whether the probationary faculty member should be re-employed for the following academic year. A recommendation not to re-employ must be made by a committee vote which is unanimous or within one vote of unanimous.

Following Lew's third semester (Fall 1992) evaluation, her tenure committee recommended unanimously that she not be re-employed for the 1993-94 academic year due to substantial teaching deficiencies. A letter indicating this was sent to Ms. Lew on February 22, 1993 by Frances Lee, the District's Acting Chancellor. Following Chamberlain's third semester (Fall 1992) evaluation his tenure review committee recommended by a 4-1 vote that he not be re-employed for the 1993-94 academic year due to deficiencies in his knowledge of general chemistry. A letter to this effect was sent to Mr. Chamberlain on February 22. On February 24 the District Board adopted resolutions stating that they would not re-employ Ms. Lew or Mr. Chamberlain for the 1993-94 school year. A copy of the Board's resolution was forwarded to the instructors by separate letters dated March 2 from Acting Chancellor Lee.

The Federation grieved the District Board's actions on March 26. On May 27 the Federation's grievances were discussed by the

[3] The parties' present contract has the effective dates of July 1, 1992 through June 30, 1994.

parties and led to a chancellor-level response of denial to Lew's grievance on June 8 and to Chamberlain's grievance on June 9.

Lew and Chamberlain were provided with fourth quarter evaluations on May 27 and May 20 respectively.[4] These evaluations were grieved by the Federation on July 8 and denied by the District on July 20 and 21 respectively.

On July 13 the Federation requested the District join the union in stipulating that the deadline for demanding arbitration in the Chamberlain and Lew grievances be extended to August 1. This was denied by the District via July 16 letter transmitted via telephonic facsimile. On July 20 the District received an amendment and particularization of Chamberlain's grievances. The District responded to this document in a July 22nd telefaxed letter. Also on July 22 the Union requested the working papers concerning these grievances. The District refused to provide the papers. On July 27 the Federation filed a grievance over this denial.

On July 27 the Federation sent the following letter to the District:

> To ensure that the District clearly understands the intent of the Union to arbitrate the Chamberlain and Lew grievances, we wish to reiterate that we are demanding arbitration on the fourth semester, as well as the third semester, evaluations of grievants Chamberlain and Lew, including the amendment and particularization of the Chamberlain grievances.

On August 11 the Federation requested the American Arbitration Association (AAA) provide a list of arbitrators for the Chamberlain and Lew grievances. On August 16 the District notified the Federation and the AAA that it felt arbitration was inappropriate for these grievances because they were untimely filed. The District explained that the "working papers" grievance should be denied arbitration because the underlying grievances upon which it was based were untimely. Shortly thereafter, a series of letters between the District's attorney, the Federation and AAA were exchanged. The final decision of AAA was to proceed with the arbitration unless both parties agreed to withdraw it or the AAA was stayed by court order. The arbitration was scheduled for May 12, 1994.

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[4] In the fourth semester review Chamberlain's tenure review committee voted 3-2 to recommend that he not be reemployed. The vote in the third semester review had been 4-1. Lew's committee vote did not change.

On January 25, 1994 the District filed a complaint for injunctive relief in the San Francisco Superior Court seeking to halt the arbitration. The Federation counterclaimed seeking an order compelling arbitration. A hearing on this matter was held on April 8, 1994 and Judge Stuart Pollak issued the following ruling:

> Grant injunction and deny petition to compel arbitration. The CBA does not confer on the arbitrator authority to determine arbitrability which therefore is for the court to determine. Defendants did not demand arbitration of their initial grievances within the 15 day time period established by CBA 22-E-3.1 That grievance was from the February 24, 1993 decision not to re-employ plaintiffs. The subsequently filed grievances are from other decisions which are not subject to an agreement to arbitrate. While the Board of Trustees certainly had the authority to rescind the February 24 decision based upon the 4th semester evaluations, its failure to do so is not the subject of an agreement to arbitrate.

The Federation's allegations that the District refused to process the Lew and Chamberlain grievances are also contained in Unfair Practice Charge No. SF-CE-1699 which was filed by the Federation on March 9, 1994. The investigation concerning this charge has not been completed. The basic theory of the case is that the Federation's request to arbitrate the grievances is timely because the timelines for pursuing these grievances are described in Article 9 - Evaluation. Article 9 has no time limit for requesting arbitration after a decision by the Chancellor. This is in contrast to Article 22 - Grievance Procedure which requires that a timely request for arbitration must be filed within 15 days of receipt of the Chancellor's decision.

FEDERATION POSITION

The Federation asserts that the District is refusing to arbitrate grievances. This is the same conduct which was found to be in violation of the statute in PERB Decision No. 278. Accordingly, PERB should enforce the cease and desist portion of that order and require the District to arbitrate the Chamberlain and Lew grievances.

DISTRICT POSITION

The District believes that enforcement of the 1982 order is inappropriate because this is primarily a question of contract interpretation over which PERB does not have jurisdiction. In addition the District argues that the cease and desist order in PERB Decision No. 278 does not cover the facts of the present case.

DISCUSSION

Government Code section 3542(d) is partially administered through Section 32980 of PERB's regulations which reads in pertinent part:

> The General Counsel is responsible for determining that parties have complied with final board orders. The General Counsel or his designate may conduct an inquiry, investigation, or hearing under Division 1, Chapter 3 of these regulations concerning any compliance matter.
>
> (a) In each case in which a compliance investigation or hearing is conducted, a written determination shall be served on the parties.
>
> (b) A determination based on an investigation may be appealed to the Board itself pursuant to Division 1, Chapter 4, Article 2 of these regulations.

This request does not raise disputes of material facts and will be decided based on the submissions of the parties. Los Angeles Community College District (1984) PERB Decision No. 411; Los Angeles Unified School District (1993) PERB Order No. Ad-250.

There is no PERB precedent regarding when PERB orders should be enforced in a situation such as this. There is no evidence indicating that the cease and desist order was not promptly complied with by the District after the Board issued the decision in 1982. Here, the Federation seeks to compel arbitration in 1994 by asking PERB to require the District to cease and desist refusing to arbitrate based on an order issued in 1982.

Due to the lack of PERB authority, the National Labor Relations Act precedent should be reviewed.[5] The National Labor Relations Board Case Handling Manual issued April 1989 at Section 10508.2 states in pertinent part:

> *Criteria for filing a new charge*: Whether or not a *new* charge covering the matters now being complained of should be filed depends on the circumstances. Ordinarily, the better practice is to suggest that a new charge be filed in view of the fact that there has, as yet, been no court enforcement of the Board order. Generally, a new charge should be filed when the complaint of non-compliance may also involve the occurrence of a new unfair labor practice. For

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[5] It is appropriate for PERB to take guidance from the NLRA precedent when applicable to public sector labor relations issues. Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 616.

> example, when the respondent has been ordered to cease and desist from interrogating its employees concerning union activities, a new occurrence of 8(a)(1) conduct, although considered as non-compliance with the cease-and-desist provisions of the order, may also be a new unfair labor practice violation. The new occurrence, if meritorious cannot be remedied under the existing board order which provisions cover only previously found violations. Under these circumstances, a new charge may be filed.

In this case the Federation filed a new charge alleging violations based on the District's handling of the Chamberlain and Lew grievances. Under the guidelines of the NLRB, filing of a new charge appears to be the preferred practice. If charging party also seeks enforcement of a prior decision, it must be shown that the decision prohibits the newly complained-of conduct.

The first question is whether the presently-alleged conduct is identical to that described in PERB Decision No. 278. In PERB Decision No. 278 the District's main contention was that a grievance concerning the suspension of an employee was not arbitrable because the grievance procedure had been superseded by provisions of the Education Code. The ALJ and the Board found that refusal to arbitrate a grievance based on this argument was in fact a unilateral attempt to change the grievance procedure in violation of the EERA. The cease and desist order in the decision was directed to that conduct. I find that the cease and desist order was limited to the District's refusal to process grievances based on its unilateral determination that provisions of the collective bargaining agreement were null and void.

In the present situation the District argues that it is not required to arbitrate the Chamberlain and Lew grievances because the request to arbitrate was filed too late under Article 22. Without reaching the merits of the question over whether the grievances and/or the requests for arbitration were timely, I find that the District's position in the present case is substantively different than that presented in Board Decision No. 278. There is no indication that the District is presently arguing that provisions of the agreement are null and void or superseded by the Education Code. It is this activity that was found to be in violation of the statute in PERB Decision No. 278. And it is this activity that the decision's cease and desist order was designed to prevent.

Finding that the District's conduct regarding Mr. Chamberlain and Ms. Lew is not covered by the cease and desist order contained in PERB Decision No. 278, I find it would be inappropriate to enforce that board decision and order. These issues should be investigated as part of the newly filed unfair practice charge.

Right of Appeal

An appeal of this decision to the Board itself may be made within ten (10) calendar days following the date of service of this decision (PERB regulation 32360). To be timely filed, the original and five (5) copies of any appeal must be filed with the Board itself at the following address:

MEMBERS, PUBLIC EMPLOYMENT RELATIONS BOARD
1031 18th Street, Suite 200
Sacramento, CA 95814-4174

A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing, ". . . or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . ." (regulation 32135). Code of Civil Procedure section 1013 shall apply.

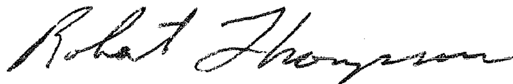
The appeal must state the specific issues of procedure, fact, law or rationale that are appealed and must state the grounds for the appeal (regulation 32360(c)). An appeal will not automatically prevent the Board from proceeding in this case. A party seeking a stay of any activity may file such a request with its administrative appeal, and must include all pertinent facts and justifications for the request (regulation 32370).

If a timely appeal is filed, any other party may file with the Board an original and five (5) copies of a response to the appeal within ten (10) calendar days following the date of service of the appeal (regulation 32375).

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding and on the Sacramento regional office. A "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself (see regulation 32140 for the required contents and a sample form). The document will be considered properly "served" when personally delivered or deposited in the first-class mail postage paid and properly addressed.

Sincerely yours,



Robert Thompson
Deputy General Counsel

RGT:mmh