

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



|                                    |   |                       |
|------------------------------------|---|-----------------------|
| SANTA ANA EDUCATORS ASSOCIATION,   | ) |                       |
|                                    | ) |                       |
| Charging Party,                    | ) | Case No. LA-CE-3382   |
|                                    | ) |                       |
| v.                                 | ) | Administrative Appeal |
|                                    | ) |                       |
| SANTA ANA UNIFIED SCHOOL DISTRICT, | ) | PERB Order No. Ad-263 |
|                                    | ) |                       |
| Respondent.                        | ) | December 1, 1994      |

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Appearances: California Teachers Association by Charles R. Gustafson, Attorney, for Santa Ana Educators Association; Breon, O'Donnell, Miller, Brown & Dannis by Claudia P. Madrigal, Attorney, for Santa Ana Unified School District.

Before Blair, Chair; Caffrey, Garcia and Johnson, Members.

DECISION

BLAIR, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Santa Ana Unified School District (District) of a PERB administrative law judge's (ALJ) denial (attached hereto) of its motion to dismiss and defer to arbitration the Santa Ana Educators Association's (Association) unfair practice charge.<sup>1</sup> In its charge, the Association alleged that the District violated section 3543.5(a) and (b) of the Educational Employment Relations Act (EERA).<sup>2</sup>

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<sup>1</sup>In Santa Ana Unified School District (1994) PERB Order No. Ad-256, the Board ordered a stay of the hearing pending resolution of the District's appeal.

<sup>2</sup>EERA is codified at Government Code section 3540 et seq. Section 3543.5 states, in pertinent part:

It shall be unlawful for a public school employer to do any of the following:

- (a) Impose or threaten to impose reprisals

The Board has reviewed the entire record in this matter, including the District's appeal and the Association's response thereto. The Board finds the ALJ's determination to be free of prejudicial error and adopts it as the decision of the Board itself together with the discussion below.

#### DISTRICT'S APPEAL

On appeal, the District contends that the ALJ erred when she refused to defer this matter to arbitration arguing that this dispute is arguably covered by Article 6.11.1 of the parties' collective bargaining agreement (CBA). The District relies on United Food and Commercial Workers Union, Local 770 v. Geldin Meat Company (9th Cir. 1994) 13 F.3d 1365 [145 LRRM 2206] (United Food), in support of its assertion that where a contract is susceptible to more than one interpretation, it is for the arbitrator to interpret the CBA. The District urges the Board to modify its long standing deferral standard set out in Lake Elsinore School District (1987) PERB Decision No. 646 to conform with the court's ruling in United Food.

The District additionally asserts that the Association conceded that the matter is arguably prohibited by the agreement

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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 this chapter.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

because it filed a grievance alleging a violation of Article 6.11.1.

#### DISCUSSION

EERA section 3541.5(a) provides, in pertinent part, that PERB 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.

In Lake Elsinore School District, supra, PERB Decision No. 646, the Board held that this section established a jurisdictional rule requiring that a charge be dismissed and deferred to arbitration if: (1) the grievance machinery of the agreement covers the matter at issue and culminates in binding arbitration; and (2) the conduct complained of in the unfair practice charge is prohibited by the provisions of the agreement between the parties. Further, the Board has held that deferral is jurisdictional, not discretionary.

In Los Angeles Unified School District (1990) PERB Decision No. 860, the Board determined that the exercise of PERB's jurisdiction is not precluded unless the conduct alleged to be an unfair practice is arguably prohibited by the parties' agreement.

Relying on United Food, the District contends that if a contract provision is susceptible to more than one interpretation, PERB must defer the matter to allow an arbitrator to determine whether the provision is subject to arbitration.

The District argues in essence for the Board to modify its standard for determining whether a dispute must be deferred to arbitration by adopting the court's "readily susceptible" standard in United Food.

In United Food, the union filed a petition to compel the employer to arbitrate the union's grievance that the employer failed to provide its employees with health insurance as promised in the parties' CBA. The lower court denied the petition stating that the union's charge was not arbitrable under the CBA. In reversing, the court found that the CBA was "readily susceptible" to an interpretation that would cover the union's dispute. The court concluded that the employer had not established with "positive assurance" that the CBA was not susceptible to an interpretation covering the dispute.

In determining whether deferral is appropriate, the policy considerations for PERB and a court faced with a request to compel arbitration are different. When PERB considers whether a charge must be deferred to arbitration, it determines which forum, PERB or an arbitrator, has jurisdiction over the dispute. The Board is guided in this determination by specific statutory criteria which governs PERB's jurisdictional authority. The District's call to adopt a different standard ignores the fact that PERB's deferral standard is based in statute. In applying the broader standard, the court in United Food does not interpret the EERA or any other comparable statute. The District provides no satisfactory explanation why the Board should abandon its

statutory deferral standard. Accordingly, it would be improper for the Board to adopt this broad deferral standard and the Board declines to do so.

The District also contends that the charge must be deferred because by filing a grievance alleging a violation of Article 6.11.1, the Association conceded that the matter is arguably prohibited by the agreement.

In State Center Community College District (1994) PERB Order No. Ad-255, the Board stated that:

The positions taken by the parties at various stages of a case are not dispositive of PERB's authority to determine whether a charge must be dismissed and deferred to arbitration.

Rather, the Board independently reviews the provisions of the parties' CBA to determine whether the complained of conduct is arguably prohibited. (Id.) Accordingly, the District's argument is rejected.

#### ORDER

The Board hereby AFFIRMS the ALJ's order denying the motion to dismiss and defer the charge. Accordingly, the Board lifts the stay of hearing and REMANDS this case to the Chief Administrative Law Judge to be processed in accordance with PERB regulations.

Members Caffrey and Johnson joined in this Decision.

Member Garcia's dissent begins on page 6.

GARCIA, Member, dissenting: The Public Employment Relations Board (PERB) does not have jurisdiction over this case because the Educational Employment Relations Act (EERA), PERB precedent, and California policy expressed through Supreme Court decisions clearly mandate that the case be sent to arbitration. Simply stated, the law in California directs a case to arbitration when the collective bargaining agreement (CBA or agreement) between the parties contains a broad arbitration clause which permits the arbitrator to apply and interpret the provisions of the grievance agreement. Only specific clauses can exclude a dispute from a broad arbitration clause.

PERB is compelled to direct this case to arbitration because California policy and law favoring that position is even stronger than the federal policy. A review of the history of federal and California arbitration policy in labor relations cases is helpful to understanding the mandate.

Although none of California's public sector labor relations statutes are copies of the National Labor Relations Act (NLRA), our statutes select and combine principles established by the National Labor Relations Board (NLRB), with provisions designed to accommodate public employment in California.<sup>1</sup> Both PERB and reviewing courts turn for instruction to precedent established

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<sup>1</sup>See Zerger, Cal. Public Sector Labor Relations (1989) Chapter 2, section 2.01, page 3, footnote 4, citing Pacific Legal Foundation v. Brown (1981) 29 Cal.3d 168, 173, 176-177, [172 Cal.Rptr. 487].

under NLRB decisions.<sup>2</sup> A brief overview of the federal precedent on pre-arbitration deferral is helpful to understanding California law and policy.

Under the Labor Management Relations Act the NLRB was granted broad quasi-legislative and quasi-judicial powers. Employing that authority the NLRB voluntarily adopted a policy that favored arbitration of disputes. The United States Supreme Court reviewed that voluntary policy in a series of cases that have become known as the Steelworkers Trilogy.<sup>3</sup> In one of those cases, Warrior, the Court adopted a strong policy favoring arbitration of labor disputes whenever arbitrability was in question by stating:

An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage. (Warrior, supra, at 582 and 583.)

Under federal law, including NLRB decisions, regardless of whether it is clear or uncertain that an agreement provides for arbitration of the disputed subject, the case is given to the arbitrator for further decision regarding matters of contract

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<sup>2</sup>Id., section 2.02, page 4, footnote 1, citing cases involving use of NLRA precedent.

<sup>3</sup>Steelworkers v. American Mfg. Co. (1960) 363 U.S. 564 [46 LRRM 2414]; Steelworkers v. Warrior & Gulf Navigation Co. (1960) 363 U.S. 574 [46 LRRM 2416] (Warrior); and Steelworkers v. Enterprise Wheel & Car Corp. (1960) 363 U.S. 593 [46 LRRM 2423].

interpretation.<sup>4</sup> The arbitrator then decides whether the agreement covers the subject matter and who has standing to participate in arbitration. In other words, except in rare or unusual cases, the courts and quasi-judicial agencies such as the NLRB and PERB should first determine whether the contract provides for arbitration, and if so, they turn the matter over to the arbitrator to interpret the scope of the arbitration, unless there is clear evidence that this was not the result the parties intended.

The California Supreme Court shortly thereafter adopted the same policy in enforcement cases brought under California arbitration statutes. For example, in Posner v. Grunwald-Marx, Inc. (1961) 56 Cal.2d 169 [14 Cal.Rptr. 297], a case brought under Code of Civil Procedure section 1282 to compel arbitration of a labor dispute, the California Supreme Court stated that California state policy is not substantially different from federal policy to promote labor peace through arbitration. The court held that, where the grievance procedure is not limited to specific complaints, then all disputes which arise are covered if a broad arbitration clause is in the agreement. Furthermore, it

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<sup>4</sup>See also Roy Robinson Chevrolet (1977) 228 NLRB 828 [94 LRRM 1474].



was noted that proceeding to arbitrate is evidence that the dispute is arbitrable.<sup>5</sup> The court stated:

This being so, the federal rule to the effect that in such cases all disputes as to the meaning, interpretation and application of any clause of the collective bargaining agreement, even those that prima facie appear to be without merit, [footnote omitted] are the subject of arbitration, is adopted by this court. (Id. at 184.)

In another California Supreme Court case, O'Malley v. Wilshire Oil Co. (1963) 59 Cal.2d 482 (O'Malley), the court confirmed California's adoption of the federal rules:

Although the issue in Posner did not involve interstate commerce and therefore did not necessarily invoke the federal rule as described by the United States Supreme Court, we nevertheless as a matter of policy followed the federal approach. We held that the trial court, instead of confining itself to the issue of whether the dispute was subject to arbitration, improperly passed upon the merits of the issue. [Id. at 487.]

The court went on to state, citing the U.S. Supreme Court case of Warrior that:

In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad. [O'Malley, supra, citing Warrior at 491.]

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<sup>5</sup>The court recognized the well-established principle of contract interpretation that the actions of the parties can be evidence of their intent and the case would support the exception raised by the Santa Ana Unified School District (District) in this case.

Those cases make it clear that federal policy and the law of California are consistent and California has gone further by adopting statutes that mandate deferral to an arbitrator in labor relations cases where the parties to the dispute agreed on arbitration.

In 1978, the California legislature adopted the EERA jurisdictional statute (EERA section 3541.5, which mandates deferral of arbitrable cases) and other EERA provisions which expressly direct parties to the arbitration statutes under the Code of Civil Procedure.<sup>6</sup>

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<sup>6</sup>See, e.g., EERA section 3548.5, which provides that:

A public school employer and an exclusive representative who enter into a written agreement covering matters within the scope of representation may include in the agreement procedures for final and binding arbitration of such disputes as may arise involving the interpretation, application, or violation of the agreement.

See also, EERA section 3548.6, which provides that:

If the written agreement does not include procedures authorized by Section 3548.5, both parties to the agreement may agree to submit any disputes involving the interpretation, application, or violation of the agreement to final and binding arbitration pursuant to the rules of the board.

And see EERA section 3548.7, which provides that:

Where a party to a written agreement is aggrieved by the failure, neglect, or refusal of the other party to proceed to arbitration pursuant to the procedures provided therefor in the agreement or pursuant to an agreement made pursuant to Section 3548.6, the aggrieved party may bring proceedings pursuant to Title 9 (commencing with Section

A close examination of PERB precedent on resolving questions of arbitrability reveals that PERB confirmed and adopted the test of arbitrability identified in the California and federal cases reviewed above. For example, in Inglewood Unified School District (1990) PERB Decision No. 821 (Inglewood), PERB expressly adopted the federal "not susceptible" language, making PERB policy synonymous with the standard in Warrior and adopted by the California Supreme Court. In Inglewood, after referring to the language employed in Warrior, PERB stated:

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.  
(Inglewood at p. 7.)

It is obvious that PERB condensed the Warrior standard into the paraphrase "arguably prohibited." This is confirmed in Riverside Community College District (1992) PERB Order No. Ad-229 (Riverside), where PERB stated that:

Further, the Board has previously noted California's strong policy in favor of arbitration. [Citation omitted.] In [Inglewood], the Board found that arbitration 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

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1280) of Part 3 of the Code of Civil Procedure for a court order directing that the arbitration proceed pursuant to the procedures provided therefor in such agreement or pursuant to Section 3548.6.

of coverage.' . . . The Board therefore affirms the ALJ's finding that the CBA's grievance machinery covers the matter at issue. [Riverside at p. 4.]

The majority opinion manipulates the paraphrase "arguably prohibited" in a subjective manner to avoid California law which mandates deferral to arbitration.<sup>7</sup> Thoughtful review of the PERB decisions in Inglewood and Riverside will lead an objective court to conclude that the majority opinion does not reflect California law or PERB precedent.

There is no need for PERB to specifically adopt United Food and Commercial Workers Union, Local 77 v. Geldin Meat Company (1994) 13 F.3d 1365 [145 LRRM 2206] since that case simply reflects existing state law and policy. However, the majority opinion is wrong in its unintelligible attempt to discredit United Food as inconsistent with California law when it refers to an undefined "deferral standard," "broader standard," "statutory deferral standard" and "broad deferral standard" in an attempt to explain away differences between federal and California law and policy.

In the case before us, the agreement between the parties plainly indicates the parties' intentions with regard to questions of arbitrability:

If any question arises regarding the arbitrability of a grievance, the party raising the question of arbitrability may,

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<sup>7</sup>This case and the recent PERB decision in Monterey Peninsula Unified School District (1994) PERB Order No. Ad-262 illustrate the abuse I warned against in my dissent in State Center Community College District (1994) PERB Order No. Ad-255.

upon request, have such question first ruled upon and decided by an arbitrator prior to any other hearing on the merit of the grievance which would thereafter be conducted by a second and different arbitrator.  
(CBA, Art. 6.10.3.)

Furthermore, Article 6.10.6 describes the powers and limitations of the arbitrator:

The function of the arbitrator shall be to hold a hearing concerning the grievance and to render a written decision . . .  
(CBA, Art. 6.10.6.1.)

The arbitrator shall have no power to alter, amend, change, add to, or subtract from any of the terms of this Agreement or the written policies, rules, regulations and procedures of the District but shall determine only whether or not there has been a violation, misinterpretation, or misapplication of this Agreement. [CBA, Art. 6.10.6.2]

In this case, the parties agree that the grievance agreement culminates in binding arbitration and neither party identifies a provision of the agreement which specifically excludes the dispute from arbitration.

The conclusion is inescapable that this case should be forwarded to an arbitrator for interpretation and application of the contract provisions. PERB has no power to determine the merits of the dispute and the Board majority is not following the law. The District should proceed to court to obtain a proper result.



STATE OF CALIFORNIA  
PUBLIC EMPLOYMENT RELATIONS BOARD



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|------------------------------------|---|-------------------------|
| SANTA ANA EDUCATORS ASSOCIATION,   | ) |                         |
|                                    | ) | Case Nos. LA-CE-3382    |
|                                    | ) |                         |
| Charging Party,                    | ) |                         |
|                                    | ) | ORDER DENYING MOTION TO |
| v.                                 | ) | DISMISS AND DEFERRAL TO |
|                                    | ) | ARBITRATION             |
| SANTA ANA UNIFIED SCHOOL DISTRICT, | ) |                         |
|                                    | ) |                         |
| Respondent.                        | ) |                         |
| <hr/>                              |   |                         |

PROCEDURAL HISTORY

On December 3, 1993, the Santa Ana Educators Association (SAEA) filed an unfair practice charge against the Santa Ana Unified School District (District). The charge alleges that the District made an unlawful threat against its employee, Gregory Katz, and thereafter terminated him as assistant boys varsity basketball coach because he raised concerns about class size at his school site and threatened to file a grievance about the class size issue.

During the investigation of this charge by the Office of the General Counsel of the Public Employment Relations Board (PERB or Board), the District contended that the charge should be dismissed and deferred to arbitration.

PERB issued a Complaint on December 24, 1993, alleging that the District's conduct described above amounted to interference with protected rights and retaliation in violation of section 3543.5(a) and (b) of the Educational Employment Relations Act

(  
(EERA or Act)).<sup>1</sup> On the same date, PERB issued a letter denying the District's request for deferral to arbitration on the ground that the conduct alleged in the charge is arguably not prohibited by the parties' collective bargaining agreement (CBA).

The District filed a timely Answer on January 13, 1994, denying unlawful conduct and asserting various affirmative defenses.

An informal conference on March 4, 1994, failed to resolve the dispute.

On April 28, 1994, the District filed a Motion to Dismiss Unfair Practice Charge, with the undersigned. On April 29, 1994, SAEA was directed to, and did, file a written response to the

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<sup>1</sup>EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

Section 3543.5 reads, in relevant part:

3543.5. INTERFERENCE WITH EMPLOYEES' RIGHTS  
PROHIBITED

It shall be unlawful for a public school employer to do any of the following:

(a) 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 this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

(b) Deny to employee organizations rights guaranteed to them by this chapter.



motion to dismiss on May 10, 1994, opposing deferral and dismissal.

The formal hearing in this matter is scheduled for May 23 and 24, 1994.

#### FACTUAL BACKGROUND<sup>2</sup>

SAEA is the exclusive representative of a unit of certificated employees of the District. SAEA and the District are parties to a CBA that contains a grievance procedure that provides for final and binding arbitration.<sup>3</sup>

In September, 1993, Gregory Katz (Katz), an SAEA unit member, voiced concerns with Principal Thomas Reasin (Reasin) about class size at his school site. On September 20, 1993, Katz sent an E-mail to Reasin which ended by stating:

I am also sending this to [sic.] E-mail to our union reps [SAEA representatives] Mr. Terhune and Mr. Jurgenson in preparation for a grievance of inequality if this issue is not resolved soon.

On September 21, 1993, Reasin sent an E-mail response to Katz stating:

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<sup>2</sup>In deciding whether to dismiss an unfair practice charge on the ground that it fails to state a prima facie violation of the EERA, all the essential facts alleged in the charge and the supplemental pleadings are assumed to be true. (San Juan Unified School District (1977) PERB Decision No. 12.)

<sup>3</sup>Official notice is taken of the SAEA-SAUSD (District) Agreement maintained in the Los Angeles Regional Office of the PERB. This Agreement has a term from July 1, 1992, through June 30, 1994.

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Greg. Believe it or not, we're on the same team. However, regarding your threat to go to Terhune/Jurgensen and file a grievance, I understand that you need to do what you need to do. Just don't burn your bridges in the process!

There was a further exchange of E-mail messages between Katz and Reasin on September 21, 1993.

On October 20, 1993, Reasin relieved Katz from his position as assistant varsity boys basketball coach. Katz filed a grievance, dated October 26, 1993, charging that the District violated Article 6.11.1 of the CBA in reprisal for his union activity. Article 6.11.1 provides that:

No reprisals of any kind shall be taken by any party to this procedure against any party, any witness, any representative, or any other participant in the grievance procedure by reason of such participation.

The District denied the grievance at Level II and Level III of the grievance procedure, on December 3, 1993, and January 18, 1994, respectively, as not being grievable within the intent of Article 6.11.1

#### DISCUSSION

In deferral to arbitration cases, PERB is bound by Lake Elsinore School District (1987) PERB Decision No. 646 (Lake Elsinore).) In Lake Elsinore, the Board held that EERA section 3541.5(a)(2)<sup>4</sup> denies jurisdiction to PERB over matters involving

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<sup>4</sup>Section 3541.5(a)(2) provides in pertinent part, that PERB shall not:

Issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance

conduct arguably prohibited by the parties' CBA until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted either by settlement or by binding arbitration. Further, the Board held that deferral is jurisdictional, not discretionary.

In this case the complaint alleges that the District made a threat that interfered with Katz' exercise of rights protected by EERA and, because of such activities, retaliated against him by terminating him from his assistant boys basketball coaching position in violation of section 3543.5(a).

The District argues that the essence of the underlying charge is a dispute regarding whether the District retaliated against Katz in violation of Article 6.11.1 of the CBA for threatening to file a grievance, and that no right protected by EERA is at issue. As an arguable contract dispute, the District maintains, the matter is subject to the contractual grievance procedure.

SAEA takes the position that the reprisal charge is the only element of the complaint arguably covered by the CBA. However, since Article 6.11.1 only prohibits reprisals against a "participant in the grievance procedure by reason of such participation," it is not clear that the CBA prohibits reprisals against Katz since arguably he never became a participant in the

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

grievance procedure, never having actually filed a grievance.

Thus, the key portion of the Lake Elsinore test, as it pertains to this case, is that the conduct at issue must be arguably prohibited by the language of the CBA.

In Los Angeles Unified School District (1990) PERB Decision No. 860, the Board made it clear that the exercise of PERB's jurisdiction is not precluded unless the alleged unfair practice is arguably prohibited by the parties' agreement. Accordingly, it is not sufficient for the agreement to merely cover or discuss the matter. The conduct alleged to be an unfair practice must be prohibited. (Fremont Union High School District (1993) PERB Order No. Ad-248 (Fremont).)

In Los Angeles Community College District (1989) PERB Decision No. 761, where an employee alleged that the district had discriminated against him for pursuing protected activity, deferral was ordered because the Board found specific language in the parties' agreement which prohibited the alleged violative conduct. In that case, the agreement stated that the district agreed to "comply with all federal and state laws regarding non-discrimination." The Board stated that EERA is a state law that prohibits, among other things, discrimination against employees because of their exercise of rights guaranteed by EERA.

Here, Article 6.11.1 does not specifically discuss alleged acts of interference, nor does this section, or any other provision of the CBA, appear to incorporate directly or indirectly into the CBA, rights guaranteed to employees and

employee organizations by EERA. (Fremont.) Inasmuch as the interference allegations are arguably not prohibited by the CBA or subject to the contractual grievance procedure, deferral is inappropriate.

Deferral of the discrimination/retaliation allegation is also inappropriate. This conclusion is reached for the same reasons set forth in the PERB Regional Attorney's December 24, 1993, letter, denying the District's request to dismiss and defer the reprisal allegation to arbitration. This conclusion is supported by evidence of the District's Level II and Level III responses to Katz' October 26, 1993, grievance which indicated that Article 6.11.1 does not apply to Katz' reprisal claim since no grievance was actually filed on the initial (class size) issue. It is further concluded that Article 6.11.1 of the CBA does not meet the requirements discussed in Fremont, since it arguably does not prohibit discrimination against employees for participation in conduct protected by EERA.

PERB is, therefore, the appropriate forum for this dispute.

#### ORDER

For all the above-stated reasons, the District's request to defer this matter to arbitration and dismiss the complaint, is DENIED. The formal hearing will proceed as scheduled.

#### RIGHT TO APPEAL

Pursuant to California Code of Regulations, title 8, section 32646(b), respondent may obtain a review of this Order by filing an appeal to the Board itself at the headquarters office

in Sacramento within 20 calendar days of service of this Order. (Cal. Code of Regs., title 8, section 32635(a).) 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 . . ." (See Cal. Code of Regs., tit. 8, sec. 32135; Code Civ. Proc., sec. 1013 shall apply.)

All documents authorized to be filed herein must also be "served" concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code of Regs., tit. 8, secs. 32300, 32305 and 32140.)

DATE: May 19, 1994

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W. Jean Thomas  
Administrative Law Judge