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A SYMPOSIUM INTRODUCTION: THE SPECIAL VALUE OF SETTLEMENTS IN EDUCATIONAL EMPLOYMENT RELATIONS ACT PROCEEDINGS

Reginald Alleyne*

The California Educational Employment Relations Act (EERA)¹ was two years old on January 1, 1978. Having been brought into effect in stages, it is even younger than its official age suggests. The EERA became fully operative on July 1, 1976 when its unfair practice provisions became effective and joined administrative and representation case sections which had become operative earlier. Six months of preparing to administer the EERA, eighteen months of administering it and forty-four Educational Employment Relations Board (now Public Employment Relations Board-PERB) decisions as of January 1, 1978, would ordinarily provide an insufficient basis for enlightening analysis. But this would be true only in a very narrow quantitative sense.

Viewing the EERA in the context of the great decade-old wave of public employee organizing activity and the influence the forty-three year old National Labor Relations Act (NLRA)² has had on public sector labor law as enacted and interpreted, the editors of the *Santa Clara Law Review* are timely in their choice of a symposium topic. It should lay the groundwork for constructively critical law review commentary on the work of the PERB and courts reviewing PERB decisions.

Even at early stages of the EERA's development, the PERB and reviewing courts should benefit from commentary of the kind that has been so valuable in law review articles on the work of the judiciary, the branch of government intended to be the least subject to influence by view-shaping group pressures and, consequently, the branch of government most in need of self-appraisal by its members.

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1. CAL. GOV'T CODE §§ 3540-3549.3 (West Supp. 1978). The legislature provided no name for what is commonly known as the Educational Employment Relations Act (EERA). The State Employer-Employee Relations Act amended the EERA by adding state employees to the jurisdiction of the Educational Relations Board and changing its name to Public Employment Relations Board, effective July 1, 1978. See 1977 Cal. Stats., ch. 1159, § 6.

2. 29 U.S.C. §§ 151-169 (Supp. V 1975).

Law review articles on the work of the PERB will aid EERA parties in their understanding of what arguments and evidence are required to persuade the decisionmakers in litigated cases, and what kinds of cases should be settled rather than litigated. The contribution to litigation-avoiding settlements is by far the more important of the two, though, as I note subsequently, they are not mutually exclusive.

My comments focus on what I view as the special importance of settlements in labor-management relations controversies. Hopefully, this will complement as well as introduce the symposium's articles, for I note here two classes of cases not addressed in the symposium: cases filed with the PERB but settled and not litigated, and cases never filed with the PERB because parties made case-avoiding adjustments in those aspects of their relationship having a potential for fostering EERA litigation. These settled and unlitigated cases and those potential EERA cases that were never filed are, I think, governed in number and kind by attributes unique to labor-management disputes.

Administrative agencies like the National Labor Relations Board (NLRB) and the PERB are unique quasi-judicial agencies. The unfair-practice and representation-case disputes that make up their work load are between institutional entities with a shifting and complex relationship. At one time they are strong adversaries; at another time they are engaged in the day-to-day administration of a collective bargaining agreement. Parties in these disputes continue to have a close relationship following a dispute's termination by a governing administrative agency like the PERB, or by a court or an arbitrator. They do not walk away from each other following a trial or hearing, as do, say, personal injury litigants. At what stage of its development a labor dispute is settled often has a close bearing on the nature of the parties' ensuing relationship. Unfair-practice and representation-case settlements are more enduring than litigated results, since the same dynamics that produce an agreement to settle are also those that contribute to the successful administration of a collective bargaining agreement.

This unique character of the labor case settlement lends special importance to the labor case decision as a possible precedent for the early settlement of future or pending unfair-practice and representation-case contests. This, in turn, places upon an agency like the PERB a special obligation to clarify the law through the consistent application of its decision and

rule-making authority, and in so doing to increase the possibilities of avoiding litigation and its high potential for consequential danger to the very relationship that collective bargaining legislation is intended to peacefully maintain.

Predictable (and hence litigation-avoiding) results in PERB litigation might not have been achievable for a long time had the California Legislature, in enacting the EERA, created a collective bargaining statute with no basis in other legislation. It did not. The EERA is in the main derived from the NLRA, and to the extent that it departs from the NLRA, largely from the Kansas³ and Indiana⁴ Educational Employment Relations Acts. The EERA follows the NLRA in defining some of its terms,⁵ in some of the criteria used for determining representation units⁶ and in the types of unfair practices established.⁷ It differs from the NLRA in its structuring of the Public Employment Relations Board⁸ and the creation of impasse-

3. KAN. STAT. ANN., §§ 72-5413 - 5431 (1972 & Supp. 1977).

4. IND. CODE ANN. § 20-7.5-1 thru 20-7.5-14 (Burns 1977).

5. Compare NLRA § 2(11), 29 U.S.C. § 152(11) (1970) with CAL. GOV'T CODE § 3540.1(m) (West Supp. 1978), defining the terms "supervisor" and "supervisory employee", respectively; and NLRA § 2(5), 29 U.S.C. § 152(5) (1970), with CAL. GOV'T CODE § 3540.1(d), defining the terms "labor organizations" and "employee organizations," respectively.

6. Compare NLRA § 9(b), 29 U.S.C. § 159(b) (1970), and the community of interest criterion as fashioned and defined by the NLRB in *Kalamazoo Paper Box Corp.*, 136 N.L.R.B. 134 (1962), with CAL. GOV'T CODE § 3545(a) (West Supp. 1978), which explicitly establishes a community of interest criterion. The NLRA does not contain the term "community of interest," but the *Kalamazoo* case, among others, makes it part of the broad unit criteria contained in NLRA § 9(b), which provides as affirmative unit criteria only that "the Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this sub-chapter, the unit appropriate for purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof. . . ."

7. Most of the unfair practices defined in NLRA § 8(a), 29 U.S.C. § 158(a) (1970), are also found in CAL. GOV'T CODE § 3543.5 (West Supp. 1978). Some of these are discussed in the symposium articles. The employee organization unfair practices defined in CAL. GOV'T CODE § 3543.6 are also found in NLRA § 8(b), 29 U.S.C. § 158(b) (1970).

8. The General Counsel of the National Labor Relations Board is independently appointed by the President and independently confirmed by the Senate. 29 U.S.C. § 153(d) (1970). In contrast, the PERB's general counsel is appointed by the PERB. CAL. GOV'T CODE § 3541(e) (West Supp. 1978). Congress made the NLRB General Counsel's office separate and independent of the NLRB itself in order to permit the General Counsel to carry out the statutory obligation to prosecute violations of the NLRA without giving the NLRB the dual and conflicting roles of prosecutor and judge. H.R. REP. NO. 510, 80th Cong., 1st Sess., reprinted in [1947] U.S. CODE CONG. & AD. NEWS 1135. Since the EERA does not provide, as does Section 3(d) of the National Labor Relations Act, that the General Counsel "shall have final authority . . . in respect of the prosecution of complaints before the Board . . .," it was not necessary for the California Legislature to make the PERB's general counsel an official separately ap-

resolution procedures not found in the NLRA itself.⁹ Where the NLRA is silent and decisions of the NLRB and the courts provide judicial standards not found in the text of the NLRA, the California Legislature has in some instances adopted the non-statutory decisional law fashioned by the NLRB.¹⁰

pointed by the governor. As a result, the PERB hears cases presented by the parties as distinguished from cases presented by its general counsel. The role of the PERB's general counsel and General Counsel's staff is analogous to that of the administrative law judges appointed by the NLRB: to hear and decide unfair practice and representation cases at the hearing level, subject to appeal to the NLRB itself on exceptions to a recommended decision by an administrative law judge. See NLRB Rules and Regulations and Statements of Procedure, 29 C.F.R. § 101.10-.11 (1977).

9. CAL. GOV'T CODE § 3548 (West Supp. 1978) authorizes the PERB to appoint mediators and fact finders to resolve bargaining impasses. Mediation is not a function of the NLRB but is a function of the Federal Mediation and Conciliation Service. Labor Management Relations Act § 202, (codified at 29 U.S.C. § 172 (1970)). Factfinding, as established in CAL. GOV'T CODE § 3548.3 (West Supp. 1978), empowering a neutral third party to make nonbinding advisory recommendations on the terms of contract settlements in any bargaining dispute arising under the EERA, is unknown in the private sector.

10. For example, the EERA's definition of management employee in CAL. GOV'T CODE § 3540.1(g) (West Supp. 1978), is derived almost verbatim from decisions interpreting the NLRA, (which does not contain a definition of management employee). Compare CAL. GOV'T CODE § 3540.1(g) (West Supp. 1978) with the decision of the United States Supreme Court in *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), tracing the history of the NLRB's treatment of managerial employees, and approving the definition of "managerial employee" as fashioned by the NLRB: those "who are in a position to formulate, determine, and effectuate management policies." 416 U.S. at 276. The EERA's definition of "confidential employee," as found in CAL. GOV'T CODE § 3540.1(c) (West Supp. 1978), approximates the definition fashioned by the NLRB: "[a]ny employee who, in the regular course of his duties, has access to, or possesses information relating to, his employer's employer-employee relations." In *B.F. Goodrich Company*, 115 N.L.R.B. 722, 724 (1956), the NLRB held that confidential employees are those "who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations." The NLRB defers to grievance-arbitration procedures by requiring their exhaustion when an unfair practice allegation is also covered by the terms of a collective bargaining agreement. See *Collyer Insulated Wire Co.*, 192 N.L.R.B. 837 (1971). The policy has no express basis in the NLRA. Questions concerning its appropriateness have sharply divided the NLRB. See *Roy Robinson, Inc.*, 228 N.L.R.B. 103 (1977). The EERA contains what might be described as a statutory Collyer doctrine. See CAL. GOV'T CODE § 3541.5(a) (West Supp. 1978). The NLRB's post-arbitration Spielberg doctrine requires deferral to arbitration awards on subjects also covered by the NLRA, so long as the arbitration award meets certain standards. *Speilberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955). Like the Collyer doctrine, the Spielberg doctrine has no express basis in the NLRA, but the EERA expressly requires its application in appropriate cases. CAL. GOV'T CODE § 3541.5(a) (West Supp. 1978). Other EERA provisions taken from NLRB or court decisions interpreting the NLRA, but not found in the NLRA, prohibit the PERB from enforcing contracts. Compare CAL. GOV'T CODE § 3541.5(b) (West Supp. 1978) with *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967). The EERA provides for an employee organization's right of access "at reasonable times" for the exercise of rights provided in the Act. Compare CAL. GOV'T CODE § 3543.1(b) (West Supp. 1978) with *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). The EERA establishes

From the outset, the EERA rarely had to be interpreted in a vacuum. Indeed, from the standpoint of decisionmaking methodology and a contribution to the predictive quality of California decisional law on collective bargaining in education, the most important decisions governing the interpretation of the EERA are in my view two California Supreme Court cases decided well before the enactment of the EERA: *Brotherhood of Railroad Trainmen v. Howard*,¹¹ and *Firefighters' Union, Local 1186 v. City of Vallejo*.¹² Read together, the two decisions require the adoption of federal decisions interpreting the NLRA when California labor legislation has a parallel in the NLRA.¹³ Thus, parties with an interest in predicting the outcome of potential EERA cases may in many instances find a common ground in the predictable outcome of their litigated dispute and may use the predicted result as a basis for settlement.

Quite naturally, in a given number of potential EERA cases, the possibilities of result-predictability will run the gamut from unambiguous and high, to ambiguous and low or nonexistent. Even when, for example, a federal case interpreting the NLRA clearly governs the outcome of an EERA case or potential case, good faith disputes over the meaning of the applicable federal decision may justifiably preclude its use as a mediating influence leading to settlement. Other factors may of course impinge upon and bar settlements. These are perhaps infinite in number. Some are too plain to require elaboration; others are too esoteric to describe. What they are is not as important as the tangible EERA case settlement rate, from which conclusions might fairly be drawn concerning the collective effectiveness of all settlement prompting factors.

Most cases filed with the PERB are settled before they reach the hearing stage. Of the remaining cases heard by hearing officers, roughly half never reach the PERB because the

contract bar rules. Compare CAL. GOV'T CODE § 3544.1(c) (West Supp. 1978) with *General Cable Corp.*, 139 N.L.R.B. 1123 (1962). Finally, the EERA creates a duty to fairly represent employees in a negotiating unit. Compare CAL. GOV'T CODE § 3544.9 (West Supp. 1978) with *Local 12, United Rubber Workers v. NLRB*, 368 F.2d 12 (5th Cir. 1966).

11. 54 Cal. 2d 684, 355 P.2d 905, 8 Cal. Rptr. 1 (1960).

12. 12 Cal. 3d 608, 526 P.2d 971, 116 Cal. Rptr. 507 (1974).

13. California appellate courts have relied upon NLRA decisions in appropriate cases. See, e.g., *Santa Clara County Dist. Attorney Investigators Ass'n v. County of Santa Clara*, 51 Cal. App. 3d 255, 124 Cal. Rptr. 115 (1975); *Alameda County Assistant Public Defenders Ass'n. v. County of Alameda*, 33 Cal. App. 3d 825, 109 Cal. Rptr. 392 (1973).

hearing officers' decision is accepted by all parties. Of those hearing officers' decisions that are appealed to the PERB, the issues before the hearing officer are generally reduced by one-half because of limited exceptions to the hearing officer's decision. Those familiar with judicial administration will immediately recognize this case-filtering process as a characteristic of quasi judicial agencies and the judiciary, but the unique value of settlements in labor cases requires more than the usual attention to the litigation stage at which those settlements occur.

In the absence of data, it is not possible to say how many potential EERA cases emerging in the day-to-day administration of school and community college employee relations are never filed with the PERB. The number of potential representation disputes is known because the EERA representation case process must begin with a request for recognition filed with the school district. The PERB representation processes may be invoked only after recognition has been denied or a district does not respond to a request for recognition. However, the number of potential unfair practice cases that never become disputed cases and the number of potential bargaining impasses that never materialize as impasses requiring mediation assistance are unknown.

It is well known that most settlements are reached at early stages of the PERB process. A fair and easy assumption is that the number of potential EERA cases that never become filed cases is high in comparison to the total number of cases filed.

Evidence of the undramatic but important mediating influence inherent in the EERA is found in revealing case statistics of the PERB. Of 1500 potential pre-election representation unit or other representation disputes, 1100, or seventy-three percent were settled before they became PERB cases. In those instances, school or community college districts voluntarily recognized employee organizations. This avoided both representation elections to choose or reject representation and litigation over negotiating unit descriptions and other pre-election matters. Another thirteen percent of potential unit or other representation disputes were resolved by consent-election agreements in which unit descriptions and other incidentals concerning the representation election were agreed to by all parties. These agreements permitted a representation election to take place without preliminary litigation. Of the remaining representation cases, 108 were litigated before PERB hearing officers; of these, sixty, or an average of three per month, were

appealed to the PERB during the eighteen months between July 1, 1976 and December 31, 1977.

Now that most of the original and almost simultaneously-filed EERA representation cases have been resolved by settlement or decision, the bulk of the PERB's EERA case load will consist of unfair practice cases. These, too, have been subject to the EERA's inherent mediating influence. Of 375 unfair practice cases filed with PERB regional offices in one year, twenty-two, or 5.8 percent reached the three-member PERB for a decision. This characteristic of the EERA is also reflected in the number of negotiated agreements reached without a strike: 825 out of 837, or 98 percent.

In summary, a benevolent circle marks the EERA representation and unfair practice case-handling process: settled cases free the time and resources of the PERB and its staff for use in the resolution of unsettled disputed cases. To a degree, depending upon its clarity and consistency with other decisions, every PERB decision in a disputed and unsettled case contributes to the predictable quality of the EERA and, in turn, improves the EERA settlement rate. The early decisions of the PERB and other aspects of its work in unsettled cases—the bare tip of the iceberg—are the subject of this symposium on collective bargaining law in California schools and community colleges.

