

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



CALIFORNIA SCHOOL EMPLOYEES)	
ASSOCIATION and its PITTSBURG)	
CHAPTER NO. 44,)	
)	
Charging Party,)	Case No. SF-CE-235
)	
v.)	PERB Decision No. 318
)	
PITTSBURG UNIFIED SCHOOL DISTRICT,)	June 10, 1983
)	
Respondent.)	
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Appearances; Madalyn J. Frazzini, Attorney for California School Employees Association and its Pittsburg Chapter No. 44; Mark W. Goodson, Attorney (Breon, Galgani & Godino) for Pittsburg Unified School District.

Before Tovar, Jaeger, and Burt, Members.

DECISION

TOVAR, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Pittsburg Unified School District (District) to the proposed decision by PERB's Administrative Law Judge (ALJ). The ALJ ruling on charges filed by the California School Employees Association and its Pittsburg Chapter No. 44 (CSEA) held that the District violated subsections 3543.5 (a), (b) and (d) of the Educational Employment Relations Act (EERA) by unilaterally reducing the work year of certain classified employees. He

dismissed CSEA's subsection 3543.5(c) allegation.¹ CSEA did not file exceptions.

FACTS

The District did not base its exceptions on any claimed error of fact by the ALJ. We have reviewed his factual findings and find them free of prejudicial error. The ALJ's decision is incorporated herein. We have summarized the essential facts, infra.

¹**EEERA** is codified at Government Code section 3540 et seq. All statutory references are to the Government Code unless otherwise indicated. Subsections 3543.5 (a) through (d) provide as follows:

It shall be unlawful for a public school employer to:

(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.

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

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

CSEA was voluntarily recognized as the exclusive representative of two units of classified employees in the District, an aides unit and a clerical/support unit, in December of 1976. During the fall of 1977, the District commissioned its business manager, Robert Padilla, to perform a study of clerical services. In that study, which was presented to the board on October 26, 1977, Padilla informed the District that a savings of between \$30,000 and \$60,000 could be realized if the clerical work year was reduced from 12 to 10 or 11 months. He pointed out that Pittsburg was the only school district in its geographic area with a total 12-month clerical service. It does not appear that the District ever informed CSEA that it was contemplating reduction of the work year nor that it provided CSEA with notice or an opportunity to negotiate regarding such a plan.

It was the practice in the District to negotiate jointly with CSEA for both units, and to enter into a collective bargaining agreement covering both units. The 1977-78 agreement is silent on the length of the work year, although it contains language regarding length of work week, workday, lunch periods, rest periods, duty time, overtime, compensatory time, shift differential, vacations, and sick and other leave, all matters pertaining to the amount and increments of working time.

On March 30, 1978, two different employee organizations filed decertification petitions in the operations/support

unit. One was filed by United Public Employees Local 390, Service Employees International Union (SEIU), the other by Public Employees Union Local 1 (Local 1). SEIU's petition was supported by a showing of interest of not less than 30 percent. Local 1's petition was initially supported by an insufficient showing. The PERB regional director gave Local 1 an additional 10 days in which to perfect its showing, and it did so. In early May, 1978, the regional director ordered a decertification election involving the incumbent and both petitioners. At that time, SEIU sought a stay of election, filing an administrative appeal with the Board itself of the regional director's grant of 10 days to Local 1 to perfect its showing. On May 26, 1978, the PERB itself stayed the election pending resolution of the underlying appeal. (Pittsburg Unified School District (5/26/78) PERB Order No. 34.) During mid-May the District met with CSEA, SEIU, and Local 1 to discuss the problems posed by the decertification petitions and the imminent expiration of the contract. The District told CSEA that it had a good faith doubt of CSEA's representative status in the operations/support unit, and could not bargain with it for a new contract in that unit.²

²PERB rules required that a decertification petition be accompanied by a 30-percent showing of support. This does not mean, however, that, because two petitions were filed, 60 percent of the unit had indicated a desire to decertify CSEA. An employee could have signed more than one

The three unions were unable to agree on coalition bargaining or any other manner of settlement of the problem. The District took the position that CSEA could administer its contract through the June 30 expiration date and that it would maintain the status quo thereafter regarding matters within scope.

CSEA did not object to the District's refusal to negotiate towards a new contract for the operations/support unit during pendency of a real question concerning representation. It did assert its continued right to administer its existing contract.

During the spring of 1978, the District began to make preparations to deal with the budgetary shortfalls which it anticipated would result from the expected passage of Proposition 13 in the June election. It solicited voluntary work year reductions from clericals, and some clericals acceded to such a reduction. On May 10, 1978, the school board adopted a resolution approving these voluntary work year reductions. Also at that meeting, several aide, gardener and custodial positions were eliminated involuntarily. CSEA did not object to or demand to negotiate over these actions. The record indicates that most, if not all, of the custodial and gardening

decertification petition. Employees from the blue collar segment of the unit had reported to District management their dissatisfaction with CSEA, although it is unclear how many did so.

slots eliminated were vacant at the time of the action, and that the aides affected were able to transfer into other vacant positions, so that it was CSEA's belief that no incumbent employees were adversely affected by the involuntary reductions.

At the June 14, 1978 school board meeting, the board approved the cancellation of summer school for 1978. Also at that meeting, a resolution was passed which purported to lay off or reassign clerk-typist Debbie Riso, pursuant to the reduction or discontinuance of services undertaken by the District on May 10, 1978. Majorie Ott, a CSEA field representative, spoke to this resolution, demanding negotiations over the reduction in Riso's wages and hours. On June 19, 1978, a letter from the District informed Riso that "due to lack of work and/or lack of funds under section 45298 of the Education Code" her work year was being reduced from 12 to 10 months. CSEA protested this action by letter dated June 29, 1978, and demanded negotiations over the reduction in wages and hours.

At the June 28, 1978 school board meeting, the District passed resolution No. 78-9 (C.P.'s Exhibit 6). That resolution provided, inter alia, that the work year and salary of some 30 clerical employees was to be reduced. The resolution imposed cuts in several other areas of the budget, indicating that it was a response to the budgetary estimate that the District

would suffer a 13.1 percent reduction in revenue due to the passage of Proposition 13.

The record is inconclusive as to the basis for selection of those whose work year was reduced. The resolution basically is an adoption of the Board of Education Accounting Committee Report for Proposed Budget Changes, presented to the District board on June 28, 1978.

Regarding the basis for selection within the job classifications listed in the resolution, it should be noted that the resolution instructs the superintendent to take the ". . . necessary steps, according to law, to reduce the following clerical positions" There was no evidence in the record to demonstrate that, at least within the job classifications listed, the selection of those to be reduced was made on grounds other than strict seniority. It is clear that not all clerical employees suffered reductions in their work year. In the transcript of the June 28 school board meeting, submitted in evidence by CSEA and not challenged as inaccurate by the District, it was indicated that the work year of secretaries for certain administrators who themselves would continue working a 12-month year would not be reduced.

CSEA demanded negotiations over the reduction in work year at negotiating sessions regarding a new contract for aides on June 29, and in subsequent sessions. The District took the

position that it would not negotiate over the decision, because it was a type of layoff and thus not within scope. The District further alleges that, at the several negotiating sessions in June and July of 1978, it raised the defense that it need not, and indeed could not, negotiate with CSEA over issues regarding the operations/support services unit. CSEA denies that this position was overtly raised in negotiating sessions. As the ALJ points out, such a position was raised by the District prior to the negotiations and it is thus reasonable to resolve this conflict in favor of the District's account, because such would be consistent with its formerly expressed and continually held position. Despite its unwillingness to negotiate regarding operations/support unit issues even after resolution of the pending decertification petition, the District did discuss issues arising from the effects of the work year reduction such as health benefits, manner of payment, eligibility for unemployment insurance, and vacations. However, the District maintained that a 10-month work year was the status quo even though the reduction in the 12-month work year was unilaterally implemented by the District.

The CSEA contract governing the operations/support services unit expired on June 30, 1978. The work year reductions took effect after that date.

In October of 1978, PERB issued Pittsburg Unified School District (10/20/78) PERB Order No. 49, dismissing both

decertification petitions. Following that event, negotiations for the operations/support unit resumed and CSEA presented a proposal on work year duration which set forth a particular number of workdays per year for employees in various classifications. The District responded that the contract should remain silent on actual number of work year days, with the work year to be established by past practice. The District unilaterally changed the status quo for clerical employees from a 12-month work year to a 10-month year and then took a bargaining position that a 10-month year was in fact the status quo. But it sought to maintain the 1977-78 status quo for all the other issues.

THE ALJ'S DECISION

The ALJ found that the reduction in work year at issue here was a subject within scope because it constituted a reduction in wages and hours, items enumerated in subsection 3543.2(a).³

3subsection 3543.2(a) provides as follows:

(a) The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8, and the layoff of probationary certificated school district employees,

Although noting that under established PERB precedent an employer may unilaterally determine that a layoff is necessary, the ALJ held that the reduction in work year at issue here was not a layoff. He held, further, that the District had a reasonable good faith doubt as to CSEA's majority status at the time it changed the work year and, thus, that the District had no obligation to negotiate with CSEA at that time. However, he found that the District did have an obligation to maintain terms and conditions of employment at their then current level when faced with a question concerning representation raised by petitions filed by competing labor organizations. He found that the unilateral reduction of work year violated that obligation of strict neutrality. As a remedy for that unilateral change, he ordered the District to reinstate the status quo ante, make all affected employees whole for earnings

pursuant to Section 44959.5 of the Education Code. In addition, the exclusive representative of certificated personnel has the right to consult on the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks to the extent such matters are within the discretion of the public school employer under the law. All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating, provided that nothing herein may be construed to limit the right of the public school employer to consult with any employees or employee organization on any matter outside the scope of representation.

lost due to the reduction in work year,⁴ and post an appropriate notice informing employees of the results of the decision.

CSEA filed no exceptions. The District excepts to the finding that the decision to ". . . layoff classified employees by a reduction in hours is mandatorily negotiable . . .", to the finding that the District was obligated to maintain the status quo regarding matters within scope during the pendency of a question concerning representation, and to the finding that backpay would be the appropriate remedy even if the Board were to find a violation predicated upon the unilateral change in work year.

DISCUSSION

A reduction in work year directly affects items enumerated in subsection 3543.2(a), supra, because it reduces wages and hours. We affirm the ALJ's finding that duration of the work year is a subject within scope. Such finding is in accord with prior Board decisions holding that the number of workdays in the work year is a subject within scope. See North Sacramento School District (12/31/81) PERB Decision No. 193; Pittsburg

⁴The ALJ provided that back pay would be mitigated if, in the compliance stage of the proceedings, the District could demonstrate that it suffered sufficient actual lack of work or funds to justify work year reductions in lieu of layoffs in the years after 1978.

Unified School District (3/15/82) PERB Decision No. 199; Palos Verdes Peninsula Unified School District/Pleasant Valley School District (7/16/79) PERB Decision No. 96; San Jose Community College District (9/30/82) PERB Decision No. 240.

The District does not dispute the finding that the length of work year is within the scope of representation. Rather, the District asserts that it may unilaterally reduce the work year due to lack of work or lack of funds as a form of layoff, pursuant to the Education Code. It asserts that the same rules PERB has established for negotiations regarding layoff should apply to its conduct here and, thus, that it should be privileged to unilaterally reduce the work year, in lieu of layoff, negotiating only over the effects of such action.⁵

In support of its position, the District cites two California appellate decisions, CSEA v. Pasadena Unified School District (1977) 741 Cal.App.3d 318 and CSEA v. King City Union Elementary School District (1981) 116 Cal.App.3d 695, for the proposition that a reduction in hours and work year is the equivalent of layoffs under the Education Code. We find that neither of those cases is dispositive of the issue presented by the instant case, for the reasons set forth infra.

5There is no allegation in this case that the District refused to negotiate over the effects of layoff. Thus, that issue is not before us.

In Pasadena, supra, CSEA filed for a writ of mandate, alleging that the District violated the Education Code by, inter alia, reducing the work hours of certain employees. The trial court treated the district's general denial as a demurrer, and dismissed CSEA's petition without leave to amend. The Court of Appeals was ruling on CSEA's appeal of that dismissal, and not on the ultimate merits of the case.

Regarding the reduction in hours of classified employees, the Court characterized CSEA's argument as being that the Education Code strictly prohibited districts from reducing the hours of employees in any manner. At issue was the language of Education Code section 13580.1(g) (now Education Code section 41505 (g)) which provides, in pertinent part, that

. . . layoff for lack of funds or layoff for lack of work includes any reduction in hours of employment or assignment to a class or grade lower than that in which the employee has permanence, voluntarily consented to by the employee, in order to avoid interruption of employment by layoff. [Emphasis added.]

The Court of Appeals clarified the opinion of the Attorney General in 58 Ops. Cal. Atty. Gen. 357 (1975) which held that the hours of classified employees may not be reduced except with the employee's consent in order to avoid interruption of employment by layoff. The Court perceived that the Attorney General's opinion implied that ". . . because such reductions cannot be made except with the employee's consent in lieu of layoff, therefore they cannot be made at all." [Emphasis in original.]

While acknowledging that the pertinent Education Code sections "... clearly imply that the school district may reduce the time assignments of specific employees within a classification only with their consent, in lieu of layoff ..." [emphasis added] the Court of Appeals went on to state that

. . . this does not mean that there is no way for a school district to accomplish the objective of reducing the time assignments of individual employees within a classification. The school district would comply with the statute by offering the reduced assignments to the employees who would otherwise be laid off. The practical effect of the statutory scheme is simply that the employees whose time assignments are to be reduced must be selected in the same order they would have been selected for layoff under section 13746. (Length of service in class plus higher classes.)

The District cites Pasadena, supra, for the proposition that under the Education Code a school employer may reduce classified employees' hours without their consent so long as it selects employees for hours reduction according to the same criteria set forth in the Education Code for layoff selection. We reject that interpretation of the Court's holding. First, such a ruling would render the language in the Education Code regarding voluntary acceptance of a reduction in hours a nullity. Second, the Court does not expressly state that the employer is free to reduce hours involuntarily; rather, it simply states that the employer may offer hours reduction to

individual employees as an alternative to laying them off. Nowhere does it state that employees are obligated to accept such an offer. Further, in the posture of the case before the Court of Appeals, it is impossible to state precisely what the district did in Pasadena. Since no facts had yet been developed, it is unclear what personnel action the District actually took. There is some indication in the decision that, due to subsequent budgetary decision, all employees on behalf of whom CSEA was suing had actually been retained.

In our view, the Pasadena decision stands only for the obvious proposition that, when faced with a bona fide lack of funds or lack of work, an employer may offer to employees the option of accepting a reduction in their hours in lieu of layoff, so long as it selects those to whom it tenders such offers by the same manner prescribed in the Education Code for selection for layoff. It does not expressly or impliedly hold that the Education Code enables school employers to reduce the hours of employees in lieu of layoff without their consent, nor does it hold that an involuntary reduction in hours is the equivalent of a layoff by Education Code definition. For these reasons, and others discussed infra, we do not find Pasadena to be authority for the District's argument in the instant case.

In King City, supra, (1981) 116 Cal.App.3d 695, the District laid off the entire class of teachers' aides for two

weeks (the first and last week of the 1976-77 school year). That practice was reinstated in the 1977-78 school year, and was not complained of until February 8, 1978. The Court found that subsection 45101(g) of the Education Code posed no impediment to this involuntary work year reduction. It held that the District's action was a temporary layoff of an entire class, not a reduction in hours of selected employees, and thus that the section did not apply. The Court found that the purpose of subsection 45101(g) was to protect the return rights of employees who voluntarily assent to reduced hours in lieu of layoff. According to the Court, the employees in King City were protected under the return rights sections applicable to laid-off employees. The District urges that the employer action in King City was identical in nature to its conduct herein. Thus, it argues, King City establishes that work year reductions are temporary layoffs under the Education Code, and thus may be undertaken unilaterally.

King City is distinguishable from the instant case. In King City the reduction in work year was keyed to the reduction in funding for a specific program in which the affected employees had worked. In the instant case the decision to reduce the work year was based upon the Padilla report received by the District in October of 1977, which recommended almost exactly the work year reductions later undertaken by the District. The evidence indicates expressly that the reductions

in work year were not tied to the cancellation of summer school. No evidence was presented to indicate that clerical work year reductions were tied to any other program cancellation, or that the reductions were otherwise motivated by lack of work. Rather, it appears that, based upon a projected monetary shortfall, the District imposed as an "emergency" measure a work year reduction which had been within its contemplation for the previous eight months, and which it had never discussed with CSEA. A more crucial difference is that, in King City, the reduction in work year was undertaken only for one year and reinstituted separately for a second year, unlike the work year reduction in the instant case, which purported to alter the work year for time immemorial, establishing a new status quo.

Both King City and Pasadena rose in a substantially different context. In each of those cases, the courts focused upon whether the employers could lawfully accomplish the personnel actions they took at all, in light of applicable Education Code procedural requirements regarding return and bumping rights, selection and timing of layoff, etc. A court determination that a given personnel action is Procedurally valid under the Education Code is not dispositive of the EERA question as to whether such action may be taken unilaterally. The reduction in work year in the instant case must be examined

on its own merits, in light of PERB and other labor law precedent to determine whether it fits into the rationale for PERB's holding that the decision to lay off for lack of funds or lack of work may be made unilaterally or whether it is governed by PERB decision mandating negotiation regarding the decision to alter the work year.

PERB's prior decisions on layoff have dealt with more classic layoff circumstances, in which employees selected by Education Code criteria regarding classification, seniority, etc., suffer total separation from service but have specific statutory return rights. Said layoffs have been open-ended. (In other words, there has been no definite indication as to when or if employees laid off would be called back.) See, for example, Newman-Crows Landing Unified School District (6/30/82) PERB Decision No. 223; Newark Unified School District (6/30/82) PERB Decision No. 225; and Solano County Community College District (6/30/82) PERB Decision No. 219.

In Newman-Crows Landing, supra, the Board held that school employers may unilaterally make the decision to lay employees off but must negotiate over the effects of that decision insofar as they affect matters within scope. This decision was reaffirmed in Newark, supra, in which we held that only the decision that a layoff is necessary may be made unilaterally, and that a district must not implement a layoff in such a manner as to affect matters within scope prior to negotiating

fully over those effects. Thus, the right of public school employers to unilaterally decide to layoff is a limited exception to the principle that all decisions affecting wages and hours must be negotiated. The exception exists because PERB has recognized management's prerogative to determine unilaterally that insufficient work or funds are available to support the current level of employees. This prerogative, coupled with the Education Code's enabling provisions which allow school employers to lay off employees for lack of work or lack of funds, means employers may unilaterally decide to lay employees off. Contract proposals which seek to place limitations on the employer's ability to initiate layoffs by defining lack of funds or which would allow the Association to analyze a claimed financial justification, are non-negotiable.

In accordance with the above holdings, school employers are free to determine unilaterally that layoffs, as defined in the Education Code and cases decided thereunder, are necessary.

With respect to workdays, PERB precedent is clear.

PERB has held that involuntary reduction in hours may not be unilaterally undertaken. In North Sacramento School District (12/31/81) PERB Decision No. 193, the language of Education Code subsection 45101(g) equating voluntary reduction of hours with layoffs did not apply. In that case, PERB stated that the decision to reduce hours (absent the enabling language

of the Education Code) may not be undertaken unilaterally. In accord is Pittsburg Unified School District (3/15/82) PERB Decision No. 199, in which the Board found that unilateral reduction of an employee's hours violated subsection 3543.5(c) of EERA.

PERB has addressed the issue of whether the number of workdays in the work year is a subject within scope in two cases. In Palos Verdes Peninsula Unified School District/Pleasant Valley School District, supra, the Board held that the beginning and ending date of certificated service for the school year, vacation and holiday dates for certificated employees, and extra hour assignments are all matters within the scope of representation. In San Jose Community College District, supra, PERB reaffirmed the mandatory negotiability of school calendar insofar as it affected the number of workdays in the school year. Neither of those cases involved an attempt by a District to reduce its ultimate labor cost by reduction of the number of paid days worked by employees. Each stands for the proposition that the decision as to the number of workdays in the year is within scope because it affects wages and hours of employees.

In this case the District altered the status quo as to the number of work days for the 1977-78 year and all subsequent years. In deciding to alter the status quo regarding work year, the District ventured beyond the realm of the current perceived funding crisis and unilaterally adopted a new policy

for all time regarding a matter (work year) which has been explicitly found to be within the scope of representation.

Because the District's action purported to establish a new status quo as to work year for all time, we find that it amounted to a unilateral change regarding a matter within scope, as opposed to a layoff.

Unilateral Change in Work Year During the Pendency of a Question Concerning Representation

We have concluded that the change in work year was a unilateral change in a matter within scope. The District argues that, even if its action herein affected a matter within scope, it was free to undertake such a unilateral change under the factual circumstances presented herein.

The factual context in which the unilateral change took place may be summarized as follows: prior to the filing of the decertification petitions at the end of March of 1978, CSEA was the voluntarily recognized exclusive representative of the classified employees in an aides unit and in the operations/support unit at issue here. CSEA and the District entered into a collective bargaining agreement covering both units, which expired on June 30, 1978. The unilateral change in work year, though announced while the contract was in effect, was made effective following the expiration of that contract. The District's good faith doubt as to CSEA's majority status arose in late March of 1978 and continued until

October of 1978, at which time PERB dismissed the decertification petitions and the District and CSEA resumed negotiations for a new contract for the operations/support services unit.

Two facts were thus operating to change the CSEA's representative status and the District's obligations between March and October of 1978. First, a question concerning representation (QCR) was pending. This had the effect of invoking a requirement of neutrality upon the District. The former rule, established by the National Labor Relations Board (NLRB), in Shea Chemical Corporation (1958) 121 NLRB 1027 and extended in Telautograph Corporation (1972) 199 NLRB 892, was that the pendency of a QCR raised by a decertification petition relieved the employer of the obligation to negotiate with the incumbent and, in fact, constrained the employer from doing so. The rationale for this rule was that the employer should refrain from extending any support to either competing union while a real question concerning representation existed. Midwest Piping and Supply Co., Inc. (1945) 63 NLRB 1060.⁶ In Dresser Industries, Inc. (1982) 264 NLRB No. 145 [111 LRRM 1436], the NLRB overruled Telautograph, holding that the mere filing of a decertification petition, without more, would no

⁶PERB held that this requirement was applicable to public school employers in Sacramento City USD (4/30/82) PERB Decision No. 214.

longer justify the employer in its refusal to bargain with the incumbent. However, the NLRB did not apply this new rule of law retroactively. Thus, no violation was committed by the respondent in that case, because its refusal to bargain was in conformity with previously valid NLRB precedent.

The NLRB indicated that a decertification petition, without more, only raises a real QCR; it does not by itself give rise to a reasonable good faith doubt as to the union's rebuttably presumed majority status. This was a restatement of the rule enunciated in RCA del Caribe (1982) 262 NLRB No. 116 [110 LRRM 1369], wherein the NLRB stated (at 110 LRRM 1370),

while the filing of a valid (decertification) petition may raise a doubt as to majority status, the filing, in and of itself, should not overcome the strong presumption in favor of the continuing majority status of the incumbent and should not serve to strip it of the advantages and authority it could otherwise legitimately claim.

Regardless of the change in NLRB precedent, the District's reliance upon the then-existent Telautograph rule was reasonable.⁷

⁷As noted above, CSEA did not except to the finding of the ALJ that the District had a good faith doubt as to CSEA's majority status, and that it therefore had no obligation to negotiate with CSEA and did not violate subsection 3543.5(c). That finding is thus binding upon the parties. Even under Dresser and RCA del Caribe, employers who have a good faith doubt as to majority status are required to maintain neutrality and refrain from engaging in collective bargaining.

It is clear that the District had no obligation to negotiate with CSEA, due to the pendency of a QCR and due to its reasonable good faith doubt as to majority status. However, such good faith doubt does not necessarily render an employer free to make unilateral changes in scope matters.

The NLRB has decided several cases in which employers faced with a QCR and a good faith doubt as to majority status increased benefit levels or wages following expiration of collective bargaining agreements. In such circumstances the NLRB trend is that benefit or wage increases consistent with the dynamic status quo are not violative of the employer's obligation of strict neutrality or otherwise unlawful.

In Stoner Rubber Company, Inc. (1959) 123 NLRB 1440, the employer unilaterally granted a 5.5 percent wage increase at a time when it had a reasonable good faith doubt. The two-member plurality of a divided NLRB held that, absent proof that the union enjoyed majority support at the time of the change, the employer was free to grant the wage increase. The third concurring member held that under the circumstances, absent a showing of employer bad faith, the employer was free to ". . . take unilateral action of the type taken here. . ." (a wage increase). The dissenting members drew an analogy to other situations in which there was an unresolved doubt as to a union's status, such as the period prior to certification but following a claim for recognition, the filing of a representation petition, or the beginnings of an organizational

campaign. In those circumstances, the NLRB had ruled in many cases that unilateral changes were violative. According to the dissent, the rationale for said decisions and the basis for their applicability to the instant case is that "... the natural effect of unilateral (wage) action was to undermine the (incumbent) union . . ." at a time when the union's status is in doubt. The dissent notes that such unilateral action materially prejudices the union and precludes a fair test of its strength.

In NLRB v. Minute Maid Corp. (5th Cir. 1960) 283 P.2d 705 [47 LRRM 2072], the Court overruled the NLRB's determination that the employer's refusal to discuss economic issues with the union was an unlawful refusal to bargain. The employer refused to discuss economics with the union because its citrus crop had been struck by severe frost and it needed time to evaluate its crop losses. The Court found that these dire economic circumstances constituted a defense to the employer's refusal to discuss economic matters. It further found that the existence of a good faith doubt as to majority status constituted a defense to the allegation that the unilateral grant of bonuses violated 8(a)(1) and (5).⁸

⁸We disavow the ALJ's basis for distinguishing Minute Maid, supra. The ALJ found Minute Maid distinguishable on the ground that in the instant case, unlike Minute Maid, no dire economic circumstances existed. However, we note that the dire economic circumstances presented in Minute Maid did not affect the holding regarding the unilateral grant of benefits; rather, it was held a defense to the refusal to negotiate allegation, which is not relevant to the instant case.

In accord with the general rule that unilateral wage and benefit increases may be granted where the employer has a reasonable good faith doubt of majority status are Union Carbide & Carbon Corp. (National Carbon Division) (1953) 105 NLRB 441 and American Laundry Machinery Co. (1954) 107 NLRB 1574.⁹ In Union Carbide, the NLRB found unilateral changes in wages, insurance benefits, and pensions to be permissible, in accordance with

. . . the Board's settled rule that after the end of the certification year an employer may with impunity refuse to continue recognition of a certified union where there exists a good faith doubt as to its continued majority status. National Carbon, supra, at 443.

In Upper Mississippi Towing Corp. (1979) 246 NLRB 262 [102 LRRM 1536] (new health plan) and The Freeman Co. (1971) 194 NLRB 595 [79 LRRM 1019] (wage increase), the NLRB found such unilateral increases in benefits and wages not to violate the bargaining obligation where a good faith doubt, but not a real QCR, existed.

⁹Other cases in which the NLRB ratified the legality of unilateral benefit increases in the face of a QCR are Ellex Transportation, Inc. (1975) 217 NLRB 750 [89 LRRM 1335] (implementation of a new health plan after expiration of the union plan); Morse Electro Products (1974) 210 NLRB 1075 [86 LRRM 1559] (unilateral wage increase); and Vernon Manufacturing Company (1974) 214 NLRB 282 [87 LRRM 1516] (unilateral increase in wages and insurance benefits).

The above-described NLRB cases establish the rule that an employer does not violate its obligations when, in the pendency of a QCR and a good faith doubt as to majority status, it unilaterally maintains or increases the level of benefits which was established by contract or practice during its relationship with the union.

In the instant case, however, the employer drastically altered the past practice and the level of benefits previously enjoyed by clerical employees. The reduction in their work year deprived them of wages and hours. Such employer action is not equivalent to the maintenance or increase of benefits undertaken by the employer in the above cited cases.

In Turbodyne Corp. (1976) 226 NLRB 522 [93 LRRM 1379], two decertification petitions were filed and an election held just prior to the expiration of the employer's contract with an incumbent union. The incumbent union was soundly defeated in the election, but filed objections to the conduct of the election and, by stipulation of the two petitioners, secured a new election. In the period between elections, the contract expired. Upon the expiration of that contract, the employer immediately distributed to all employees a shop manual which set forth new wages, hours, and working conditions, including a grievance procedure which did away with the right of union representation on grievances. It further announced its intention to cease contributing to the incumbent union's pension plan.

The administrative law judge in Turbodyne, with NLRB approval, acknowledged that an employer faced with a real QCR must remain neutral vis-a-vis the competing labor organizations. He stated that the essential question posed by the case was " . . . what constitutes 'remaining neutral' . . . where one of the vying labor organizations is an incumbent union whose collective bargaining agreement with Respondent has expired." (Turbodyne, supra, at 524). The administrative law judge held that whether the employer had a good faith doubt was "essentially beside the point." He held that the legal obligation of the employer was to await resolution of the QCR by the NLRB (in other words, to maintain existing benefit levels until the NLRB resolved the objection to the second decertification election and, by means of a new election or some other method, ultimately certified the results of the decertification effort). He found that the new grievance procedure and the cessation of payments to the pension funds thus constituted unlawful unilateral changes. Apparently because they constituted maintenance of existing benefit levels, he did not find the provisions for wages and benefits in the shop manual to constitute unlawful unilateral changes.¹⁰

¹⁰The District characterizes Turbodyne as a departure from a long-standing rule permitting unilateral changes once an employer has a good faith doubt as to a union's majority status. The Board finds Turbodyne to be consistent with most

Cases applying the Turbodyne rule are in accord with the holding that an employer faced with an unresolved QCR may not reduce established benefit levels.

In Mervyn's (1979) 240 NLRB 54,¹¹ the employer and union had a collective bargaining agreement which expired on March 31, 1978. On March 10, 1978, the union lost a decertification election, the results of which were not certified due to the union's timely objections thereto. On April 1, 1978, at a time when the election objections were still pending and thus a QCR still existed, the employer instituted its own health plan and ceased contributions to the union health plan. The administrative law judge, with NLRB approval, found that the unilateral change in benefits was a violation, citing Turbodyne for the proposition that " . . . any doubt as to the Union's

of the cases cited by the District. While it holds that unilateral changes which reduce employee benefits are violative of the employer's obligation of neutrality if made during the pendency of QCR, regardless of good faith doubt, it implicitly holds that unilateral changes which essentially maintain benefit levels are not violative of the obligation.

¹¹The decision in Mervyn's may be factually distinguished from the instant case because, in Mervyn's, the employer was found to have committed numerous 8(a)(1) violations and its motive for instituting the new health plan was independently suspect in that it may have been linked to the decertification campaign being waged by the employer. Nonetheless, it does stand for the proposition that, in the pendency of a QCR, the existing level of benefits must be maintained. The NLRB supplemented the administrative law judge's order, providing for make-whole relief if it could be shown in compliance that any employee suffered a loss by virtue of the change in benefits.

majority status is irrelevant, and the presumption of majority flowing from the recently expired contract continues . . . " until the board officially resolves the QCR.

The NLRB further strengthened the doctrine that neutrality is required in the pendency of a QCR in Dow Chemical Co. (1980) 250 NLRB 748, finding even a wage and benefit increase to violate the obligation of neutrality. In accord is Grede Plastics (1976) 24 NLRB 1312, wherein a unilateral grant of benefits during the pendency of objections to a decertification election was found to be unlawful interference with employee rights. See also Associated Grocers (1980) 253 NLRB 31.¹²

The weight of NLRB authority persuades the Board that, as the ALJ held, the District herein had an obligation to remain strictly neutral vis-a-vis the competing employee organizations. The District had this obligation of strict neutrality even though it also had a good faith doubt as to CSEA's majority status. It is clear that an employer faced with a QCR violates its obligation of neutrality when it reduces the level of benefits and working conditions

12The weight of authority would seem to indicate that employers may increase or maintain the level of benefits after contract expiration, so long as there is no other evidence of overt favoritism on the part of the employer and thus the action is consistent with the "dynamic status quo." In any event, we need not ultimately rule on the legality of an increase in benefits here, since the instant case clearly involved a decrease.

established pursuant to its relationship with an employee organization by policy, practice, or contract.

The change in work year at issue herein was a unilateral reduction in benefit levels undertaken in the pendency of a QCR. Consistent with the analysis of the ALJ, we find that such unilateral change violated the District's obligation of strict neutrality and hence violated subsections 3543.5(a), (b) and (d) of EERA.

REMEDY

PERB has the statutory authority to fashion appropriate remedies. In this regard, subsection 3541.5(c) provides as follows:

The board shall have the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

As noted above, the ALJ ordered the District to restore the 12-month work year, to make employees whole for any loss of earnings they suffered by virtue of the reduction in work year, to post an appropriate notice, and to negotiate over the work year issue with CSEA upon demand.

While not specifically excepting to any other portion of the proposed remedy, the District excepts to the requirement that it make the affected employees whole for any earnings

which may have been lost by them. The District contends that back pay is not generally the appropriate remedy for an economically motivated unilateral change unless it is further proven that the employer had a discriminatory motive. It further contends that in many unilateral change cases back pay has not been awarded. The ALJ ordered reinstatement of hours lost and full back pay on the premise that

. . . PERB's usual remedy in a case involving the unilateral change of employment terms and conditions is to . . . require reinstatement of employment positions, benefits and back pay. . . .

Beyond the need to protect the integrity of the election, the circumstances of this case warrant granting the ALJ's proposed make-whole remedy. First, after PERB resolved the question concerning representation, the District maintained that a 10-month work year was the status quo even though the reduction from a 12-month work year was unilaterally implemented by the District during the pendency of the QCR. Second, the employer maintained this position even after the Board dismissed the decertification petitions. Thus, the District failed to meet its negotiating obligation even after the good faith doubt as to CSEA's majority status was resolved. Third, unlike some PERB cases which have employed a Transmarine type remedy, the District's action in reducing

hours concerned a subject that required negotiations as to the decision itself. Fourth, the District's "Padilla Report," recommending clerical work year reductions, had been received by the District in October, 1977, yet the District never provided CSEA with notice or the opportunity to negotiate the report's recommendations but unilaterally implemented the same only after the QCR had arisen. Finally, we find no basis for the distinction which Member Burt makes between violations of duty to negotiate and violations of the obligation to remain neutral and refrain from interfering with the selection of a representative during an election.

Thus, for the aforementioned reasons we find the ALJ's proposed remedy appropriate. The Board's general policy is to attempt to restore the status quo ante in cases involving unilateral changes. Reinstatement of employment positions, benefits and back pay is appropriate. San Mateo County Community College District (6/8/79) PERB Decision No. 94; San Francisco Community College District (10/12/79) PERB Decision No. 105; and Davis Unified School District et al. (2/22/80) PERB Decision No. 116.

ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this case, and pursuant to Government Code subsection 3541.5(c), it is hereby ORDERED that

the Pittsburgh Unified School District, board of trustees, superintendent, and their respective agents shall:

1. CEASE AND DESIST FROM:

(a) Interfering with employees because of the exercise of their right to freely select an exclusive representative to meet and negotiate with the employer by failing to maintain the established work year of clerical employees while a question of representation is pending involving employees in the negotiating unit;

(b) Denying the California School Employees Association its right to represent unit members free from employer interference by failing to maintain the established work year of clerical employees while a question of representation is pending involving employees in the negotiating unit; and,

(c) Encouraging employees to join any organization in preference to another by failing to maintain the established work year of clerical employees while a question of representation is pending involving employees in the negotiating unit.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

(a) Reinstate the 12-month work year effective the beginning of the 1983-84 school year, and make whole the affected clerical employees in the operations and support unit whose work year, pay and benefits were reduced from their

established 12-month work year for any and all losses they have suffered;

(b) Upon request, meet and negotiate with the exclusive representative regarding any proposed new work year reductions within the scope of representation, and meet and negotiate over the effects of any such new proposed reductions;

(c) Mail copies of the attached Notice to the employees affected by the District's conduct within ten (10) calendar days after service of this Decision. The mailing should inform employees of reinstatement and reimbursement procedures; and,

(d) Within five (5) workdays after the date of service of this Decision, prepare and post copies of the Notice To Employees attached as an appendix hereto, signed by an authorized agent of the employer. Such posting shall be maintained for at least thirty (30) consecutive workdays at District's headquarters office and at all locations where notices to classified employees are customarily posted. Such Notices must not be reduced in size and reasonable steps shall be taken to ensure that they are not defaced, altered or covered by any material;

(e) Within twenty (20) calendar days from service of this Decision, notify the San Francisco Regional Director of the Public Employment Relations Board, in writing, of the steps the employer has taken to comply with the terms of this Order.

Continue to report in writing to the regional director periodically thereafter as directed. All reports to the regional director shall be served concurrently on the charging party herein.

3. It is further ORDERED that the allegation that the Pittsburgh Unified School District violated Government Code subsection 3543.5(c) by the conduct at issue in the instant case is DISMISSED.

4. At a compliance hearing in this case, the compliance officer shall attempt to accommodate any reasonable proposal regarding the method of payment for the monetary award ordered by the Board.

Member Jaeger joined in this Decision.

Member Burt's concurrence and dissent begins on page 37.

BURT, Member, concurring and dissenting.

I concur in the finding that by unilaterally reducing the work year the District failed to abide by its obligation of strict neutrality and thus violated EERA subsections 3543.5(a), (b) and (d) .

For the reasons set forth below, I disagree that back pay is appropriate herein.

Each case cited by the ALJ for the general proposition that back pay is appropriate involved a unilateral change undertaken at a time when the employer had a negotiating obligation. See San Mateo County Community College District (6/8/79) PERB Decision No. 94; San Francisco Community College District (10/12/79) PERB Decision No. 105; and Davis Unified School District et al. (2/22/80) PERB Decision No. 116. None of those cases involved a unilateral change which violated only an employer's obligation of neutrality. The employers in those cases had no defense to their negotiating obligation such as the good faith doubt as to majority status present in the instant case. Each violated subsection 3543.5(c) by making unilateral changes. Such conduct has been held to be an unlawful refusal to negotiate in good faith even absent proof that the employer lacked a general desire to reach agreement or was otherwise acting in bad faith. NLRB v. Katz (1962) 369 U.S. 736b [50 LRRM 2177].

The gravamen of employer misconduct in the instant case is far different. The District herein did not violate a negotiating obligation, for it had no such obligation due to its good faith doubt as to CSEA's majority status. It violated only its obligation of neutrality in violation of subsection 3543.5(d), thus derivatively violating employees' right to select their exclusive representative, and CSEA's right to preserve its majority, free of employer interference.

The rationale for finding such conduct to be a violation is that it tends to undermine the representative status of one of the competing employee organizations, or to lend employer support to another of the competitors.

Cases in which such violations have been found characteristically arise in situations in which the incumbent has lost a decertification election and alleges that a breach of neutrality by the employer resulted in loss of employee support. Teledyne, Dow, supra. Establishment of such a violation does not require direct evidence of loss of support. However, in assessing the seriousness of the violation herein, it is appropriate to consider the overwhelming majority retained by CSEA once the decertification election was held, following the breach of neutrality.

PERB has issued modified remedial orders in unilateral change cases even when a negotiating obligation was violated. For example, in Solano County Community College District

(6/30/82) PERB Decision No. 219, the Board declined to order reinstatement or back pay to employees whose positions were eliminated unilaterally. Instead, it imposed a remedy such as the one devised by the NLRB in Transmarine Navigation Corporation (1968) 170 NLRB 389, whereby the district was required to pay back pay commencing five days from issuance of its decision, to run until 1) the district and the employee organization reached agreement; 2) the parties reached impasse over the issue; 3) the employee organization waived its right to bargain; or 4) the employee organization failed to negotiate in good faith. Similarly, in Delano Union Elementary School District (10/15/82) PERB Decision No. 213a, PERB modified its initial full back pay order, requiring that the district pay back pay only until the date that it had reached a new agreement with the employee organization over working hours. The Board held that it would be punitive in the circumstances of that case to require payment for hours not worked or to reinstate longer working hours, absent evidence that those extra hours were required.

Under the circumstances of the instant case, I would find that it would be unduly punitive to order back pay. I note that the District's culpability resulted from its failure to abide by its obligation of strict neutrality, and not by a failure to negotiate. Further, the facts indicate that CSEA was amply able to combat whatever impact the unilateral

reduction in work year may have had on its majority status and that, aside from the work year change, the District apparently attempted to remain strictly neutral vis-a-vis the competing employee organizations during the pendency of the QCR herein.

I would, however, retain the other aspects of the ALJ's proposed remedy herein, including restoration of the 12-month work year as the status quo.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. SF-CE-235, in which all parties had the right to participate, it has been found that the District violated Government Code subsections 3543.5(a), 3543.5(b) and 3543.5(d). Specifically, the District was found to have unlawfully reduced the established work year of certain clerical employees, a subject within the scope of representation, while a question of representation was pending in their negotiating unit. (A charge that the District violated section 3543.5(c) by refusing to meet and negotiate over the work year reduction was dismissed because the District had no duty to negotiate while a question concerning representation was pending.)

As a result of this conduct we have been ordered to post this Notice, and will abide by the following. We will:

1. CEASE AND DESIST FROM:

(a) Interfering with employees because of the exercise of their right to freely select an exclusive representative to meet and negotiate with the employer by failing to maintain the established work year of clerical employees while a question of representation is pending involving employees in the negotiating unit.

(b) Denying the California School Employees Association its right to represent unit members free from employer interference by failing to maintain the established work year of clerical employees while a question of representation is pending involving employees in the negotiating unit.

(c) Encouraging employees to join any organization in preference to another by failing to maintain the established work year of clerical employees while a question of representation is pending involving employees in the negotiating unit.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT

(a) Reinstate the 12-month work year effective the beginning of the 1983-1984 school year, and make whole the

affected clerical employees in the operations and support unit whose work year, pay and benefits were reduced from their established 12-month work year for any and all losses they have suffered.

(b) Upon request, meet and negotiate with the exclusive representative regarding any new proposed work year reductions within the scope of representation, and meet and negotiate over the effects of any such new proposed reductions.

(c) Mail copies of this Notice to clerical employees affected by the District's conduct, within ten (10) calendar days of service of PERB Decision No. 318, informing them of reinstatement and reimbursement procedures.

Dated: _____ PITTSBURG UNIFIED SCHOOL DISTRICT

By _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CALENDAR DAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED BY ANY MATERIAL.