STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION and its AZUSA CHAPTER NO. 299,	)	
Charging Party,	)	Case No. LA-CE-1498
v.	)	PERB Decision No. 374
AZUSA UNIFIED SCHOOL DISTRICT,	)	December 30, 1983
Respondent.	)	

Appearances; Siona D. Windsor, Attorney for California School Employees Association and its Azusa Chapter No. 299; Patrick D. Sisneros, Attorney (Wagner, Sisneros & Wagner) for Azusa Unified School District.

Before Tovar, Morgenstern and Burt, Members.

DECISION

BURT, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Azusa Unified School District (District) to the proposed decision of the Administrative Law Judge (ALJ) and the response to exceptions filed by the California School Employees Association (CSEA or Association). The District excepts to the ALJ's finding that it violated subsections 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA)[1] by

[1]The EERA is codified at Government Code section 3540 et seq. All statutory references herein are to the Government Code unless otherwise noted.

failing to provide a seniority list in a timely fashion, and by unilaterally reducing the hours of instructional aides. The Association's response defends the decision of the ALJ.

The Board has reviewed the ALJ's proposed decision in light of the District's exceptions and the Association's response thereto, and the entire record in this matter, and we affirm the ALJ's proposed decision consistent with the discussion below.

FACTS

CSEA is the exclusive representative of the District's classified employees. During contract negotiations in May of 1981, a CSEA negotiating team member informed the District that after past reductions in hours for aides, those affected were not given the opportunity to bump into other positions as required by the Education Code. The parties agreed to discuss the issue further in the fall, and proceeded to agree on a new contract which was ratified on May 5, 1981. The contract extended through June 30, 1983, and contained extensive procedures for layoff and reemployment, including procedures for bumping according to seniority and breaking ties in case of equal seniority.

In the fall, the parties resumed discussions about the previous reduction in hours, and the District agreed to send out a letter to all aides previously affected notifying them that they might be eligible for compensation because they had

not been afforded proper bumping rights. The letter was sent on September 10, and aides were to respond by October 10.

At an executive session of the school board on September 15, Assistant Superintendent Robert Kahle and other administrators advised the board that there would have to be a layoff of instructional aides in order to meet increased personnel costs. The board did not formally vote on this recommendation, but indicated by consensus that the administration could proceed with the reductions. The action proposed, according to Kahle, was a layoff, but Kahle understood that he might also proceed with a reduction in hours.

On September 30, Kahle met with CSEA Field Representative Thomas P. McGuire. Kahle testified that he called the meeting to discuss the proposed layoff; McGuire asserted that he called the meeting to discuss the aides' responses to the September 10 letter. They agree that Kahle told McGuire about the possibility of a layoff of aides or a reduction in their hours to save money. Kahle testified that at this meeting he showed McGuire a copy of a letter to be sent to aides advising them that their workday would be reduced. McGuire denies that he saw a copy of the letter until after it had been sent out.

The two also agree that McGuire asked Kahle to delay action until he could further investigate the District's financial situation and until the aides' responses were all received.

Kahle testified that he responded to McGuire that, "I'll think about it . . . but I indicated to him that this was the direction we were going." CSEA received no further notice that the District would proceed with the reduction in hours.

On October 5, McGuire pursued his inquiry about finances through the District's director of specially funded projects, who indicated that $140,000 was left in the fund from which aides were paid.

On October 7, the District sent letters over Kahle's signature to 68 instructional aides informing them that, as of November 9, their hours would be reduced from three and one-half hours per day to three hours per day because of lack of funds and reduction in service. All aides in the District then working three and one-half hours per day received these notices.[2] (There were other aides already working only three hours per day, and their hours were not affected.)

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[2]The notices stated:

> This letter constitutes a notice that your hours of employment will be reduced from 3 1/2 hours per day to 3 hours per day in your classification as instructional aide, effective on Monday, November 9, 1981.
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> You will retain reemployment rights consistent with your seniority in the District for a period of 39 months. During this time you will have preference to be employed in any vacancy of 3 1/2 hours per day in the classification from which laid

Sometime after the mailing of the notice, but before October 26, McGuire requested a copy of the seniority list for District aides. Kahle responded that such a list was unnecessary because all of the aides were having their hours reduced by the same amount. McGuire believed this to be reasonable and he withdrew his request.

The parties met again on October 26. McGuire renewed his request for a seniority list in order for CSEA to prepare a proposal to negotiate about the reduction in hours. McGuire suggested that aides now working three hours could work two and a half hours per day instead of changing the three-and-a-half-hour workday of others. Kahle pronounced this proposal unworkable, but promised to consult with the District's attorney about provision of the seniority list.

On November 6, the parties again discussed the reduction in hours. McGuire complained that he still had not received the seniority list. Kahle replied that the District's attorney had

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> off in accordance with your seniority and ahead of new applicants.
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> This process is in accordance with Education Code Section 45117 and the agreement between the District and the California School Employees Association and its Azusa Chapter, Local 299.
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> We sincerely regret the necessity of this action that we must take because of lack of funds and reduction in service.

advised that the District had the right to reduce hours unilaterally. On November 9, the proposed reduction took place.

The next day, CSEA placed in writing its demand for the seniority list and asked for information about the funding sources for aides. In that letter McGuire further disputed the District's justification for the reduction: lack of funds and lack of work.

On December 8, the parties met again. McGuire again asked for the seniority list and complained that the reduction had been accomplished without CSEA's agreement. Kahle promised to hand over the list but said that it was not a high priority, since hours of all of the three-and-one-half-hour aides were being reduced the same amount.

On January 12, McGuire wrote to Kahle, requesting that the aides be restored to their full three and one half hours. He also complained that the action had been taken without a resolution of the school board. McGuire further reiterated that CSEA was not satisfied that the District had demonstrated that there was a lack of funds.

On January 19, the school board adopted a resolution to ratify the "layoff (reduction in hours)" which had been instituted "due to lack of funds or lack of work." On January 21, Kahle sent McGuire a copy of the resolution. On February 8, McGuire met with the assistant superintendent of educational services in a further effort to understand the

District's contention that a layoff was necessary because of lack of funds.

Finally, on April 27, the District did provide a seniority list for aides.

DISCUSSION

We find that the ALJ's findings of fact are free from prejudicial errors, and we affirm them as those of the Board itself.

Because of the resignation of the ALJ who conducted the hearing, the case was assigned to a different ALJ for decision. The District excepts, claiming that "the one who decides must hear" since only he has had the opportunity to observe the witnesses. The District argues that this is particularly relevant in a case such as this where questions of credibility are important.

Substitution of ALJs is specifically authorized by PERB's regulations at California Administrative Code, title 8, section 32168(b).[3] Further, the Board has previously considered and rejected the argument that the ALJ who hears the

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[3]Regulation 32168(b) states:

> . . . . . .
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> (b) A Board agent may be substituted for another Board agent at any time during the proceeding at the discretion of the Chief Administrative Law Judge in unfair practice cases....

case must decide it. Fremont Unified School District (4/5/78) PERB Order No. Ad-28. Here the District has demonstrated no prejudice by reason of the substitution and we have decided the case without the need for credibility resolutions. We therefore find this exception to be without merit.

Seniority List

The District argues that there was no failure to supply a seniority list, nor was there any unreasonable delay in supplying the list. The ALJ correctly noted that an exclusive representative is entitled to all information that is necessary and relevant to discharging its duty to represent unit members. An employer's refusal to provide such information constitutes bad faith bargaining unless the employer can give adequate reasons why it cannot supply the information. Stockton Unified School District (11/3/80) PERB Decision No. 143.

Here the Association was entitled to the seniority list to monitor compliance with the contract as well as to formulate proposals concerning reduction in hours, and the ALJ correctly found that the District failed to provide relevant information in a timely fashion. Though the District did not flatly refuse, it did not provide the information for six months. The District's belief that the information was unnecessary or the Association's reasons for wanting it impractical does not constitute adequate justification. We therefore affirm the

ALJ's conclusion that the District's unreasonable delay in providing information violated EERA.

Reduction in Hours

The District generally contends that its action was not a reduction in hours but a layoff. It then asserts that requiring negotiations prior to reduction in hours conflicts with the Education Code, basing its argument on Education Code sections concerning layoff and notice of layoff, and past Board decisions which have decided that the decision to lay off is not negotiable under EERA.

This argument is based on supersession language in EERA,[4] and on the Board's test for resolving conflicts between the Education Code and EERA, previously articulated in Healdsburg Union High School District (6/19/80) PERB Decision No. 132, and approved by the California Supreme Court in San Mateo City School District v. PERB (1983) 33 Cal.3d 850. That test provides that section 3540 of EERA should be interpreted to

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[4]Section 3540 provides in part:

> . . . Nothing contained herein shall be deemed to supersede other provisions of the Education Code and the rules and regulations of public school employers which establish and regulate tenure or a merit or civil service system or which provide for other methods of administering employer-employee relations, so long as the rules and regulations or other methods of the public school employer do not conflict with lawful collective agreements. . . .

prohibit negotiation only where provisions of the Education Code would be "replaced, set aside or annulled by the language of the proposed contract clause." The Board found that proposals would be negotiable "unless the statutory language [of the Education Code] clearly evidenced an intent to set an inflexible standard or insure immutable provisions."

Education Code section 45308 provides that "classified employees shall be subject to layoff for lack of work or lack of funds." PERB has interpreted this language to permit districts unilaterally to decide to lay off employees. Newman-Crows Landing Unified School District (6/30/82) PERB Decision No. 223.

In claiming that the reduction in hours was a layoff, the District relies principally on Education Code subsection 45101(g) which states that a layoff "includes any reduction in hours."[5] It argues that the Board's holding in North Sacramento School District (12/13/81) PERB Decision No. 193, that a reduction in hours is different than a layoff, was based on our finding that Education Code subsection 45101(g) did not

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[5]Subsection 45101(g) provides as follows:

> '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.

apply to North Sacramento's merit system. According to the District, since Azusa is a nonmerit system, North Sacramento is distinguishable, and Education Code subsection 45101(g) applies here to compel a finding that this reduction in hours was equivalent to a layoff.

We disagree.

Hours of employment is included as a specifically enumerated item in section 3543.2, which defines the scope of representation under EERA.[6]

Further, in North Sacramento School District, supra, the Board specifically determined that reduction in hours was a matter within scope which could not be accomplished unilaterally. The Board there concluded that a reduction in hours is different from a layoff and is to be treated differently under EERA. However, the Board found that subsection 45101(g) of the Education Code, which applies to nonmerit systems, was not applicable to North Sacramento's merit system.

The ALJ in this case reasoned that the underlying policy in finding reduction in hours negotiable is the same regardless of

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[6]Section 3543.2 provides in part:

> (a) The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment.

subsection 45101(g) of the Education Code. Hours is a specifically enumerated subject of bargaining under EERA, and while a layoff suspends the employment relationship entirely, a reduction in hours maintains the relationship but alters the terms. Thus, the ALJ concluded that layoff and reduction in hours are not the same under EERA and found North Sacramento to be applicable here.

We agree.

Moreover, the language of subsection 45101(g) refers to reductions voluntarily consented to in order to avoid layoff. In this case, there is no evidence that employees, any or all of them, voluntarily consented to the reduction in their hours. We, therefore, find that this subsection of the Education Code is not applicable to the case at hand. Therefore, both North Sacramento and the instant case involve reductions in hours in situations which are not covered by the language of subsection 45101(g) of the Education Code. In the former case, the District was not covered by the Education Code subsection because it was a merit system. Here, though the District is not a merit system, its action was not a voluntary reduction in hours covered by subsection 45101(g).

We, therefore, conclude that the ALJ's reliance on North Sacramento to find involuntary reduction within scope was appropriate. While the District consistently characterized the reduction as a layoff, the action which it took unilaterally

was quite different. It involuntarily reduced the hours of its aides without negotiating with CSEA and thereby violated EERA.

The District also reasserts its argument that a requirement to negotiate to impasse over reduction in hours is inconsistent with the language of Education Code 45117, which permits layoff with 30 days notice.[7] As we have found above, an involuntary reduction in hours is not a layoff, and this section of the Education Code is therefore not applicable to the District's action in this case.

Waiver

An employer must give notice and an opportunity to negotiate before unilaterally altering a matter within scope. However, the representative must adequately signify a desire to negotiate or it will be found to have waived its right to do so. Newman-Crows Landing Unified School District (6/30/82) PERB Decision No. 223.

The District asserts that the Association waived its right to negotiate by its failure to demand negotiations. The Association claims, and the ALJ found, that it had no effective notice that a reduction was to take place.

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[7]The Board has previously found that notice and timing of layoff is negotiable, regardless of section 45117, since that section sets out only minimum notice requirements. Oakland Unified School District (11/2/81) PERB Decision No. 178. Oakland Unified School District (7/11/83) PERB Decision No. 326.

The ALJ found that the September 30 meeting between McGuire and Kahle did not constitute notice of its decision to reduce hours. Kahle testified that he called the meeting to talk to McGuire about the proposed reductions, and that at that meeting he showed McGuire a copy of the notice he intended to send out to aides. McGuire denied seeing the notice. Kahle believed that the meeting concluded with an understanding that the District would go forward, but admitted that in response to McGuire's request to delay, he said, "I'll think about it."

Thus even under Kahle's version of the meeting, the outcome was unclear. An offhand agreement to "think about it" hardly constitutes formal notice that an action is to occur.

Moreover, even if we were to find that the meeting between Kahle and McGuire constituted formal notice to CSEA of the impending reduction, we could not find that CSEA clearly and unmistakeably waived its right to negotiate at the meeting or thereafter. Los Angeles Community College District (10/18/82) PERB Decision No. 252; San Francisco Community College District (10/12/79) PERB Decision No. 105.

Nothing in the September 30 meeting between McGuire and Kahle could be construed as a clear and unmistakable waiver; indeed, McGuire was quite clear in his opposition to the District's action and his intention to seek further information about the District's financial status. Nor does the less than one-month delay in presenting an alternative proposal

constitute a waiver, particularly given McGuire's persistent and obvious attempts to gain information in the meantime. We therefore reject the District's argument that the Association waived its right to negotiate,[8] and conclude that the District violated EERA by its unilateral reduction in the hours of instructional aides.

ORDER

Upon the foregoing facts and conclusions of law and the entire record in this case, and pursuant to subsection 3541.5(c), it is found that the Azusa Unified School District violated Government Code subsections 3543(a), (b) and (c). It is hereby ORDERED that the Azusa Unified School District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

(1) Failing and refusing to meet and negotiate in good faith with the exclusive representative by refusing to provide in a timely fashion information regarding the seniority of instructional aides;

(2) Failing and refusing to meet and negotiate in good faith with the exclusive representative by taking unilateral action with respect to reduction in hours of classified employees;

[8]The District did not raise the contract as a defense to the charges that it refused to negotiate and we therefore do not consider that issue.

(3) Denying to the California School Employees Association rights guaranteed by the Educational Employment Relations Act, including the right to represent its members;

(4) Interfering with employees because of their exercise of rights guaranteed by the Educational Employment Relations Act to select an exclusive representative to meet and negotiate with the employer on their behalf by unilaterally changing matters within the scope of representation without meeting and negotiating with the exclusive representative.

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

(1) Reinstate, upon request, all teacher aides to their full hours of employment prior to the November 9, 1981 reduction of hours and make whole affected employees for any loss of pay or benefits which they suffered because of the unilateral reduction in hours;

(2) All payments ordered above shall include interest at a rate of 7 percent per annum and shall continue in effect until the status quo ante is restored or the parties reach agreement or exhaust the statutory impasse procedures;

(3) Within 35 days after the date of service of this Decision, post copies of the Notice to Employees attached as an Appendix hereto and signed by an authorized agent of the employer. Such posting shall be maintained for a period of thirty (30) consecutive workdays at the District's headquarters

offices and in conspicuous places at the locations where notices to classified employees are customarily posted. Reasonable steps shall be taken to insure that this Notice is not reduced in size, defaced, altered, or covered by any material;

(4) Written notification of the actions taken to comply with the Order shall be made to the Regional Director of the Public Employment Relations Board in accordance with her instructions.

Members Tovar and Morgenstern joined in this Decision.

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. LA-CE-1498, California School Employees Association and its Azusa Chapter No. 299 v. Azusa Unified School District, in which all parties had the right to participate, it has been found that the Azusa Unified School District violated the Educational Employment Relations Act, Government Code subsections 3543.5(a), (b) and (c).

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Taking unilateral action with respect to reduction in hours of classified employees or other matters within the scope of representation.

2. Denying CSEA its right to represent unit members by failing and refusing to meet and negotiate about matters within the scope of representation.

3. Interfering with employees because of their exercise of their right to select an exclusive representative to meet and negotiate with the employer on their behalf by unilaterally changing matters within the scope of representation without meeting and negotiating with the exclusive representative, and

4. Failing timely to supply CSEA with requested information, including seniority lists, that is necessary and relevant to discharging its duty as exclusive representative.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

Reinstate, upon request, all teacher aides to their full hours of employment prior to the November 9, 1981 reduction of hours; make whole each of the teacher aides whose hours were so reduced for any loss of pay or benefits which they suffered because of the reduced hours during the 1981-82 school year and subsequently until such time as (1) they are reinstated to their previous hours; or (2) their hours of

employment are changed upon agreement with CSEA; or (3) the District has met and negotiated in good faith with CSEA through impasse. All payments ordered will include interest at the rate of 7 percent per annum.

Dated: _____ AZUSA UNIFIED SCHOOL DISTRICT

By: _____
Authorized Representative

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE DEFACED, ALTERED, REDUCED IN SIZE, OR COVERED WITH ANY OTHER MATERIAL.