STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 257, AFL-CIO,	)	
Charging Party,	)	Case No. SF-CE-472
v.	)	PERB Decision No. 540
OAKLAND UNIFIED SCHOOL DISTRICT,	)	December 12, 1985
Respondent.	)	

Appearances; Norback & DuRard by Joseph R. Colton for American Federation of State, County and Municipal Employees, Local 257, AFL-CIO; Breon, Galgani, Godino & O'Donnell by Richard V. Godino for Oakland Unified School District.

Before Hesse, Chairperson; Morgenstern and Porter, Members.

DECISION

HESSE, Chairperson: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Oakland Unified School District (District) to a hearing officer's proposed decision. The District excepts to the hearing officer's finding that it violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA or Act)[1] by failing to fulfill its obligation to negotiate in good faith with the American Federation of State, County and Municipal Employees, Local 257, AFL-CIO (AFSCME).

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

Section 3543.5 provides, in pertinent part:

The Board has reviewed the proposed decision in light of the parties' exceptions and the entire record in this matter. For the reasons discussed herein, we affirm in part and reverse in part the hearing officer's proposed decision.

FACTS

Beginning in November 1979, W. B. Lovell, the District's business manager, conducted a series of workshops with representatives of various employee organizations representing bargaining units in the District, including AFSCME, on the need to make budgetary cuts. The final staff recommendation was that the District reduce expenses by 10 percent in order to overcome the anticipated deficit of $10 million. At that time, salary and benefits constituted 86.1 percent of the budget.

On April 1, 1980, District representatives held a preliminary meeting with AFSCME to discuss budgetary problems in more detail and to alert it to possible cuts in personnel. Then, on April 9, 1980, Lovell again met with representatives of

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> It shall be unlawful for a public school employer to:
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> (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.

all bargaining units in order to show them the slide show he planned to present to the board of education that night. The presentation included recommendations that (1) 40 custodians be laid off, and (2) 150 custodial positions be reduced from a 12-month to a 10-month work year. The specific number of employees targeted for the layoffs and work-year reductions was determined by criteria used in Army/Navy studies, which calculated the needed person-hours based on the number of square feet to be covered.

During the course of this meeting, Nadra Floyd, AFSCME's business agent, told Lovell that the work year was negotiable and that, therefore, the District could not make the proposed changes unilaterally. Lovell responded, "We do not feel that way."

That night, Lovell made his presentation to the board of education. Floyd was present and made the same remarks to the board of education that she had made to Lovell.

On April 14, Floyd wrote to Dr. Ruth Love, District superintendent, voicing AFSCME's concerns and requesting to meet. The letter also requested specific information on who would be affected by the work-force reductions, the effect on employee benefits, the cost to the District of the tax-deferred annuity, and other pertinent information. Lovell, rather than Love, responded on April 29. He indicated that information was being prepared for the board of education and would be made available to AFSCME only when it was made public. He also

indicated he would call Floyd in a few days to set up a meeting with AFSCME.

On April 30, Superintendent Love sent the board of education a document reflecting that, in an executive session held on April 23, 1980, the board had approved the recommended layoffs and work-year reductions. The purpose of this document was (1) to publicly announce the board's action, and (2) to request board approval to freeze all hiring. The document noted that, following the executive session on April 23, managers and supervisors were instructed to advise each person whose position was affected by the cuts that the employee would be laid off or the employee's work year would be reduced effective June 30.

When the instant dispute arose, Ruth McClanahan had just assumed the position as director of staff relations/chief negotiator for the District. During the summer of 1980, she was responsible for representing the District in negotiations with 12 units, all of which were involved in negotiating new or successor contracts.

McClanahan learned of the decision to reduce certain positions from a 12-month work year to a 10-month work year early in May. She began to formulate the District's position in discussions with several people, including Lovell, John Wimberly, director of building operations, and Jim Rodrigues, assistant to the director of building operations. McClanahan telephoned Floyd and said they would need to sit down and negotiate the effects of the layoff and the reduction of hours.

The parties first met on May 7, 1980. The District announced that the work year for 150 positions was being reduced from 12 to 10 months and that 40 positions were being eliminated. Its position is reflected in a letter dated May 7 to AFSCME:

> The District maintains the position that it is not required to bargain the decision to layoff, but acknowledges a duty to bargain a reduction in work year/hours and other "effects of layoff."

Notwithstanding the District's announced position, it suggested four alternatives to the proposed layoffs and reduction in work year. They were:

1. Eliminate 40 more positions in lieu of reduced work year.
2. Give no salary increases for 1980-81.
3. Give up tax-sheltered annuities.
4. Take a pay cut.

In order to evaluate the District's proposed alternatives, AFSCME said it needed more information. The union requested financial information on the cost to the District of the tax-sheltered annuity and figures on salary increases for the unit. It also sought information regarding use of vacation and sick leave during the summer. The District said it needed to save funds to negotiate 1980-81 salary increases for employees, and AFSCME said it needed to know the level of salary or compensation increase the District had in mind for 1980-81 in order to address the issue. AFSCME requested a list of employees scheduled for layoff and the site where each worked.

The District stated that it did not presently have that information.

AFSCME also made proposals concerning ways to save funds other than by reducing the work year, i.e., by selling property or making non-personnel cuts. In addition, Floyd made proposals that she felt addressed the impact of layoff. Her proposals referred to the 40 abolished positions and the effect such work-force reductions would have on those school sites left with one custodian. Also, to limit the number of active employees laid off, AFSCME proposed that the reduction be applied to persons on disability leave.

On May 7, 1980, the same day that the parties began negotiations, the board of education took official action to lay off and to reduce the work year of custodial employees, using inverse seniority. It formally adopted Resolution #28992, which stated:

> NOW, THEREFORE, BE IT RESOLVED that the Board thereby directs the Superintendent to abolish or reduce the work year, no later than June 30, 1980, of certain classified positions as indicated on Attachments A and B, respectively, pursuant to Education Code section 45117.2

According to the District's witness, the District was ready to give notice and could not delay the personnel reductions

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[2]Attachment A eliminated 40 custodial positions. Attachment B reduced the work year for 182 custodial positions. Apparently, 32 reduced-year positions were vacant.

without jeopardizing compliance with the 30-day notice requirement in the Education Code.[3]

On May 12, the parties again met, and the District responded to some of AFSCME's information requests. AFSCME was provided with the list of employees scheduled for layoff and the site where each employee worked. The District also provided the cost of salary increases for all maintenance employees, but not for custodians only. The District informed Floyd that, since the possible savings from the tax-sheltered annuity was only $391,000, elimination of that benefit was not a viable alternative. Nevertheless, Floyd was again informed that, if the union could come up with an alternative, McClanahan would take it to the board of education. Absent such an alternative, however, the board's action to lay off and reduce the work year would stand.

On May 27, while negotiations were underway, Love sent notices of reduced work year to the affected employees, characterizing the action as an involuntary reduction in hours in lieu of layoff.

At the May 30 negotiating session, the parties again discussed cost-saving alternatives such as school closures, the tax-sheltered annuity, and sale of property. The District said these alternatives had already been considered and rejected by the board of education, and the board was firm in its position

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[3]Education Code section 45117 provides that:

> . . . affected employees shall be given notice of layoff not less than 30 days prior to the effective date of the layoff.

that it would not reconsider the alternatives. The District stated that, since notices had been sent to the affected employees, it was too late to implement any alternatives.

The District also announced that custodians working during the summer would not get the usual July or August vacation. Instead, all vacations would be delayed until after summer.

When the parties next met on June 4, 1980, the District provided AFSCME with a draft memorandum which, as the hearing officer noted, conveyed a "this is what we are going to do" impression and presented a "take it or leave it attitude." The draft memorandum set forth a job description for head custodians which included, among other duties, "perform regular duties as necessary." Since there would be only a head custodian present at each site from July 1 to August 27, the head custodian would be required to perform all the regular custodial duties previously performed by other custodians.

At the June 4 negotiating session, the District's position was that those items discussed in the draft memorandum were non-negotiable. The District's position was also that employees who returned to work during summer school were outside the unit, that the contract permitted minimal staffing, that the District could prohibit vacations in July and August, and that substitutes were outside the unit.

AFSCME raised concerns over nearly every item mentioned in the memorandum, including vacations, sick leave, pay for substitutes, and summer school and temporary employment. In the

face of AFSCME's proposals concerning summer school assignments, the District maintained that summer school was a temporary assignment since the employees would be on layoff status when they returned to work during the summer. The District adhered to its position that it had the right to maintain staffing levels in accordance with the contract and, therefore, had the right to unilaterally decide to prohibit vacations during the summer.

AFSCME voiced strong objections to the head custodian job description and to the school principal's authority to select custodians for all summer school positions.

In the end, the parties disagreed over the scope of negotiations, and AFSCME walked out of the June 4 meeting, stating that it was declaring impasse.

The following day, AFSCME wrote to PERB declaring impasse. It filed the instant charge and a request for injunctive relief with PERB on June 6. PERB denied the request for injunctive relief.[4] As to AFSCME's impasse declaration, the Board declined to appoint a mediator because the parties were not engaged in contract negotiations but, rather, mid-contract negotiations over the layoffs and reductions. The Board felt that the matter was best resolved by the unfair practice charge that had been filed.

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[4]Oakland Unified School District (1980) PERB Order No. IR-16.

In a June 6 memorandum from Lovell to all school principals, the District reiterated its earlier position. Lovell advised the principals that:

1. Except for head custodians, all custodians were being changed to 10-month employees.

2. Except for true hardship, no custodial vacations would be granted between June 15 and August 27, 1980.[5] 3. The District planned to utilize cer vacations, sick leave, summer school assignments and watch duties, including:

a. Substitutes for vacation and sick leave (for leaves of five days or more) to be obtained from classified personnel records on the basis of seniority and persons offered the job must accept or deny the offer on the day it is made. Substitutes to be paid at the rate of pay received during the regular work year unless over five days, then to be paid at rate of position filled (Education Code section 45110).

b. Watch duty and civic center assignments not to exceed 35 hours per month.

c. Summer school positions to be treated like all other positions — post, principal selects — pay on an hourly basis contained in the posting (an amount less than that received by custodians during the regular work year).

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[5]This is a longer period than was contained in the June 4 draft memorandum. According to that document, the District only prohibited vacations from July 1 to August 27.

When the parties again met on June 11, Floyd gave McClanahan a letter which delineated those areas in which the District would have to make significant movement before AFSCME would withdraw its petition from PERB:

1. As a show of good faith negotiations, the District should rescind all 10-month layoff notices to custodians and halt all actions taken to implement the plan.

2. This union cannot negotiate "in the blind." The negotiations regarding reduction in hours must be integrated with contract negotiations.

3. The District should restore the 40 custodians scheduled for layoff.

4. The District, through its representatives, has repeatedly stated that the only reasons for this layoff is to free up monies for salary negotiations; yet, the only salary offer has been no wage increase. Before we can consider any monetary trade-offs, the District must make a realistic wage offer to this unit.

The District representatives caucused, returned and said that they originally had a proposal to present to AFSCME but, because of the letter, they would not present it and saw no need to meet further. Neither would they respond to AFSCME's letter.

Hopeful that the addition of a third party would help resolve the difficulties, the Central Labor Council invited McClanahan to explain to the Council why a strike sanction should not be granted. She was unable to attend but set a meeting on June 17 as an alternative. At this meeting, the District indicated it would take any plans or alternatives the union could suggest to the board of education and specifically invited proposals relating to the tax-sheltered annuity. No

proposal was forthcoming from the union, however.

On June 17, the parties had planned to meet because McClanahan said she had a proposal to make. She did not make a proposal, however, and thereafter, neither party requested further meetings. The layoffs and work-year reductions were implemented on July 1, 1980, as had been announced.

During the course of the layoff and work-year reduction talks, the parties' attention also focused on their successor agreement. The contract in effect between AFSCME and the District was due to expire on June 30, 1980. On March 26, 1980, AFSCME presented a comprehensive package as a successor contract. Although the District referred to wage increases in the layoff talks, when it responded to AFSCME's successor contract proposals on July 8, 1980, it proposed no wage increase. AFSCME attempted to persuade the District to combine talks regarding impact of layoff and reduced hours with the negotiations on a successor contract. The District refused to do so.

Similarly, during the successor agreement talks, the District would not discuss the impact of the layoffs or the work-year reductions because those issues were before PERB in the unfair practice charge which had been filed on June 6.

Due to legislation signed by Governor Edmund G. Brown, Jr. on June 30, 1980, the District received about $2.8 million it did not anticipate. Then, on the night of September 17, 1980, the board of education changed its position on a successor agreement and authorized McClanahan to make proposals that affected those employees whose work year had been reduced.

Relevant portions of the District's offer were:

> 1. The District proposes a 9-percent salary increase.
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> 2. The custodial work year shall be 12 months for those for whom it currently is 12 months as a result of the layoffs pursuant to board action on May 7, effective July 1, 1980.
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> a. The issue of restoration of the 150 custodians whose work year was reduced will become a negotiable item today as a result of the board's instructions to its negotiator in executive session last night.
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> . . . . . .
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> 7. Those 10-month employees who were in a paid status the day before or the day after July 4, 1980 shall be paid for the July 4 Holiday.

After give-and-take at the table, item 2 was changed by the District as follows:

> 2. A side letter of agreement shall be developed with the following stipulation:
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> a. Salary increase of 9 percent, effective January 1, 1981, and restoration of the work year from 10 months to 12 months for those custodians in a paid 10-month status as of the signing of this agreement.

The effective date of January 1, 1981 was later crossed out and September 1, 1980 written in.

The final side letter read:

> The OUSD Board of Education agrees to 9-percent salary increase for fiscal year 1980-81, effective September 1, 1980; and to the restoration of the work year from 10 months to 12 months for those custodians in a paid 10-month status as of the signing of this agreement. Said restoration shall be effective on September 1, 1980. The restoration is effective only with respect

> to the initial 150 custodians who had their work year reduced from 12 months to 10 months pursuant to Board Resolution #28992, adopted May 7, 1980. It expressly excludes the custodians whose services were completely terminated pursuant to Board Resolution #28992.

Additionally, the District agreed to pay employees on 10-month status who were on paid status the day before and the day after July 4, 1980 for the July 4 holiday.

DISCUSSION

The District is correct in asserting that it did not violate section 3543.5(c) of EERA by failing to negotiate over the decision to lay off the 40 custodians. The Board has held that the decision to lay off is clearly within management's prerogative. Newman-Crows Landing Unified School District (1982) PERB Decision No. 223. In Newman-Crows Landing, at p. 13, the Board held that:

> [T]he determination that there is insufficient work to justify the existing number of employees or sufficient funds to support the work force is a matter of fundamental managerial concern which requires that such decisions be left to the employer's prerogative.

Nevertheless, the employer is obligated to provide the exclusive representative with notice and an opportunity to negotiate over the effects of its decision that have an impact upon matters within scope. Newark Unified School District, Board of Education (1982) PERB Decision No. 225; Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District (1984) PERB Decision No. 375.

As to the negotiability of the work-year reduction, we find

some merit in the District's argument that the work-year reductions, not unlike layoffs, suspended the employees' employment relationship for two months. Indeed, we agree that an employer may unilaterally reduce the employees' work year by means of a layoff and, at the same time, establish a reinstatement date two months hence. Here, however, such was not the case. In the instant case, the District reduced the work year of its custodial employees as an alternative to the layoff of an additional 40 custodians, and not as a layoff itself. Indeed, in the May 27, 1980 notice to the affected employees, the District stated that the reduction in work year was taken "in lieu of layoff." Thus, inasmuch as the Board has previously held that alternatives to layoff are negotiable as "effects" of layoff (see San Mateo City School District (1984) PERB Decision No. 383), the instant reduction in the work year was negotiable as an alternative to additional layoffs.[6]

The District, therefore, was required to negotiate over the layoff effects and the work-year reduction at such time as a "firm decision" on the layoffs had been reached. Mt. Diablo Unified School District (1983) PERB Decision No. 373. Contrary to the hearing officer's conclusion, we find that the District

[6]While Member Morgenstern agrees that the work-year reduction here was a negotiable decision inasmuch as it was promoted as a layoff alternative, as such it also constituted a reduction in the custodian's hours of work and was, therefore, negotiable on that basis as well. (Azusa Unified School District (1983) PERB Decision No. 374; Pittsburg Unified School District (1983) PERB Decision No. 318; North Sacramento School District (1981) PERB Decision No. 193.)

had reached a firm decision to lay off custodians before the governing board passed its resolution on May 7, 1980.

The April 30, 1980 memorandum from Superintendent Love to the governing board reveals that the layoffs had been approved in the April 23, 1980 executive session. More importantly, the April 30th memorandum indicates that District supervisors and managers contacted the affected employees concerning the layoffs and reduction in work year prior to April 30, 1985. The May 7 resolution of the board of education was merely a formal announcement of its earlier decision. Thus, as of April 23, 1980, the District was required to negotiate in good faith as to the effects of its layoff decision and the decision to reduce the work year.

In so concluding, we note our disagreement with the hearing officer's reliance on the Board's reasoning in San Francisco Community College District (1979) PERB Decision No. 105 and San Mateo County Community College District (1979) PERB Decision No. 94, wherein the Board found that the districts committed per se violations when their school boards adopted resolutions. We agree with the District's assertion that the facts in the instant case distinguish it from the past PERB decisions. Those cases involved situations where the employer implemented the announced changes prior to affording the unions an opportunity to meet. In contrast to San Francisco and San Mateo, supra, where the board resolutions were adopted only a few days prior to implementation, the Oakland board resolution was adopted two months before implementation. Thus, inasmuch as the timeframe

provided ample opportunity for good faith negotiations to take place prior to implementation of the resolution, we find no per se violation evidenced by passage of the resolution. As outlined infra, however, since such good faith discussions did not ensue, we nonetheless find the District failed to satisfy its bargaining obligation.

Using the Board's totality of circumstances test,[7] we find the record supports the hearing officer's conclusion that the District violated EERA in the course of the layoff and work-year negotiations.

As noted above, the District was cognizant of the decision to lay off and reduce the work year as early as April 23, 1980. However, the District instructed the managers and supervisors to directly give the affected employees notice of the layoffs and reduction in work year rather than bargain with the employees' exclusive representative. Indeed, it refused to meet with the employees' exclusive representative until its intentions were made public by the school board resolution. Such conduct directly affronts the bargaining process. Moreover, not only did the District's conduct turn away from the negotiating

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[7]PERB has held that:

> [T]he question of good faith in negotiations must be based on the "totality of the parties' conduct." In weighing the facts, we must determine whether the conduct of the parties indicates an intent to subvert the negotiating process or is merely a legitimate position adamantly maintained. (Oakland Unified School District (1982) PERB Decision No. 275.)

process, its publicly released resolution failed to even acknowledge a duty to negotiate. That announcement, by "direct[ing] the Superintendent to abolish or reduce the work year, no later than June 30, 1980," conveyed strict "marching orders" that worked only to vitiate the bilateral process.

We find that, in the course of the negotiating sessions that followed, the District continued to evidence bad faith bargaining by providing inadequate salary information to AFSCME. In spite of AFSCME's entitlement, as the exclusive representative, to information that is necessary and relevant to represent unit employees (Stockton Unified School District (1980) PERB Decision No. 143), the information the District provided covered all maintenance employees, not just those in the bargaining unit. Inasmuch as the District failed to set forth any reason why it was unable to provide the more limited and more useful information in the form AFSCME requested, we find additional evidence of the District's failure to bargain in good faith.

We also find merit in AFSCME's contention that the District improperly refused to combine the negotiations concerning layoff effects and work-year reductions with the negotiations on the successor agreement. In the instant case, the District continued to interject future wage increases as a possible variable in the layoff/work-year reduction plan. Having linked the future wage issue to the "effects" bargaining, it so entangled the subjects as to require that the District accede to AFSCME's demand to

combine negotiations.

In reaching our conclusion that the District's conduct, in toto, evidenced bad faith bargaining, we note our disagreement with the hearing officer's finding that there was no compelling reason why the District had to implement the layoffs on July 1, 1980. We find that, although a later implementation date could have been negotiated, the number of employees subject to the cuts and the severity of the action would necessarily have been compounded with each delay in implementation. In terms of the fiscal year, a layoff effective July 1 produces the greatest amount of savings and affects the fewest number of employees and students. Thus, inasmuch as the July 1 implementation date was not an arbitrary deadline, we do not view it as decisive evidence of bad faith bargaining.

The hearing officer also found that the District violated the Act by its failure to resolve a seniority list dispute.[8] We disagree.

Seniority is a mandatory subject of bargaining. Healdsburg Union High School District, supra. Here, however, the duty to negotiate seniority is limited by Article VII of the parties'

[8]The District and AFSCME discussed the accuracy of the seniority list during negotiations but, because of time constraints, were unable to "clean it up." The seniority list dispute was not a question of inaccuracies but, rather, of whose list should be used. The District's seniority list did not include custodians who were assigned to the children's centers. AFSCME maintained the appropriate seniority list was one which included the entire class of custodians.

contract which includes provisions for establishing the seniority list and its use in layoff situations. Thus, while the union has the right to negotiate which employees will be included on a particular seniority list, inclusion of a seniority provision in the parties' collective bargaining agreement evidences that AFSCME exercised its right to negotiate the composition of the seniority list. For that reason, its right to negotiate the subject of seniority in conjunction with the layoffs was superseded by its previous agreement. Marysville Joint Unified School District (1983) PERB Decision No. 314; South San Francisco Unified School District (1983) PERB Decision No. 343.

We also reject AFSCME's assertion that the District's insistence on keeping separate seniority lists is a violation of EERA. In our view, since the District's alleged misapplication of the contract did not amount to a change in policy but, rather, appears to be a contract interpretation dispute, no violation of the Act has been alleged. Grant Joint Union High School District (1982) PERB Decision No. 196. To correct what the union believed to be an improper application of the seniority article, the negotiated grievance procedure was the correct avenue of redress.[9]

The District takes exception to the hearing officer's proposed decision by stating she gave an "incomplete explanation

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[9]In fact, the union did file a grievance against the District for "failure to follow seniority in the layoff of custodians." However, it failed to proceed in a timely fashion to the second step of the grievance procedure.

of the [PERB] decision not to defer" to arbitration. In the proposed decision, the hearing officer stated:

> Pursuant to a request for injunctive relief and an interim order of the Public Employment Relations Board . . . the issue of whether the matter should be deferred to arbitration was decided by a hearing officer on July 28, 1980, in a proposed decision not to defer to arbitration which became final on August 18, 1980.

We do not find that prejudicial error was committed by the hearing officer in her treatment of the decision not to defer to arbitration. She merely stated that the issue was presented and resolved in a prior decision. It was not an issue before her in the instant case and there was, therefore, no need to provide a detailed explanation of the effect of the decision not to defer.

Finally, the District asserts that the parties, in reaching agreement on a successor agreement and side letter, intended to settle the instant unfair practice charge. We join the hearing officer in finding no such intention.

The successor agreement was executed on November 12, 1980. Among other things, the parties agreed that the District would provide the union with two-weeks' notice in advance of its intended date for sending layoff notices to affected employees. It also provided for a 9-percent salary increase for fiscal year 1980-81, effective September 1, 1980. Pertinent to the issue raised here, however, there was no indication that this acted as a settlement of the unfair practice charge.

In a Side Letter of Agreement, the District restated its agreement to raise salaries 9 percent and further agreed to

restore the work year from 10 months to 12 months. We find it noteworthy that this restoration was effective only as of September 1, 1980. While the side letter provides holiday pay for those employees on paid status, neither document in any way redresses the custodians for the two-month period their work year was reduced. For that reason and because there was no statement or indication that this side letter was intended to act as settlement of the instant charge, we find that the hearing officer correctly concluded that neither document settled the instant unfair practice charge.

REMEDY

PERB has the statutory authority to fashion appropriate remedies. In this regard, section 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 hearing officer ordered the District to cease and desist from taking unilateral action on matters within the scope of representation without meeting and negotiating with AFSCME, to reinstate custodians laid off out of seniority with appropriate back pay, to restore the 12-month work year, to make employees whole for any loss of earnings they suffered by virtue of the reduction in the work year, to post an appropriate notice, and to negotiate, upon demand, over the work-year issue with AFSCME.

We find the hearing officer's proposed remedy is inappropriate in one regard. An employer's decision to lay off is non-negotiable, and normally it is inappropriate to order the reinstatement of the terminated employees.[10] Here, however, the hearing officer held that a layoff was an unfair practice because it did not strictly rely on employees' seniority. Since we have found that the seniority dispute is a contractual issue and not an unfair practice, an order to reinstate custodians laid off out of seniority is inappropriate.

However, because the District unlawfully refused to negotiate the effects of its decision to lay off, we find it appropriate to order the District to negotiate, upon demand, those proposals which we have found to be within the scope of representation. Accordingly, we find it appropriate to order the District to negotiate any implementation of layoff issue which is consistent with the Decision herein.[11]

In order to recreate as nearly as possible the economic situation that would have prevailed but for the unfair labor practice, and in order to effectuate the policies of the Act, we

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[10]Moreno Valley Unified School District (1982) PERB Decision No. 206, aff'd (1983) 142 Cal.App.3d 191; South Bay Union School District (1982) PERB Decision No. 207a.

[11]We note that the parties concluded negotiations on two successor collective bargaining agreements covering the periods of July 1, 1980 to June 30, 1981, and July 1, 1981 through June 30, 1984. These agreements include provisions concerning layoffs and restoration of the 12-month work year. Whether back pay liability ceased because of either agreement is a matter to be determined in a compliance proceeding.

also direct the District to pay the employees affected by the layoff their wages at the rate paid at the time they were laid off, from twenty (20) days following the date this Decision is no longer subject to reconsideration, until occurrence of the earliest of the following conditions: (1) the date the parties reach agreement; (2) the date the statutory impasse procedure is exhausted; (3) the failure of AFSCME to request negotiations within thirty (30) days of service of this Decision, or to commence negotiations within five (5) days of the District's notice of its desire to bargain with AFSCME; or (4) the subsequent failure of AFSCME to negotiate in good faith. In no event shall the sum paid to any employee exceed the amount he or she would have earned as wages from July 1, 1980, the date of the layoff, to the time he or she secured equivalent employment elsewhere.

To remedy the employer's failure to negotiate the decision to reduce the custodians' work year, we affirm the order that the affected employees be made whole for any loss of pay or actual costs incurred as a result of loss of benefits which they suffered because of the unilateral reduction in the work year.[12] All back pay will include interest at the rate of 10 percent per annum.

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[12]As noted supra, the parties reached agreement to restore the 12-month work year. Thus, we need not order restoration of the 12-month work year.

ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found that the Oakland Unified School District violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act. Pursuant to Government Code section 3541.5(c), it is hereby ORDERED that the Oakland Unified School District, its governing board, and its representatives shall:

1. CEASE AND DESIST FROM:

a. Taking unilateral action on matters within the scope of representation without first meeting and negotiating with the American Federation of State, County and Municipal Employees, Local 257, AFL-CIO.

b. Failing or refusing to meet and negotiate in good faith with the American Federation of State, County and Municipal Employees, Local 257, AFL-CIO, with respect to matters within the scope of representation as defined in Government Code section 3543.2 and specifically with respect to effects of and alternatives to layoff.

c. Denying to the American Federation of State, County and Municipal Employees, Local 257, AFL-CIO, its statutory right to represent members of the unit as exclusive representative.

d. Interfering with employees because of their exercise of representational rights.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

a. Upon request, meet and negotiate with the exclusive representative over the effects of any layoffs or work-year reductions.

b. Pay to the employees laid off a sum equal to their wages at the time they were laid off, from twenty (20) days following the date this Decision is no longer subject to reconsideration, until occurrence of the earliest of the following conditions: (1) the date the parties reach agreement; (2) the date the statutory impasse procedure is exhausted; (3) the failure of AFSCME to request negotiations within thirty (30) days of service of this Decision, or to commence negotiations within five (5) days of the District's notice of its desire to bargain with AFSCME; or (4) the subsequent failure of AFSCME to negotiate in good faith. In no event shall the sum paid to any employee exceed the amount the employee would have earned as wages from July 1, 1980, the date of the layoff, to the time the employee secured equivalent employment elsewhere.

c. Make whole the affected employees for any loss of pay and benefits resulting from the reduction in work year in 1980.

d. All payments ordered above shall include interest at a rate of 10 percent per annum.

e. Mail copies of the attached Notice to the employees affected by the District's conduct within ten (10) calendar days after this Decision is no longer subject to reconsideration.

f. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, prepare and post copies of the Notice 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 the District's headquarters office and at all locations where notices to classified employees are customarily posted. Reasonable steps shall be taken to insure that they are not defaced, altered, reduced in size, or covered by any other material.

g. Written notification of the actions taken to comply with this Order shall be made to the regional director of the Public Employment Relations Board in accordance with her instructions.

It is further ORDERED that the allegation that the Oakland Unified School District violated Government Code section 3543.5(c) by its refusal to negotiate the seniority list at issue in the instant case is DISMISSED.

At the compliance proceeding, the compliance officer shall attempt to accommodate any reasonable proposal regarding the method of payment of the monetary award ordered by the Board.

The District's request for oral argument pursuant to PERB Regulation 32315 is DENIED.

Member Morgenstern joined in this Decision.

Member Porter's Dissent begins on page 28.

Porter, Member, dissenting: I respectfully dissent. I am not persuaded by the overall record in this case that the totality of the circumstances in late 1979 and early 1980 demonstrate bad faith bargaining by the District.[1] But even assuming that there was bad faith bargaining, the record shows subsequent negotiations, bargaining and settlement between the parties.

During the parties' negotiations in May and June 1980 concerning the impending layoffs and the 12-month to 10-month work-year reductions, AFSCME attempted to join those matters with negotiations over the successor 1980-81 school year contract. AFSCME was particularly concerned with the percentage salary increase the custodians might obtain for 1980-81 as a result of the savings the District would achieve from the layoffs and the July/August work-year reductions. The District refused to merge the negotiations inasmuch as statutory and fiscal needs necessitated that the layoffs and work-year reductions be effected by July 1, 1980, and thus could not be intertwined with and made to await the future

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[1]Such overall circumstances included in part: (a) the District's then-impending $9 to $16 million fiscal deficit for the 1980-81 (July 1, 1980 - June 30, 1981) school year, (b) the statutory and fiscal needs to implement and achieve layoffs and work-year reductions by July 1, and (c) the arrival in April 1980, of a new District negotiator who had to familiarize herself with, oversee and negotiate with 12 bargaining units concerning the grave fiscal problems, the large numbers of layoffs and work-year reductions in teachers and classified employees, and the ongoing 1980-81 contract negotiations with the various units.

resolution of the negotiations over the 1980-81 contract.[2]

Subsequent to AFSCME's filing of the unfair charge on June 6, 1980, and the effective date of the layoffs and work-year reductions on June 30, 1980, the parties commenced negotiations on the successor contract for the 1980-81 school year. These negotiations began on July 8, 1980, and continued into November 1980. At the commencement of the 1980-81 negotiations in July 1980, AFSCME attempted to include the layoff and work-year reduction matters in the bargaining. The District refused to bargain on such matters on the basis that the matters were before PERB on the unfair charges that AFSCME had filed.

During July, August and early September, 1980, the parties negotiated on other matters relating to the 1980-81 school year.

On September 18, 1980, the District's negotiator advised AFSCME that the District's board had authorized her to negotiate the layoff and work-year reduction matters which the board had previously refused to bargain with AFSCME. Proposals and counterproposals by the parties resulted in an agreement in November 1980 that: the 150 10-month custodians would be retroactively returned to a 12-month work-year status effective September 1, 1980 (having been bargained backwards from an original January 1, 1981 date, first to November 1, 1980, and

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[2]Faced with a large fiscal deficit for 1980-81, it was the anticipated savings from the reduced work year during July and August which the District felt might possibly afford some basis for being able to offer a salary increase in the bargaining on the 1980-81 school-year contract.

finally to September 1, 1980); retroactive payment would be made of the July 4, 1980 holiday pay to the 10-month custodians who were working (summer school) but who would not otherwise have received the holiday pay because they were not 12-month employees at that time; and a retroactive 9-percent salary increase would be effective September 1, 1980. The record indicates that the 9-percent salary increase involved the salary savings the District had achieved from the work-year reductions for the 150 custodians in July and August 1980. Also, one of the results of bargaining the effective date of the restoration of the 150 custodians retroactively to September 1, 1980, was to entitle the 150 custodians to additional vacation pay benefits for the 1980-81 school year.

This negotiated agreement arrived at in November 1980 and finally ratified by AFSCME in January 1981, was entitled "MEMORANDUM OF TERMS OF SETTLEMENT," and states that the parties were agreeing to recommend to their respective membership and Board: "the following terms of settlement, and the execution of a new contract of agreement between . . ." for the period July 1, 1980 to July 30, 1982. An agreed-to side letter provided for the 9 percent salary increase and the restoration of the 12-month work year retroactively to September 1, 1980, and for the retroactive payment of the July 4, 1980 holiday pay to the 10-month work-year custodians. The subject matters of this unfair practice/bad faith bargaining charge having been subsequently negotiated, settled

and resolved by the bargaining between the parties, the complaint should accordingly be dismissed.

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-472, American Federation of State, County and Municipal Employees, Local 257, AFL-CIO v. Oakland Unified School District in which all parties had the right to participate, it has been found by the Public Employment Relations Board that the Oakland Unified School District violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act.

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. Taking unilateral action on matters within the scope of representation without first meeting and negotiating with the American Federation of State, County and Municipal Employees, Local 257, AFL-CIO.

b. Failing or refusing to meet and negotiate in good faith with the American Federation of State, County and Municipal Employees, Local 257, AFL-CIO, with respect to matters within the scope of representation as defined in Government Code section 3543.2 and specifically with respect to effects of and alternatives to layoff.

c. Denying to the American Federation of State, County and Municipal Employees, Local 257, AFL-CIO, its statutory right to represent members of the unit as exclusive representative.

d. Interfering with employees because of their exercise of representational rights.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

a. Upon request, meet and negotiate with the exclusive representative over the effects of any layoffs or work-year reductions.

b. Pay to the employees laid off a sum equal to their wages at the time they were laid off, from twenty (20) days following the date PERB Decision No. 540 was no longer subject to

reconsideration, until occurrence of the earliest of the following conditions: (l) the date the parties reach agreement; (2) the date the statutory impasse procedure is exhausted; (3) the failure of AFSCME to request negotiations within thirty (30) days of service of the Decision, or to commence negotiations within five (5) days of the District's notice of its desire to bargain with AFSCME; or (4) the subsequent failure of AFSCME to negotiate in good faith. In no event shall the sum paid to any employee exceed the amount he or she would have earned as wages from July 1, 1980, the date of the layoff, to the time he or she secured equivalent employment elsewhere.

c. Make whole the affected employees for any loss of pay and benefits resulting from the reduction in work year in 1980.

d. All payments ordered above shall include interest at a rate of 10 percent per annum.

Dated: _____ OAKLAND UNIFIED SCHOOL DISTRICT

By _____
Authorized Agent

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