

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION)
AND ITS MORGAN HILL CHAPTER #159,)
)
Charging Party,) Case No. SF-CE-844
)
v.) PERB Decision No. 554
)
MORGAN HILL UNIFIED SCHOOL DISTRICT,) December 27, 1985
)
Respondent.)
_____)

Appearances; William C. Heath for California School Employees Association and its Morgan Hill Chapter #159; Littler, Mendelson, Fastiff & Tichy by Patricia P. White and Janice Jablonski for Morgan Hill Unified School District.

Before Hesse, Chairperson; Morgenstern and Burt, Members.

DECISION

MORGENSTERN, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Respondent, Morgan Hill Unified School District (District), to the proposed decision of a PERB administrative law judge (ALJ).¹ The District excepts to the ALJ's finding that it violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA)² by making a unilateral change

¹Charging Party, California School Employees Association and its Morgan Hill Chapter #159 (CSEA), also filed an exception, claiming the proposed order is inadequate because it does not require the District to return to the status quo ante by reassigning former dispatcher Vicki Rivera in accordance with her proper seniority status.

²EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

in policy concerning a matter within the scope of representation when it allowed a former dispatcher to include her dispatcher hours in calculating her bus driver seniority for the purpose of bidding on bus routes. More specifically, the District complains that the ALJ erred by not finding that the contract in effect at the relevant time required the inclusion of the dispatcher hours, by not finding that the practice of the District was to calculate seniority for all purposes according to Education Code section 45308 (sec. 45308), by giving too much weight to Charging Party's bumping procedure memorandum, by failing to credit the testimony of Jay Yinger, and by finding that an adverse impact upon bargaining unit members resulted from the inclusion of the dispatcher hours.

The complaint also alleged that the District violated section 3543.5 by actually allowing the former dispatcher to bid based upon the combined seniority total and by engaging in bad faith bargaining over the alleged unilateral change. The ALJ found no merit to either of these charges, and CSEA does not except to these determinations.

In accordance with the discussion below, we affirm the decision that the inclusion of the dispatcher hours in the calculation of bus driver seniority constituted an unlawful unilateral change in violation of EERA. The Board has reviewed the entire record, including the exceptions filed by both parties and CSEA's response to exceptions.

FACTUAL SUMMARY

A. Route Bidding

On August 25, 1983, Vicki Rivera, the District's bus dispatcher, requested a voluntary demotion to bus driver. The dispatcher classification is higher on the salary scale and, unlike the bus driver classification, is not in the bargaining unit represented by CSEA. Also on August 25, Rivera met with the District's personnel director, Lee Cunningham, concerning whether she would be credited with her dispatcher hours when bidding on bus routes. Also present was Jay Yinger, then president of the CSEA local, who clearly communicated that he was assisting Rivera as a "friend" and not in his official capacity as president.³³ Cunningham informed Rivera and Yinger that if the demotion to bus driver was approved, the dispatcher hours would be counted for seniority purposes.

After consulting with the District superintendent, Cunningham sent a note, dated August 25, to Rivera confirming that her dispatcher hours would be included in calculating seniority. On August 27, Cunningham, Yinger, Supervisor of Transportation Bill Speegle, and Assistant Superintendent Jim Hall met to discuss whether Rivera would be allowed to bid even though she would continue temporarily as the dispatcher, making her unavailable

³³The District does not dispute that Yinger was not acting in his official capacity at the August 25 meeting. In fact, in its post-hearing brief, the District emphasized that, as opposed to the August 25 meeting, at an August 27 meeting, Yinger was clearly acting in his official capacity and, thus, had at least the apparent authority to bind CSEA.

to drive at the beginning of the school term. In this meeting, Yinger participated as CSEA president. Yinger told the administrators it was past practice to allow a driver to bid despite temporary unavailability, and to then fill the driver's slot with a temporary employee. This avoids going through a series of "bumps" according to seniority when the unavailable driver returns. Yinger said CSEA wanted the District to follow this past practice, and the District agreed to do so.

With the inclusion of her dispatcher hours, Rivera was 12th in the bus driver seniority ranking; without them, she was 17th. No other driver on the list had worked in a higher classification for the District. On August 31, 1983, Rivera was allowed to bid along with the other drivers and chose 12th, in accordance with the revised seniority list that had been posted by the District the previous day. Since drivers are paid at an hourly rate and the routes vary in the number of hours per week, the route chosen is a major determinant of each driver's annual earnings.⁴

The other bus drivers, as well as other CSEA officials, were not pleased with Yinger's handling of the Rivera matter. They felt the inclusion of the dispatcher hours violated past practice

⁴Routes of 40 hours per week are available to only the top 4 or 5 drivers on the seniority list. The other drivers may have the opportunity to be assigned kindergarten and activity routes which would increase their hours to 40 per week. These extra routes are assigned separately according to seniority, so it is not uncommon for drivers to bid on main routes which are shorter than other available ones (assuming all the 40-hour routes are taken) if the shorter main routes would better facilitate assignment of the extra routes.

and that Rivera should not have been allowed to bid with the extra seniority until the matter had been resolved. Upon receiving this reaction from CSEA members and officials, Yinger refrained from further involvement in the Rivera matter. Yinger resigned as president in October or November 1983.

B. Bargaining History

Prior to July 1, 1980, seniority was based on an employee's date of hire. In 1980, the parties negotiated a new agreement running from July 1, 1980 through June 30, 1983. This new agreement based seniority on the number of hours worked. Paragraph 5 of Article IV, section C, entitled "Initial Assignment (Food Service and Bus Drivers)" read as follows:

The initial assignment of time to Food Service workers and bus drivers shall be based on an estimate of hours needed for a particular assignment. Assignments shall be offered first to the unit member in the appropriate class having the greatest number of hours of paid employment in the District in that class. When such an assignment is declined, it shall be offered to other unit members in descending order of their total hours of paid employment in the District in that class. If, after 20 days, the total amount of time worked on a particular assignment regularly deviates by 30 minutes per day from the estimate, it shall be offered for reassignment to other unit members in order of their time worked for the District. (Emphasis added.)

Paragraphs 6 and 7 of the same section consisted of the following:

6. Assignment of Additional Hours

Assignment of additional hours to a part-time position on a regular basis shall

be offered to the unit member in the appropriate class having the greatest number of hours of paid employment in the District in that class. When such an assignment is declined, it shall be offered to other unit members in descending order of their total hours of paid employment in the District in that class.

7. Decrease in Assigned Hours

In the event that a change in workload requires a decrease in the number of assigned hours of a part-time unit member, such adjustment shall be made just in the assignment of the unit member having the least hours of paid employment in the District in the appropriate class.

On February 8, 1982, the District incorporated into its "Bus Drivers Handbook" several provisions related to seniority and assignment of work. Article II, "Assignment of Routes and Schedules," includes the following:

1. The District shall prepare and maintain a bus driver "seniority list." . . .
2. The seniority list shall contain the following information:
 - A. Driver's name.
 - B. Numerical seniority position of each driver as determined by hours of paid employment at the date as specified.

(Emphasis added.)

Less than three weeks after the "Bus Drivers Handbook" was prepared, Assistant Superintendent Hall sent a note to Supervisor of Transportation Speegle entitled, "Clarification of Reassignment Rights." This note provided the following:

The initial assignment of time to bus drivers shall be based on an estimate of hours needed for a particular assignment.

That assignment shall be offered to the driver having the greatest number of hours of paid employment in the District.

Later in 1982, the District and CSEA renegotiated various provisions of the collective bargaining agreement. Article IV, section C, paragraphs 5, 6 and 7 read as follows:

5. Initial Assignment

The District shall assign unit members to particular positions based upon the needs of the District.

6. Assignment of Additional Hours

When the hours of an existing position are increased by the District, the employee in the same class with the greatest "length of service" (as defined in Ed. Code 45308) at the particular administrative unit where the adjustment is being made, shall be offered the increase.

7. Decrease in Assigned Hours

In the event the District decreases the number of assigned hours, such decrease shall be handled according to Ed. Code 45308.

A successor to the 1980-83 agreement was not negotiated until after the August 1983 bidding in dispute.

Sec. 45308, referred to above, includes the following provision:

Whenever a classified employee is laid off, the order of layoff within the class shall be determined by length of service. The employee who has been employed the shortest time in the class, plus higher classes, shall be laid off first.... (Emphasis added.)

One other document was introduced as relevant to the bargaining history, a one-page memorandum entitled "Bumping

Procedure, Bus Drivers." The document includes the following provisions:

1.(A) . . . Assignments shall be offered first to the unit member in the appropriate class having the greatest number of hours of paid employment for the District in that class. When such an assignment is declined, it shall be offered to other unit members in descending order of their total hours of paid employment in that class for the district. If, after 20 days the total amount of time worked on a particular assignment deviates in excess of 1.5 hours per week from the estimate it shall be offered for reassignment to other unit members in order of their time worked for the district. (Emphasis added.)

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2. In the event that a change in workload requires a decrease in the number of assigned hours of a unit member, such adjustment shall be made first in the assignment of the unit member having the least hours of paid employment in the district in the appropriate class. (Emphasis added.)

In sum, the language of the 1980-83 contract quite clearly bases seniority for initial assignments⁵ on hours of paid employment in the class. The 1982 renegotiated agreement is

⁵The ALJ found that assignments of routes at the beginning of the school year are "initial assignments." As will be discussed later, the District claims that sec. 45308 was applied where the bidding process resulted in reductions in hours (from the previous year). However, the District does not dispute that the bidding process represents "initial assignments."

silent⁶ on seniority for initial assignments. The District asserts that, in either 1980 or 1982, the parties intended to use the method of calculating seniority provided by sec. 45308 for all purposes, including initial assignments. CSEA asserts that, for initial assignments, the parties continued to use hours worked in the class and that sec. 45308 was to be used only where the District increases or decreases assigned hours.

DISCUSSION

In order to prove a violation of EERA section 3543.5 based upon a unilateral change, a charging party must first make a prima facie showing that the respondent breached a written agreement or altered a past practice. Grant Joint Union High School District (1982) PERB Decision No. 196. In the instant case, CSEA has made that showing through the introduction of the original 1980-83 contract and the renegotiated 1980-83 contract. The original contract quite clearly states that initial assignments are to be offered first to the unit member having the greatest number of paid hours in that class. As discussed above, the renegotiated contract is silent on seniority

⁶The renegotiated contract, on its face, gives total discretion to the District in making assignments, without regard to seniority. However, at no time has the District asserted this literal interpretation, and both parties introduced evidence designed to prove that there was in fact a seniority rule for initial assignments in effect after the 1982 negotiations. The issue in dispute is the proper method of calculating bus driver seniority. With the clear rejection by both parties of the literal meaning of the provision, the renegotiated contract can only be viewed as silent on the method of seniority calculation for initial assignments.

calculation for initial assignments. Since the original 1980-83 contract contains the last clear provision for initial assignment seniority,⁷ the inference is raised that this provision continued to reflect the mutually agreed-upon policy applicable to route bidding.

CSEA introduced a memo on bumping procedures, quoted above, as evidence that the parties continued to live by the original 1980 contract language on initial assignments. The memo arose in the context of negotiations in the fall of 1982 to lower the bumping "trigger."⁸ The memo was prepared by CSEA from a pre-existing document for use as a working proposal to present to the District, the only change being the reduction of the "trigger" from 2.5 to 1.5 hours per week. Otherwise, the memo

⁷Both the note from Hall to Speegle and the "Bus Drivers Handbook" mentioned earlier refer to "hours of paid employment." After noting that both documents were drafted in early 1982, prior to the drafting of the 1982 renegotiated contract, the ALJ found that language consistent with the 1980 contract language then in effect, which referred to hours of paid employment in that class. We find this to be a reasonable conclusion. In any case, the language does not support the District's position, for, if taken literally, "hours in paid employment" means hours in all classes, whether higher or lower. Neither party asserted that such a method of seniority calculation was ever used by the District.

⁸The bumping procedure is contained in the latter part of paragraph 1(A). The bumping procedure is basically a review of the route bidding process, whereby routes are reassigned if they deviate a certain number of hours per week from the estimate used for the initial bidding. After complaints from bus drivers that the "trigger" was too high, it was tentatively lowered from 2.5 hours to 1.5. (The agreement was never finalized because the 1.5 hour figure was still too high to suit many of the drivers.)

is identical to the language of paragraphs 5 and 7 of the original 1980-83 contract, quoted above.

The testimony revealed that the parties neither discussed nor changed the language in the memo concerning seniority for initial assignments. From this, the ALJ drew the inference that the parties must have acknowledged its accuracy. The ALJ also credited testimony from various witnesses (primarily, temporary dispatcher Darlene Bannister) that the memo was applied to bumping situations that occurred thereafter. The District claims the ALJ gave too much weight to this document. For the following reasons, we agree.

It is true that the parties failed to discuss or change the provision on seniority for initial assignments. But it is also true that paragraph 2 of the memo, which provided for in class seniority for decreases in assignments, was not discussed or changed. Yet, this clearly contradicts the explicit contract language that both parties agree was in effect at the time (Article IV, section C-7, which called for use of the sec. 45308 method where decreases occurred). The parties' failure to address this obvious inconsistency undermines the inference drawn by the ALJ with respect to the initial assignment language. A more reasonable inference would be that the parties were concerned only with the trigger reduction from 2.5 to 1.5 hours, and they simply paid no attention to the seniority language (either on initial assignments or decreases) in the bumping memo. Further, the testimony as to the application of the bumping

procedure is certain only as to the "trigger" amount used (1.5 hours) and is inconclusive as to the seniority method used in the rebidding.⁹ On the other hand, the fact that the memo was posted in the transportation department and occasionally referred to does weigh somewhat in favor of CSEA's position.

Though we agree with the District that the bumping memo was not as significant as the ALJ believed, the fact remains that the only clear language on seniority for initial assignments is found in the original 1980-83 agreement. This is sufficient to raise the inference that the language of the original 1980-83 agreement continued to reflect the mutually agreed-upon policy for initial assignments (route bidding). Absent some credible evidence to reflect that the policy on initial assignments was in fact something different, we must conclude that the original 1980-83 contract language indeed reflects the policy applicable to the 1983 route bidding at issue here.

The District maintains that it had agreed with CSEA to use the sec. 45308 method of seniority calculation (hours in class, plus higher classes) for all purposes, including initial assignments of bus drivers. This agreement is said to be evidenced by various examples where the District used hours in higher classifications in calculating seniority, by the

⁹Since Rivera was the only bus driver working for the District who had worked in a higher classification, the application of either seniority method would yield the same result.

maintenance of a single seniority list calculated in accordance with sec. 45308, and by the application of this section to the 1983 bidding process.

The District's version of the bargaining history between the parties is heavily dependent upon the testimony of former CSEA Chapter President Yinger, who was called on behalf of the District. The ALJ failed to credit Yinger's testimony, primarily due to a perceived conflict between Yinger and CSEA. His actions were contrary to the interests of at least a dozen bargaining unit members (those below Rivera on the seniority list) and, in fact, disturbed the bus drivers and other CSEA officials. When Yinger's impartiality was questioned by others in CSEA, he ceased playing any role in the Rivera matter. As noted above, Yinger resigned a few months later.

The ALJ observed that Yinger had an interest in shaping his testimony to fit the District's position, for a decision in favor of the District would tend to vindicate Yinger. The ALJ also found that antagonism between Yinger and CSEA was reflected by Yinger's December 1983 letter (before a complaint was issued but after the charge was filed) to PERB's regional attorney. The letter asserted that Yinger (on behalf of CSEA) had made an agreement with the District to allow Rivera to bid on August 31, 1983, and to fill the position with a temporary employee. Yinger wrote the letter on District stationery and signed it as president of the CSEA local, even though he had already resigned. Yinger did not send a copy of the letter to CSEA.

The ALJ found Yinger's testimony to be hopelessly confused and factually inaccurate, and rejected it on that basis as well. Yinger insisted that the intent of the parties at the time of the switch from a date-of-hire to an hours-worked basis for seniority was to establish a single seniority system for all purposes based upon sec. 45308. This is dubious, for when the parties switched to an hours-worked standard in 1980, the contract clearly provided that seniority was based upon hours worked in the class. Further, the contract made no mention of sec. 45308.

After reviewing the entire record, we see no reason to disturb the ALJ's finding that Yinger's testimony on the bargaining history of the parties was too tainted by bias and confusion to be credible.¹⁰ **10**

As noted above, Yinger testified that the parties agreed in 1980 to use the sec. 45308 method of seniority calculation for all purposes. The District pursued this argument in its post-hearing brief. In its exceptions to the proposed decision,

¹⁰In Santa Clara Unified School District (1979) PERB Decision No. 104, the Board articulated the standard it will apply in reviewing its hearing officers' credibility findings. The Board stated that:

. . . while the Board will afford deference to the hearing officer's findings of fact which incorporate credibility determinations, the Board is required to consider the entire record, including the totality of testimony offered, and is free to draw its own and perhaps contrary inferences from the evidence presented.

the District appears to acknowledge that Yinger confused the 1980 and the 1982 negotiations and instead asserts that in 1982 the parties agreed to calculate all seniority in accordance with sec. 45308.

Even assuming that the District and Yinger did in fact confuse the two sets of negotiations and meant to assert that the seniority calculation change occurred in 1982, we would still find that the District failed to demonstrate that the parties agreed at the time of the 1982 negotiations to use the sec. 45308 method for initial assignments, or that there was some subsequent agreement to do so. As Yinger's testimony has been discredited, the District cannot rely merely on its bald assertion that the parties intended, from July 1982 forward, to apply the sec. 45308 method to initial assignments. Certainly, the language of the renegotiated contract gives no such indication.

While the provisions for increases and decreases in assignments clearly indicate calculation of seniority in accord with sec. 45308, the provision dealing with initial assignments in 1982, as in 1980, makes no reference to sec. 45308. Nor was there testimony explaining why the new provision on initial assignments made no mention of seniority calculation or of sec. 45308 if, in fact, the parties intended to use the sec. 45308 method. The existence of a separate provision for initial assignments in both the 1980 and 1982 agreements demonstrates that initial assignments are viewed independently from increases or decreases in hours, and we find no evidence in the contract

or the record that would indicate the parties agreed to end this distinction.

In support of its reading of the 1982 renegotiated contract, the District offered evidence that its past or "actual" practice was, in fact, to use the sec. 45308 seniority method for all purposes. First, there is Personnel Director Cunningham's testimony that she always calculated seniority according to sec. 45308. She provided five examples. The subject of one example, Pat Auser, also testified, stating that she was credited with time worked as a confidential secretary (in 1977) after she returned to the position of school secretary. Cunningham testified that she credited Merle McCartney with time served as director of transportation (in 1973), a supervisory position, when he returned to the position of mechanic.

The ALJ properly found little relevance in these examples because in both cases the time served in the higher classifications was prior to the 1980 change from date of hire to hours worked as the basis for calculating seniority. There is no provision in either the original or the renegotiated 1980-83 contract making the seniority provisions retroactive; therefore, whatever level of seniority an employee had under prior methods of seniority calculation would, of course, carry forward. Thus, examples of time worked prior to 1980 or 1982 are not instructive of the District's practice under the relevant contractual provisions. Further, Cunningham's

testimony reveals that Auser's seniority was calculated for layoff purposes.¹¹

The next example involved two account clerks who temporarily worked out of class as supervising accountants and were credited in their account clerk seniority with the out-of-class hours. Because these examples merely involve temporary out-of-class work, where the employees officially remain in their original classifications, they are also of little relevance.

The last example involved Frank Rael, who took a voluntary demotion from lead mechanic to mechanic and, according to Cunningham, his lead mechanic hours were credited to his mechanic seniority. The ALJ noted that the District's seniority lists show Rael with 12,200 hours as a lead mechanic, 12,784 hours as a bus mechanic, and 3,043 hours as a bus mechanic helper. Clearly, Rael's seniority as a bus mechanic helper does not include his hours in the higher classifications. His hours as a bus mechanic might include his hours as a lead mechanic, assuming he had worked very few hours as a bus mechanic. In terms of support for the District's position, this example is at best inconclusive.

Closely related to the last example above is the District's insistence that it maintained but one seniority list, which was calculated in accordance with sec. 45308 (hours in class plus

¹¹There is no dispute that sec. 45308 obligates the District to follow its provisions for the sequence of layoffs.

higher classes). If this were true, it might provide persuasive evidence; however, the record before us does not support the District's claim. The seniority lists put in evidence generally do not reflect hours worked in higher classifications in the hour figures for lower classifications. Instead, they appear to simply list the time worked in each classification. While the hours worked in each classification could easily be added to those in higher classifications for comparative purposes, the lists, on their face, do not reflect inclusion of hours in higher classifications.

The District also introduced evidence that in 1983 it applied sec. 45308 to the bidding procedure whenever drivers chose routes shorter than those available and shorter than their routes of the previous year. The District had drivers sign documents attesting that they voluntarily accepted the reductions in time and then sent confirming notices. The District maintains that this was required by the contractual provision on decreases in assigned hours (quoted above), which provided that if the District decreases assigned hours, such decreases shall be handled according to sec. 45308.

The ALJ found this attempt to apply sec. 45308 to the bidding process to be nonsensical. He pointed out that the contract calls for the application of sec. 45308 where the District initiates increases or decreases in assigned hours and cannot be fairly read to encompass the choice of shorter than available routes in the bidding process. While we tend to agree that the

District's attempt to apply sec. 45308 to the route bidding process in 1983 constituted a strained construction of the parties' agreement, such a conclusion is not necessary for finding a violation.

The only evidence presented consists of the documents signed by bus drivers after the 1983-84 bidding. This is the bidding that is at issue here and in response to which CSEA first requested negotiations and then filed this unfair practice charge. The renegotiated 1980-83 contract was ratified in July 1982. This was prior to the 1982-83 route bidding. (The record reflects that route bidding normally takes place in late August, just before the beginning of the new school year.) The District introduced no evidence that it applied sec. 45308 to the route bidding process that year. Evidence of actions taken which involve only the bidding that is in actual dispute does not establish a past practice.

The District's final exception states that no adverse impact upon other drivers was shown. However, there was testimony that drivers often bid on routes shorter than those available, in the hope that the scheduling of such routes is more conducive to assignment of additional hours (kindergarten and activity routes). Thus, a driver may end up with more total hours than if he or she had initially chosen the longer route. Whether the District's unlawful conduct actually caused calculable damages

to those drivers wrongfully placed below Rivera on the seniority list is a matter for compliance.¹²--

CSEA argues in its sole exception that the proposed order is deficient in that it fails to require a return to the status quo ante by ordering that Rivera's seniority be adjusted to exclude her dispatcher hours (for the purpose of route bidding).

Ordinarily, a return to the status quo ante is the appropriate remedy for an unlawful unilateral change. Rio Hondo Community College District (1983) PERB Decision No. 292. However, given the potential disruption from a rebidding of routes in the middle of the school year, we decline to order an immediate return to the status quo ante. The order shall reflect that, absent agreement of the parties or completion of statutory impasse procedures, the status quo ante shall be restored prior to the route bidding for the next school year. Until such time, the District shall make the affected drivers whole for any continuing damages caused by its unlawful actions.

In sum, we find that CSEA established by a preponderance of the evidence that the language of the original 1980-83 contract

¹²It is argued in Chairperson Hesse's dissent that damages are precluded by the fact that the drivers who were wrongfully placed below Rivera on the seniority list had the opportunity to bid on routes equal to or greater than that chosen by Rivera. As explained in footnote 4, supra, where the main routes are less than 40 hours per week, their attractiveness is not solely dependent on their length. We believe that the displaced drivers should have the opportunity of showing that Rivera's improper placement on the seniority list affected their assignment to kindergarten or activity routes, creating calculable damages.

continued to control seniority calculation for the initial assignment of bus routes in August 1983. The District failed to introduce credible evidence to support its contention that the then existing (and lawful) policy required that such seniority be calculated pursuant to sec. 45308.¹³ We, therefore, affirm

¹³Chairperson Hesse's dissent erroneously asserts that the District argued it had reached agreement with CSEA Chapter President Yinger as to the calculation of Rivera's seniority. The District argued only that Yinger had actual or apparent authority at the August 27 meeting to agree to allow Rivera to bid on August 31. Only in the August 25 meeting was the calculation of Rivera's seniority discussed. In fact, the District clearly admits that Yinger was not acting in his official capacity at the August 25 meeting, for in both its post-hearing brief and its exceptions to the proposed decision, the District made a point of distinguishing Yinger's role at the two meetings. The ALJ properly found, and we affirm, that Yinger did have the actual or apparent authority to bind CSEA on August 27. Further, the District never argued that it relied on Yinger's acquiescence at the August 25 meeting. Therefore, the argument in the dissent as to apparent authority fails on that basis as well.

While we disagree with the conclusion in the dissent that waiver could be found upon the facts of this case, we decline to reach the issue because it is not properly before us. At no time has the District argued that CSEA waived its right to negotiate a change in the calculation of seniority. Nor did the ALJ consider a waiver defense in his proposed decision.

Waiver is an affirmative defense which is itself waived if not raised by the respondent. Walnut Valley Unified School District (1983) PERB Decision No. 289; Brawley Union High School District (1982) PERB Decision No. 266. Nevertheless, the Board will raise an issue sua sponte if necessary to correct a serious mistake of law. See, e.g., Fresno Unified School District (1982) PERB Decision No. 208. Fresno and its progeny involved issues of law which were dealt with erroneously by the ALJ but not excepted to. Therefore, had the Board adopted the proposed decisions without correcting the mistakes, erroneous precedents would have been established. In contrast, in the instant case the issue of waiver was never argued by the District nor considered by the ALJ. Likewise, our decision does not consider waiver but merely relies on established law concerning unilateral changes and the

the decision below that the District violated EERA section 3543.5(a), (b) and (c) by making an unlawful unilateral change in a matter within the scope of representation, as defined by EERA section 3543.2.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, and pursuant to section 3541.5(c), it is hereby ORDERED that the Morgan Hill Unified School District and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with the California School Employees Association and its Morgan Hill Chapter #159 by unilaterally altering the method by which the District calculates the hours of seniority of bus drivers for the purposes of initial assignments.

2. Denying the California School Employees Association and its Morgan Hill Chapter #159 the right to represent its members by failing and refusing to meet and negotiate in good faith concerning seniority calculation for the initial assignment of bus routes.

duty to bargain. Thus, no error of law is present in this decision. Were we to raise sua sponte an unargued affirmative defense, as the dissent would have us do, we would effectively be substituting our judgment as to how to try a particular case for that of the party involved. Clearly, this would not be a proper role for the Board.

3. Interfering with employees in the exercise of rights guaranteed by the Educational Employment Relations Act by failing and refusing to meet and negotiate in good faith concerning seniority calculation for the initial assignment of bus routes.

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

1. Upon request, meet and negotiate with CSEA, as defined by EERA section 3540.1(h), prior to adopting any change in the existing method of calculating seniority of bus drivers for purposes of initial assignments. If, however, subsequent to the District's unlawful actions, the parties have on their own initiative reached agreement or negotiated through completion of statutory impasse procedures concerning seniority calculation for initial assignments, further negotiations shall not be required as a result of this Decision.

2. Absent agreement of the parties or negotiation through completion of statutory impasse procedures, restore the status quo ante prior to the initial assignment of bus routes for the 1986-87 school year by adjusting Vicki Rivera's seniority (for the purpose of initial assignments) to exclude her hours as a dispatcher.

3. Make whole any employee who has suffered, or continues to suffer, financial or seniority loss as a consequence of the District's unilateral change of the method of calculating seniority for initial assignments in 1983. If, however,

subsequent to the District's unlawful actions, the parties have on their own initiative reached agreement or negotiated through completion of statutory impasse procedures concerning seniority calculation for initial assignments, monetary liability shall terminate at that time.

4. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all work locations where notices to employees customarily are placed, copies of the Notice attached as an Appendix hereto, signed by an authorized agent of the employer. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that this Notice is not reduced in size, defaced, altered or covered by any material.

5. 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 all other allegations in the action herein are hereby DISMISSED.

This Order shall become effective immediately upon service of a true copy thereof upon the Morgan Hill Unified School District.

Member Burt joined in this Decision. Chairperson Hesse's dissent begins on p. 25.

Hesse, Chairperson, dissenting: On appeal, the District asserts that it did not unilaterally change the method of determining seniority for the purpose of bidding on bus routes. The District argues that it reached agreement with the CSEA chapter president, i.e., an agent of the exclusive representative.¹ I respectfully dissent from the majority opinion which finds no such agreement.

On August 25, 1983, the president of the CSEA Morgan Hill Chapter, Jay Yinger, met with the District personnel director

¹The District argued that it reached agreement with CSEA as to the seniority calculation. In its Answer, the District stated, in relevant part:

8. As its eighth affirmative defense, Respondent alleges that the method for computing Vicki Rivera's seniority was consistent with past practice and the parties' agreement and was the same method as that used for all other bus drivers in the District. . . .

9. As its ninth affirmative defense, Respondent alleges that Ms. Rivera was allowed to bid on bus runs at the same time as all other bus drivers in accordance with an agreement reached between Respondent and Charging Party.

10. As its tenth affirmative defense, Respondent alleges that the agreement between Respondent and Charging Party allowing Ms. Rivera to bid on bus runs at the same time as other drivers was reached prior to the bidding of routes on August 31, 1983. (Emphasis added.)

Based on the evidence the District produced, I find the District did reach agreement with the CSEA chapter president, and argued the same.

to discuss crediting Vickie Rivera's hours as a bus dispatcher for bidding purposes. Yinger told the District that he was acting as a friend, and not in his official capacity as chapter president. Later, the District agreed to credit Rivera with her hours as a dispatcher.

On August 27, Yinger met with the District to discuss whether Rivera would be allowed to bid with the other drivers, even though she was required to continue working temporarily as a dispatcher at the time. At this meeting, Yinger acted in his official status as the chapter president. The District and Yinger agreed to allow Rivera to bid on bus routes with the other drivers. The bidding was scheduled to take place on August 31.

On August 30, 1983, the day before the bidding, CSEA Field Representative Stephen Pearl discussed the seniority dispute with Yinger and some of the bus drivers. Although Pearl disagreed with Yinger's handling of the matter, it was not until September 19, or three (3) weeks later, that Pearl notified the District that CSEA was taking a position contrary to Yinger's.

In similar cases, the Board has ruled that officers or agents of employee organizations must be presumed to be acting on behalf of the organization. Furthermore, the acts of an officer or agent within his apparent authority are binding on the organization. In Antelope Valley Community College District (1979) PERB Decision No. 97, the Board held:

Under California common law, the acts of an agent within his actual or apparent authority are binding on the principal. Apparent authority results from conduct of the principal upon which third persons rely in dealing with agents. The liability of the principal attaches where such reliance was reasonable and results in a change in position by the third party. (Antelope Valley, supra, at p. 11.) (Emphasis in original.)

In the August 27 meeting, Yinger had apparent, if not actual, authority to negotiate the seniority issue on behalf of CSEA.

In addition, the Board has held that

Officers of employee organizations should be presumed to be acting with the authorization of and on behalf of the organization on those matters which even remotely relate to the goals or interests of the organization. If the determination of "organizational activity" were dependent upon specific authorization, the natural result would be that public school employers and the PERB would be required to continuously monitor the internal affairs of employee organizations in order to ascertain whether an individual had been properly authorized to act on behalf of the organization. This is hardly the function of either public agency. (San Diego Community College District (1983) PERB Decision No. 368, citing the Board's affirmance of a hearing officer's decision in Santa Monica Unified School District (1980) PERB Decision No. 147.)

Thus, I conclude that Yinger had authority to act on behalf of CSEA in reaching agreement on the seniority matter. Not only was an agreement reached with Yinger in the August 27, 1983 meeting, but I also find that agreement was reached in the August 25 meeting, as well.

In Ravenswood City School District (1984) PERB Decision No.

469, the Board found a violation when a supervisor counseled an employee (and the supervisor's "friend") regarding her pursuit of a grievance. The supervisor acted on behalf of the employee and had assisted in both the filing and the processing of the grievance. The Board held that supervisory participation or interference in an employee's protected right is imputable to the employer. In essence, the supervisor was not allowed to remove her supervisory "hat," despite her good intentions and her good faith conduct. Likewise, here the CSEA local president was acting as a "friend" of Rivera, but negotiating on her behalf. It would indeed be a double standard to allow a union official to remove his official status, yet preclude a supervisor from doing the same.

Even if an artificial distinction is made of Yinger's status as a "friend" rather than an agent at the August 25 meeting, it must be granted that CSEA (through Chapter President Yinger) was on notice of the District's proposed action. Again, when Yinger met with the District on August 27 to discuss the bidding procedure, he failed to raise an objection to the calculations. CSEA's silence could be found to be a waiver of the opportunity to bargain the issue.

²Yinger's failure to object at the August 27 meeting is not the only waiver by CSEA. As noted above, Field Representative Pearl became aware of the dispute on August 30, the day before the bus drivers bidding. He was first notified by an employee in a telephone call. Later that evening, at a strategy meeting for negotiations on a successor contract, Pearl met with Yinger and other bus drivers. At this meeting,

Thus, I disagree with the majority in their finding no agreement was reached between the parties. The District met with CSEA Local President Yinger and reached agreement on the seniority issue. No unilateral action was taken. The District did not violate EERA section 3543.5(a), (b) and (c). The ALJ's proposed decision should be reversed and this unfair practice case dismissed.

Even if a violation is found, this is not a "matter for compliance." Rivera bid on a 28 3/4-hour assignment. The next three employees passed up not only another 28 3/4-hour slot, they passed up a 31 3/4 hour slot. Thus, even if a violation is found, the only remedy that is appropriate is to cease and desist from unilaterally changing the method by which bidding seniority for bus drivers is calculated.

the seniority dispute was discussed at great length. Yet it was not until September 19, three weeks later, that Pearl notified the District of CSEA's position on the issue.

Even after the August 30th meeting, neither Pearl nor Yinger approached the District with objections and a demand to negotiate, despite their knowledge of the proposed placement. CSEA had a reasonable opportunity to bargain the issue before the bidding occurred. By its failure to do so, CSEA waived its right to negotiate. Therefore, the District's change was not a violation of the EERA.

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-844, California School Employees Association and its Morgan Hill Chapter #159 v. Morgan Hill Unified School District, in which all parties had the right to participate, it has been found that the District violated Government Code section 3543.5(a), (b) and (c) by unilaterally changing the method by which seniority is calculated for the purpose of initial assignment of bus drivers. As a result of this conduct, we have been ordered to post this Notice, and will abide by the following. We will:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with the California School Employees Association and its Morgan Hill Chapter #159 by unilaterally altering the method by which the District calculates the hours of seniority of bus drivers for the purposes of initial assignments.

2. Denying the California School Employees Association and its Morgan Hill Chapter #159 the right to represent its members by failing and refusing to meet and negotiate in good faith concerning seniority calculation for the initial assignment of bus routes.

3. Interfering with employees in the exercise of rights guaranteed by the Educational Employment Relations Act by failing and refusing to meet and negotiate in good faith concerning seniority calculation for the initial assignment of bus routes.

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

1. Upon request, meet and negotiate with CSEA, as defined by EERA section 3540.1(h), prior to adopting any change in the existing method of calculating seniority of bus drivers for purposes of initial assignments. If, however, subsequent to the District's unlawful actions, the parties have on their own initiative reached agreement or negotiated through completion of statutory impasse procedures concerning seniority calculation for initial assignments, further negotiations shall not be required as a result of this Decision.

2. Absent agreement of the parties or negotiation through completion of statutory impasse procedures, restore the status quo ante prior to the initial assignment of bus routes for the 1986-87 school year by adjusting Vicki Rivera's seniority (for the purpose of initial assignments) to exclude her hours as a dispatcher.

3. Make whole any employee who has suffered, or continues to suffer, financial or seniority loss as a consequence of the District's unilateral change of the method of calculating seniority for initial assignments in 1983. If, however, subsequent to the District's unlawful actions, the parties have on their own initiative reached agreement or negotiated through completion of statutory impasse procedures concerning seniority calculation for initial assignments, monetary liability shall terminate at that time.

Dated: _____ MORGAN HILL 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.