STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS NEVADA UNION CHAPTER NO. 165,	)	
Charging Party,	)	Case No. S-CE-566
v.	)	PERB Decision No. 557
NEVADA JOINT UNION HIGH SCHOOL DISTRICT,	)	December 31, 1985
Respondent.	)	

Appearances: Christopher E. Niehaus, Field Representative for California School Employees Association and its Nevada Union Chapter No. 165; Finkle & Stroup by Robert W. Stroup, Leith B. Hansen and Mary Beth de Goede for Nevada Joint Union High School District.

Before Morgenstern, Burt and Porter, Members.

DECISION

BURT, Member: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Nevada Joint Union High School District (District) to the proposed decision of an administrative law judge (ALJ) finding that it violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA)[1] by its failure

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

Section 3543.5 provides in pertinent part:

to negotiate in good faith over a change in the method of calculating monthly salary payments. The California School Employees Association and its Nevada Union Chapter No. 165 (CSEA or Association) except to the remedy proposed by the ALJ.

FACTS

The parties here were covered by a collective bargaining agreement incorporating successor agreements between 1979 and June 1982. Each year, the parties negotiated salary rates which were then translated into monthly and hourly rates in a salary schedule incorporated into the agreement. The same rates applied whether employees were 12-month employees or less than 12-month (9, 10 or 11-month) employees. However, because the pay rates did not take into account the variations in days worked per month for less-than-12-month employees, the result was a discrepancy between the monthly and hourly rates for less-than-12-month employees. In other words, those employees

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It shall be unlawful for a public school employer to:

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

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

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

actually received a higher salary when calculated monthly than they would have if calculated strictly on an hourly basis.[2]

The agreement also provided for paid vacation days for employees, and the monthly salary rate included pay for these days. Twelve-month employees could take vacation at any time. However, less-than-12-month employees were required to take vacation time on days when school was not in session during the year, during Christmas recess, for example, or have their monthly salary docked accordingly. Any remaining vacation pay was disbursed in a lump sum at the end of the year. As noted by the ALJ, the District explained that it:

> . . . used the vacation deduction procedure as a means to offset its "alleged" overpayment of less than 12-month employees due to the hourly/monthly rate error.

In June 1982, June Weatherly, a 10-month employee who was CSEA president, concluded that the District's payment practice was in error, since she believed that she should be paid for vacation days in addition to her monthly salary. Weatherly used a work sheet to demonstrate her actual salary in comparison to the calculated amount she believed to be correct. The following calculations[3] are useful in interpreting her contentions:

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[2]For example, using a monthly basis, a less-than-12-month employee gets paid at the same rate for February as for January. Computed on an hourly basis, the February salary would be less.

[3]The numbers are rounded off.

1. Weatherly's actual 1981-82 pay at the "monthly" rate excluding vacation pay - ($1146 a month x 10 months = $11,460).

2. Weatherly's contention (vacation at the hourly rate of pay was in addition to monthly salary) - ($52.88 a day x 12.5 days = $661. $11,460 + 661 = $12,121).

3. The District's contention (monthly rate plus excess vacation payable at the end of year after 10 nonworking days deducted) - $11,460 +.$132 ($52.88 a day x 2.5 days = $132.) = $11,592.

As noted above at point 2, Weatherly originally sought her monthly salary plus vacation pay calculated on an hourly basis. As a compromise, however, she proposed that her salary be increased to reflect the difference between what she was actually paid, her monthly rate with no vacation pay, and what she would have received if her pay had been calculated as follows:

> Computation of annual wage based on hourly wage rate plus total vacation days earned - ($6.61 an hour x 8 hours x 209 workdays = $11,051 + $661 (12.5 vacation days) = $11,713.

The difference between Weatherly's first proposal and her compromise position amounted to $253. She also proposed that the salary of other employees be calculated accordingly.

Weatherly approached the administration of the District with her calculations. She met with Ty Blount, assistant superintendent, Irene Roath, bookkeeper, and Ruth Watson, CSEA representative. The parties agreed to the settlement as proposed, that is, an annual wage based on an hourly rate plus an hourly rate for 12.5 vacation days. Weatherly and Watson

met later in June to calculate the additional payment for all less-than-12-month employees.

Although the parties' agreement expired on June 30, 1982, there were no negotiations during the summer because the District was uncertain as to the amount of State funding it would receive.

Beginning with the July and August 1982 pay periods, less-than-12-month employees received monthly checks in a lesser amount than the previous year. For example, Weatherly's monthly check was reduced from $1,146 to $1,105. The explanation for the reduction was that the District had begun to calculate monthly salaries using the same hourly rate as was used to settle the vacation question in June. The lower monthly checks were to be offset by a lump sum at the end of the year compensating employees for any unused vacation. In the District's view, it was discontinuing its practice of "fronting" vacation pay via the monthly salary and, instead, went to a system by which vacation pay was given entirely in a lump sum at the end of the year. In total, Weatherly's yearly compensation was exactly the same in 1982-83 as it was in 1981-82 once the settlement for vacation was credited.

No one disputes that there was a change in the method of computing and paying salary. The basic contention by the District is that the change was a negotiated one, made with the agreement of the Association. The Association claims that its

agreement went only so far as resolving vacation pay and did not signify its agreement to the hourly computation of monthly pay as was adopted by the District.

Blount testified that the outcome of the June meeting and the agreement to recalculate vacation pay also constituted an agreement by CSEA to calculate monthly salaries on an hourly basis. Weatherly testified that she believed that the subsequent meetings with District Bookkeepers Roath and Watson were only intended to resolve the vacation issue and did not constitute agreement to recalculate salaries overall. Roath did not testify. Blount gave hearsay testimony that Roath told him that she explained the full effects of changing to an hourly basis -- including a reduced monthly paycheck -- to Weatherly.[4]

Blount testified that he and Weatherly met informally later in June when settlement paychecks were being prepared, and that he expressed concern at that time about the effect of the reduced monthly paychecks. He testified that Weatherly told him she would explain to employees that their checks would be smaller, but that they would receive the same amount overall. Weatherly denied saying that she would explain lower monthly

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[4]The District introduced a document which purported to be Roath's account of these transactions. It was not prepared as an affidavit or deposition, and the ALJ considered it hearsay, to which he accorded no weight. To the extent it was corroborated by Blount's testimony, he discounted it because he considered the testimony suspect.

paychecks, claiming that she did not know the amount would be lower. She testified that she did agree to explain to members that the calculations used to recompute the 1981-82 paychecks would be used again in 1982-83.

There was vague and inconclusive testimony about a summer meeting where Weatherly allegedly agreed to a separate salary schedule for less-than-12-month employees on an hourly basis. Roath's discounted documents included unsigned, undated notes of a negotiation session between Weatherly and the superintendent. Blount testified that Roath showed him these notes, claiming that she had informed CSEA of the changes to be made. Weatherly denied that there were negotiations in the summer regarding wages, and denied agreeing to the use of an hourly wage for the future.

Blount testified that he and Weatherly met briefly after school began and he inquired if she had explained the changes in paychecks to the other employees so that they would not question him. He testified that, after employees began receiving lower paychecks, Weatherly, Watson, and another CSEA representative met with Blount to inquire how the checks were being calculated. He told them to "go do their homework." They then went back to study the pay calculations.

Weatherly testified that James Ross, the District accountant, called her to his office between September and early November 1982 to discuss the salary schedule. He showed

her schedule A, showing both hourly and monthly rates as in the past, and schedule B showing the hourly rates for less-than-12-month employees. He asked her if she would accept only the hourly schedule and she replied "no." Weatherly testified that the first time she had seen the separate schedule for less-than-12-month employees was at that meeting.

With regard to the same events, Ross testified that he met with Weatherly and Watson in late November to discuss whether schedules A and B were sufficient, or whether additional schedules were necessary. He testified that Watson agreed that only the hourly B schedule was necessary for less-than-12-month employees. Around the same time, Weatherly indicated that publication of the schedule should not be held up or tied to the continuing dispute about vacation pay. Ross forwarded a memo to Blount on November 18 confirming CSEA's request to publish the schedule with no monthly figures listed for less-than-12-month employees. Weatherly never saw the memo. Watson did not testify. As noted by the ALJ, the record is unclear as to whether Ross and Weatherly were describing the same meeting, although the ALJ specifically credited Ross' account.

Employee Contracts

In the past, employees were requested to sign annual contracts which included salary rate, days to be worked and vacation days. Before 1982-83, these contracts reflected the

average monthly salary rate for less-than-12-month employees. In 1982-83, the contracts reflected the hourly wage rate from schedule B rather than the monthly rate. Weatherly signed her contract on October 29, although she stated her disagreement with the payment method.

Flores' Grievance

On January 10, Blount, Weatherly, and Ross met to discuss the grievance of Kay Flores. Flores had been erroneously overpaid and the District was seeking to recover the overpayment. The parties agreed to use the hourly wage rate to recompute the wages earned. Weatherly testified that she agreed to this method of settling the grievance since:

> They were already computing at that time all the classified 9, 10, and 11 month payment on an hourly basis instead of a monthly basis. I had absolutely no expectation from the District that they would make an exception in this employee's case and put her back on the correct, what I perceived as the correct monthly adjustment.

No CSEA representative requested to negotiate the change after employees began receiving reduced paychecks. Weatherly indicated that the Association had spent time trying to understand why the paychecks were lower and had expressed its concern to the District about the way salaries were being computed.

DISCUSSION

In order to establish a prima facie case of an unlawful unilateral change, the Association must establish that there

was indeed a change in established policy which was made without its agreement. Grant Joint Union High School District (1982) PERB Decision No. 196, Pajaro Valley Unified School District (1978) PERB Decision No. 51. It is uncontested that the District departed from its practice of using a monthly payment schedule. The question before us here is whether Weatherly's agreement regarding the vacation pay dispute encompassed an agreement to thereafter compute salary on an hourly basis. The District claims it agreed to a "package" in discussions with Weatherly: an added amount to cover vacation pay, with the corollary reduction in monthly pay. The Association claims that it agreed only to the lump-sum payment and not the quid pro quo.

The Association conceded that discussions about the vacation issue were instigated by Weatherly on behalf of the Association, using a worksheet which analyzed salary on an hourly basis. From that discussion flowed further meetings by which back pay was calculated for other similarly situated employees. Many of the individuals involved in these meetings (e.g., Watson for the Association and Roath for the District) did not testify. The document which purports to give Roath's version of the disputed events is pure hearsay. The testimony of Weatherly and Blount is in substantial conflict over many of the particulars involving the negotiation.

Blount's testimony was largely hearsay and consisted of events which he understood to have taken place, although he

testified directly that he and Weatherly discussed the lower paychecks to come on at least one occasion in June. Weatherly, on the other hand, was present at all of the discussions in question, and testified consistently that she did not agree to an arrangement by which monthly paychecks would be reduced, regardless of the vacation settlement. The ALJ credited Weatherly's testimony over that of Blount's[5] and, after a review of the record as a whole, we find no reason to do otherwise.

Further, we do not find that Weatherly's subsequent conduct is inconsistent with this result. She testified that she was initially uncertain about why the paychecks were lower since she had no reason to expect that they would be, and that she, therefore, could not have agreed to explain the discrepency. She protested to Blount, although neither she nor any other CSEA representative specifically requested to negotiate. Although she signed her own contract, she apparently did so after her protest to the District. While her account of her reaction to the "B" salary was directly contradicted by Ross, whom the ALJ found credible, even her agreement to the B scale, like her settlement of the Flores' grievance, is not

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[5]In finding that Blount's testimony "was not more credible than Weatherly's," the ALJ erroneously placed on the District the burden of proving that the agreement permitted the change. The burden is rather on the Association to prove that the change was unilateral.

necessarily inconsistent with a conclusion that she did not agree as part of the June negotiations and was proceeding under protest.

Having adopted the Association's version of the events in question, we, therefore, conclude that the established past practice of using a monthly payment schedule was unilaterally altered. We likewise decide that the Association's failure to request to negotiate does not demonstrate a waiver of the right to negotiate over the subject matter of the District's unilateral change. The District provided no notice and opportunity to negotiate before making the changes, and PERB has previously determined that the failure to request negotiations over a decision already made does not constitute waiver. Arvin Union School District (1983) PERB Decision No. 300.

Remaining at issue is the remedy in this case. The Association argues that a "status quo ante" remedy would include a return to the previous method of calculating monthly salaries, plus the vacation payment made in 1981-82. The District argues that a true status quo ante remedy would rescind both the vacation payment and the integrally related change in calculating monthly salaries, thus leaving employees with less money than they were receiving before the changes at issue. The District does not argue for total rescission but, rather, makes the argument to oppose a back pay award as computed by the Association.

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. Here, the District is correct that a true status quo ante remedy would be a return to the previous practice regarding the monthly pay schedule, minus the lump-sum payment of vacation. As a result, classified employees would actually receive a reduction in total pay. We find that such a remedy would not effectuate the purposes of EERA and so we decline to order a roll back to the pay status before the vacation payment settlement.

We will, however, order the District to negotiate upon request regarding the payment method to be used in the future. If, however, subsequent to the District's unlawful action the parties have, on their own initiative, reached agreement or negotiated through completion of the impasse procedure concerning the subject matter of the unilateral change, further negotiations shall not be required as a result of this Decision.[6]

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[6]The District argues that the parties subsequently reached agreement to ratify the procedure in question here. The Board has previously determined, however, that disagreements about whether subsequent agreements constitute compliance with the Board's order are best left to a compliance hearing. San Mateo City School District (1984) PERB Decision No. 375a.

ORDER

Upon the foregoing facts, conclusions of law, and the entire record in this case, and pursuant to Government Code section 3541.5(c), it is hereby ORDERED that the Nevada Joint Union High 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 Nevada Union Chapter No. 165 by taking unilateral action with respect to the method of computing and paying salaries for less-than-12-month employees.

2. Interfering with the rights of employees to be represented by failing and refusing to meet and negotiate in good faith with the exclusive representative.

3. Denying the California School Employees Association and its Nevada Union Chapter No. 165, the right to represent employees by failing and refusing to meet and negotiate in good faith.

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

1. Upon request, meet and negotiate with the exclusive representative concerning the method of computing and paying salaries for less-than-12-month employees.

If, however, subsequent to the District's unlawful action the parties have, on their own initiative, reached agreement or negotiated through completion of the impasse procedure

concerning the subject matter of the unilateral change, further negotiations shall not be required as a result of this Decision.

2. Within thirty-five (35) days following the date the 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.

3. 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 his instructions.

This Order shall become effective immediately upon service of a true copy thereof upon the Nevada Joint Union High School District.

Members Morgenstern and Porter joined in this Decision.

Appendix

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

After a hearing in Unfair Practice Case No. S-CE-566, California School Employees Association and its Nevada Union Chapter No. 165 v. Nevada Joint Union High School District, in which all parties had the right to participate, it is found that the Nevada Joint Union High School District violated the Educational Employment Relations Act, Government Code section 3543.5(a), (b) and (c) by unilaterally changing the method of computing and paying salaries for less-than-12-month employees.

As a result of this conduct, we have been ordered to post this Notice and 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 Nevada Union Chapter No. 165 with respect to the method of computing and paying salaries for less-than-12-month employees.

2. Interfering with the rights of employees to be represented by failing and refusing to meet and negotiate in good faith with the exclusive representative.

3. Denying the California School Employees Association and its Nevada Union Chapter No. 165 the right to represent employees by failing and refusing to meet and negotiate in good faith.

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

Upon request, meet and negotiate with the exclusive representative concerning the method of computing and paying salaries for less-than-12-month employees.

If, however, subsequent to the District's unlawful action the parties have, on their own initiative, reached agreement or negotiated through completion of the impasse procedure concerning the subject matter of the unilateral change, further negotiations shall not be required.

Dated: NEVADA JOINT UNION HIGH SCHOOL DISTRICT

By: _____
Authorized Representative

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