STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS PLACENTIA CHAPTER #293,	)	
Charging Party,	)	Case No. LA-CE-1602
v.	)	PERB Decision No. 595
PLACENTIA UNIFIED SCHOOL DISTRICT,	)	November 4, 1986
Respondent.	)	

Appearances: Rutan & Tucker by David C. Larsen for Placentia Unified School District.

Before Burt, Porter and Craib, Members.

DECISION

CRAIB, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the respondent, Placentia Unified School District (District), to the attached proposed decision of an administrative law judge (ALJ). The ALJ found that the District violated sections 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA)[1] by refusing to negotiate the effects of layoffs and decisions to reduce assignments in 1982.

[1]The EERA is codified at Government Code section 3540, et seq.

We find the ALJ's findings of fact and conclusions of law to be free of prejudicial error and adopt them as our own, consistent with the discussion below. We write separately to more fully address the District's waiver defense with regard to layoff effects, to comment briefly on the District's obligation to bargain the reductions in hours and to make clarifying changes in the proposed order.

DISCUSSION

After learning of proposed layoffs and reductions in hours in 1982, the charging party, California School Employees Association and its Placentia Chapter #293 (CSEA), requested that the District bargain over the reductions in hours and various effects of layoff. The effects of layoff listed in CSEA's proposal primarily concerned severance pay, continuation of health and welfare benefits, and reinstatement of former salary and benefits levels upon reemployment. With the exception of one provision concerning voluntary demotions, which was withdrawn because the parties' then current contract (1980-1983) clearly covered that subject, none of the effects sought to be negotiated were expressly covered by the contract's layoff article.[2] The 1980-1983 contract did not contain a "zipper clause," nor any other provision that could

[2]CSEA's 1982 proposal on layoff effects is summarized at pp. 12-14 of the attached proposed decision.

be construed as an express waiver of the right to bargain subjects not covered by the contract. Additionally, there was no evidence that the specific items in the 1982 proposal were discussed by the parties during their 1980 contract negotiations. In fact, while there was substantial testimony concerning the provision on notice of layoffs, there was little evidence presented concerning other aspects of the layoff article.

The District argues that its duty to bargain was satisfied by inclusion of the layoff article in the contract, and that CSEA thereby waived any right to bargain further on layoff effects. The Board has adopted the standard for waiver used by the National Labor Relations Board (NLRB), which requires that a waiver of statutory rights be "clear and unmistakable."

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[3]The 1980-1983 contract did contain the following management rights clause:

> It is understood and agreed that the District has all the customary and usual rights, powers, functions and authority to discharge its obligations. All of the rights, powers, or authority which the District had prior to the execution of this Agreement are retained except as those rights, powers, and functions or authority which are specifically abridged or modified by this Agreement.

This provision can reasonably be interpreted to allow the District, for the term of the contract, to adhere to any existing policies or practices not modified by the contract, without obligation to bargain. The District did have a pre-existing layoff policy, but it too was silent as to the specific layoff effects sought to be negotiated by CSEA in 1982.

Further, a union waives its right to bargain a subject only if the subject was "fully discussed" or "consciously explored" and the union "consciously yielded" its interest in the matter. Los Angeles Community College District (1982) PERB Decision No. 252.

Waiver is most readily apparent where the specific subject is covered by the express terms of an existing collective bargaining agreement. See, e.g., Solano County Community College District (1982) PERB Decision No. 219. Waiver is also found from evidence of negotiating history reflecting a conscious abandonment of the right to bargain over a particular subject. See, e.g. Palo Verde Unified School District (1983) PERB Decision No. 321; St. Mary's Hospital. (1982) 260 NLRB 1237 [109 LRRM 1343]. A "zipper clause" might also be the basis for finding a waiver.[4] While a "zipper clause" does not allow an employer to make unilateral changes in terms and conditions of employment, it may provide the privilege of maintaining existing policies for the term of the contract. In the absence of some form of waiver, the duty to bargain continues during the term of a collective agreement.

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[4]"Zipper clauses" typically state that there shall be no further duty to bargain negotiable subjects during the term of contract. Sometimes the clause is expressly limited to subjects actually discussed during negotiations and sometimes purports to cover even subjects not in the contemplation of either party at the time of negotiations. Undoubtedly, zipper clauses arose as a means of avoiding the type of dispute involved herein.

South San Francisco Unified School District (1983) PERB Decision No. 343; NLRB v. Jacobs Manufacturing Co. 196 F.2d.680 (2d Cir. 1952) (30 LRRM 2098).

In the present case, there is no express contractual language, bargaining history[5] or zipper clause on which to base a finding of waiver. The District nevertheless argues that the negotiation of some layoff effects into the contract itself constitutes a waiver of the right to bargain other types of effects. We can find no authority for the proposition that negotiation over a broad subject such as layoffs itself constitutes waiver as to particular aspects of the subject that neither were discussed nor covered by the eventually agreed upon contract language.

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[5]The District's chief negotiator, Larry Clem, testified that the District's position in negotiations was that either there would be a layoff article or there would be negotiations each time a layoff arose. CSEA's chief negotiator, Liz Stephens, testified that she and Clem understood that the layoff article covered primarily procedures for layoff and that the parties would meet to discuss layoff effects should the need arise. The ALJ did not expressly credit either witness's testimony over the other, nor do we. We find that the testimony most reasonably reveals a misunderstanding at the bargaining table over the negotiation of layoff effects not covered by the contract. At most, the testimony is inconclusive as to the parties' intent in negotiating the layoff article which appeared in the contract. As a waiver of bargaining rights must be "clear and unmistakable," such testimony provides little support for the District's position.

In all prior decisions of this Board, and in applicable NLRB precedent, there has been some further evidence of waiver not present in the case herein.[6] See, e.g., Solano County Community College District, supra, (union sought to negotiate layoff effects clearly covered by the parties' contract), South San Francisco Unified School District, supra (contract contained a zipper clause, an "effect of agreement" clause which stated that, in the absence of contract provisions, Personnel Commission policies would apply, and there was evidence that in negotiations the union consciously abandoned efforts to modify the Personnel Commission policies), Placer Hills Union School District (1982) PERB Decision No. 262 (established past practice allowed the District unfettered discretion to lay off CETA workers when their funding ran out), St. Mary's Hospital, supra (evidence showed that dental plan

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[6]Despite our dissenting colleague's protestation that our decision is inconsistent with both federal precedent and prior PERB decisions, the cases he relies on merely stand for the proposition that a party has no mid-term obligation to renegotiate subject matters specifically covered by a collective agreement. As explained above, that is not the factual situation we face in the instant case. None of the decisions cited rely solely on the "comprehensive" nature of a contractual provision which does not specifically cover the matters at issue; thus, they are not inconsistent with the result we reach in the instant case.

By our decision in this case we do not foreclose the possibility that a contract provision could be so all-encompassing as to impliedly include non-specified terms. Because we do not find the provision at issue here to be of such character, we leave this issue for another day.

was discussed and abandoned in circumstances reflecting a trade-off for other provisions), Nevada Cement Co. (1970) 181 NLRB 738 [74 LRRM 1013] (items union sought to negotiate were clearly covered by the contract). Our prior decision in Mt. Diablo Unified School District (1983) PERB Decision No. 373, where the union sought mid-term negotiations on various layoff effects, supports our approach in the present case. While there was no layoff article per se, the District claimed that various provisions of the parties' contract did cover the matters at issue. The Board analyzed each specific bargaining proposal separately, finding those expressly covered by the contract non-negotiable but finding those on which the contract was silent negotiable.[7]

In finding no waiver on the facts of this case, we note that not only must a waiver be "clear and unmistakable" but waiver is also an affirmative defense, therefore, the party asserting it (in this case, the District) bears the burden of proof. Morgan Hill Unified School District (1985) PERB

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[7]In its exceptions, the District claims that the proposed decision in the instant case is inconsistent with a PERB ALJ's decision in Pacific Grove Unified School District (1982) PERB Decision No. HO-U-142 [6 PERC 13135]. While ALJ decisions are not precedential unless expressly adopted by the Board itself (PERB Regulation 32215, codified at California Administrative Code, title 8), nevertheless, Pacific Grove is not inconsistent with the result in the instant case. In Pacific Grove, the ALJ expressly relied on contract language which generally covered the subject of layoff effects in combination with a strong zipper clause.

Decision No. 554, California Evidence Code section 500, Trujillo v. Los Angeles (1969) 276 Cal.App.2d 333 [81 Cal. Rptr. 146], Insurance Workers' International Union. AFL-CIO (1980) NLRB Gen. Coun. Ad. Memo No. 5-CB-3391 [106 LRRM 1469]. Thus, not only must waiver be clearly established, but any doubts must be resolved against the party asserting waiver. While the inclusion in a contract of a layoff article covering some effects permits the inference that the subject was exhausted in negotiations, the "clear and unmistakable" standard requires that the evidence of waiver be conclusive. In this case, it is not.[8]

[8]Acknowledging that the evidence failed to reflect a mutual understanding that the subject of layoff effects was exhausted in negotiations, our dissenting colleague nevertheless would resolve this uncertainty in favor of the District. He does this by reframing the issue so as not to involve any waiver analysis, thus eliminating the District's burden of proof. He begins by asserting that the District satisfied its obligation to bargain by agreeing to a comprehensive layoff article. He then concludes that CSEA has the burden to show that some residual duty to bargain remained. Since the evidence of exhaustion of the subject in negotiations is inconclusive, he reasons that the uncertainty must be resolved against CSEA. This attempt to stand waiver analysis "on its head" is clever, but patently fallacious.

The essential disagreement we have with our colleague is whether or not the contract sufficiently covers the matter at issue so as to waive any right to further negotiations during the term of the contract. In other words, does the contract language itself (or other evidence) act to suspend the duty to bargain? If so, the District had no further obligation to negotiate; if not, there was such an obligation. Thus, while the issue can be framed as whether bargaining obligations were fulfilled, it is the presence or absence of waiver that ultimately decides the issue. In this instance, the existence

On the issue of reduction in hours, we agree that the District did not satisfy its duty to negotiate the decision and effects. In its initial proposal, CSEA proposed language identical to that in Education Code section 45101(g), to wit,

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

Consistent with its position on CSEA's other proposals, the District refused to include Education Code language in the contract. The District took the position that since a

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of waiver, and the duty to bargain are merely "two sides of the same coin" and cannot legitimately be viewed as separate issues. Therefore, our application of waiver analysis is appropriate.

Further, even if our colleague's framing of the issue was correct, his reasoning contains a fatal flaw. We agree that, at the time of contract negotiations, the District fulfilled its then existing duty to bargain, which was triggered by the submission of proposals on layoff effects. However, here the issue is whether or not a further duty to bargain was triggered by a later request to negotiate over effects not specifically covered by the contract. By failing to differentiate between these two triggering events, our colleague begins with the false premise that the District had already fulfilled its duty to bargain. In so doing, his reasoning becomes circular, as his premise and conclusion are essentially the same. In deciding whether the District had a mid-term duty to bargain, our colleague begins by assuming that the duty to bargain had already been fulfilled. He would find a further duty to bargain not as a matter of law, but only if the District had expressly agreed to negotiate further. This analysis fails to recognize that the duty to bargain is not necessarily extinguished or suspended upon the signing of a contract (depending upon the content of the contract) and may be continuing.

reduction in hours was defined as a layoff under the Code, language in the contract was not necessary. In addition, the District's Classified Personnel Reduction Policy also included a provision defining layoff to include a reduction in hours. CSEA dropped that portion of its proposal. Thus, the contract is silent as to reductions in hours. The District claims the parties understood that the Education Code section 45101(g) definition of "layoff" (which includes voluntary reductions in lieu of layoff) would be used. CSEA claims that the contracted layoff article was not intended to include reduction of hours. We find the evidence insufficient to conclude that the parties consciously and fully explored the issue and intended the layoff article to cover reductions in hours. In view of the management rights clause noted above, the District could follow, to the extent applicable, and without obligation to bargain, the personnel policy with regard to the implementation of reductions. However, the policy does not grant the District the right to unilaterally decide to reduce hours. Thus, as the ALJ concluded, the District had a duty to negotiate the decision to reduce assignments. Pittsburg Unified School District (1983) PERB Decision No. 318.

Furthermore, both the Education Code and CSEA's proposal refer to reductions in hours "voluntarily consented to by the employee." There is no evidence that the reduction in hours in

this case was voluntarily consented to by the employees.[9]

The District also excepts to the absence of any express provision in the proposed order for the offset of wages earned through other employment. While the order can reasonably be read to impliedly account for such an offset, we find it prudent to clarify the order. We shall also modify the order to expressly account for the effect of subsequent agreements between the parties upon the restoration of the status quo ante and upon monetary liability. Additionally, with regard to the failure to negotiate layoff effects, we shall provide for a limited back pay remedy in an effort to approximate the parties' bargaining positions had there been no violation. Solano County Community College District, supra; Transmarine Navigation Corporation (1968) 170 NLRB 389 [67 LRRM 1419].

ORDER

Upon the foregoing findings of fact and 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 Placentia

[9]We pass no opinion on the authority of school employers to reduce hours without the consent of affected employees, since the parties have not raised this as an issue in the case. See, California School Employees Association v. Pasadena Unified School District (1977) 71 Cal.App.3d 318; 58 Ops.Atty.Gen. 357 (1975). See also Education Code section 35160.

Unified School, its governing Board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with the exclusive representative of its classified employees by taking unilateral action on matters within the scope of representation, as defined in section 3543.2, specifically, the impact of layoffs and the decision to reduce the hours of work of employees.

2. Denying the California School Employees Association and its Placentia Chapter #293 their right to represent unit members by failing and refusing to meet and negotiate about matters within the scope of representation.

3. Interfering with employees' right to select an exclusive representative to meet and confer with the employer on their behalf by unilaterally changing matters within the scope of representation without first providing the exclusive representative with notice and the opportunity to meet and confer.

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

1. Upon request of the Association, rescind the decision to reduce the hours of work of the teachers' aides and the account clerk effectuated in June and September 1982. The three employees whose hours were reduced shall be made whole

for any loss of economic benefits suffered as a result of the District's reduction in hours, with interest at the rate of 7 percent per annum until: (1) the date the parties reach agreement; (2) completion of the statutory impasse procedures; (3) the failure of CSEA to request bargaining within 10 days following the date this Decision is no longer subject to reconsideration; or (4) the subsequent failure of CSEA to bargain in good faith. However, if subsequent to the District's unlawful action the parties have, on their own initiative, reached agreement or negotiated through the completion of statutory impasse procedures concerning reductions in hours, then monetary liability shall terminate at that time and the status quo ante shall not be restored.

2. Beginning 10 days after this Decision is no longer subject to reconsideration, pay the employees who were laid off in June and September 1982 their salary and benefits at the rate being paid prior to their layoff until: (1) the date the District bargains to agreement with CSEA regarding the impact of its decision to lay off the concerned employees; or (2) the date the District and CSEA bargain to a bona fide impasse; or (3) the failure of CSEA to request bargaining within 10 days after this Decision is no longer subject to reconsideration or to commence negotiations within 5 working days of the District's notice of its desire to bargain; or (4) the subsequent failure of CSEA to bargain in good faith.

However, in no event shall the sum paid to these employees exceed the amount they would have earned in wages and benefits from the date of their layoff in either June or September 1982 to the time they secured or refused equivalent employment elsewhere, provided, however, that in no event shall they be paid less than they would have earned for a two-week period at their normal rate of pay and benefits when last in the District's employ. The District shall be entitled to offset from any amounts owed pursuant to this Order the value of wages and benefits secured from alternative employment during the period of liability.

3. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post copies signed by an authorized agent of the District, of the Notice To Employees attached as an Appendix hereto, for at least 30 consecutive workdays at its headquarters office and in conspicuous places at the locations where notices to classified employees are customarily posted. It must not be reduced in size and reasonable steps should be taken to see that it is not defaced, altered or covered by any material;

4. Written notification of the actions taken to comply with this Order shall be made to the Los Angeles Regional Director of the Public Employment Relations Board in accordance with his instructions.

This Order shall be effective immediately upon service of a true copy thereof upon the Placentia Unified School District.

Member Burt joined in this Decision. Member Porter's concurrence and dissent begins on page 16.

Porter, Member, concurring and dissenting: I concur in that portion of the majority opinion that finds that the District did not satisfy its duty to negotiate the decision and effects of the reduction in hours. However, I do not agree that the District was obligated to engage in additional negotiations on the subject of the effects of its decision to lay off the classified employees. I reach that conclusion based on the record in this case, prior Board precedent, and the underlying purposes of the EERA.

Both parties to this dispute agree that, during the course of the negotiations of the collective bargaining agreement, CSEA proposed, and the parties negotiated, contract language on the subject of effects of layoff. They both agree, and the contract demonstrates, that an agreement was reached on this subject matter, and comprehensive provisions were included in the contract that covered the effects of layoff.[1] They disagree on whether

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[1]The layoff article in the negotiated agreement encompasses the following topics: notice to the employee, including the timing, content, and manner of service; notice to the Association; order of layoff; definition of "length of service"; bumping rights; voluntary demotions or transfers; priority right of retention over short-term employees; acceptance of substitute or short-term employment by the employee on layoff status; refusal of short-term employment; procedures for layoff, including the order of layoff, establishment of a reemployment list, order of layoff in the event of equal seniority; reemployment rights, including duration of such rights, order of reemployment, priority of reemployment over other hires, promotional opportunities, reemployment rights of employees who take voluntary demotions or reduction in assigned time; early retirement in lieu of layoff; maintenance of a seniority roster; notification of reemployment opportunities; manner of employee acceptance or rejection of reemployment offers and continued reemployment rights if offer rejected; right to be reemployed in the highest rated job classification; and rights of an employee who is improperly laid off.

their intent was to foreclose subsequent negotiations on this subject matter at the time a layoff was implemented.

The District insists that it took an adamant position at the table that it would not agree to put the layoff provision into the contract if it was going to be obligated to renegotiate the subject at the time of a layoff. However, since the union took the position that it would not, as a matter of policy, agree to a zipper clause, no such clause was included. Instead, the parties agreed to the management rights provision that reserved to the District all the "customary and usual rights, powers, functions and authority to discharge its obligations." The District also retained "all of the rights, powers, or authority which the District had prior to the execution of this Agreement . . . except as those rights, powers, and functions or authority which are specifically abridged or modified by this Agreement." The District understood this to give it the same rights as would a zipper clause or a waiver provision.

CSEA, on the other hand, claims it took the position that what it proposed and negotiated did not constitute a waiver as to specific effects not negotiated at the time, inasmuch as its original proposal was primarily "procedural" effects, while the proposal at the time of the layoff concerned more substantive effects, such as severance pay, etc. It is not clear that CSEA made this position known at the table, in light of the District's statement that it would not put the article in the contract at all if it was still obligated to negotiate further effects.

Neither the ALJ nor the majority resolved this conflict in the record, instead deciding that there was no mutual understanding and, therefore, the District, having the burden of establishing waiver, did not meet its burden. I disagree with this analysis of the issue. The contract on its face establishes that the parties negotiated a comprehensive, albeit not all-inclusive, article on the effects of layoff. In light of this, the District did satisfy its obligation to negotiate the effects of the layoff, unless the parties specifically agreed that further negotiations would occur. The burden of establishing such an agreement would fall on CSEA as the charging party asserting that the District had some further obligation to negotiate. Since the majority would find no meeting of the minds on the question of whether further negotiations would be required at the time of a layoff, CSEA has failed to carry its burden of proving that it reserved some residual right to negotiate.

Until today, a party that negotiated a subject to agreement and agreed to place that subject in the collective bargaining agreement had no further obligation to renegotiate the subject matter for the duration of the agreement, absent some agreement or understanding to do so. Clearly, this does not authorize an employer to make some kind of change in its policy or to act inconsistently with the terms of the contract. Further, this does not allow an employer to develop a new policy on a negotiable subject without negotiating. It also does not allow a party to refuse to negotiate a subject not covered by the

agreement or the negotiations in the absence of a zipper clause. However, the majority writes new law by requiring an employer to go back to the table in the middle of a contract and negotiate additional provisions into the agreement because those specific proposals were not addressed at the time the subject was fully negotiated and because the parties did not put a zipper clause into the contract, whenever the "triggering event" of a union request to negotiate occurs. This conclusion flies in the face of the goal of peaceful labor relations that ideally results from a stable bargaining relationship enjoyed during the term of an agreement derived from good faith negotiations. It is inconsistent with PERB precedent and unsupported by federal labor decisions.

Past Board decisions have found that a district that has negotiated a subject, and agreed to include those provisions in the agreement, has no further obligation to renegotiate that subject during the term of the agreement. Further, these decisions do not rely on the existence of a zipper clause to reach such a finding.

First, the Board has specifically rejected the argument that "procedures" and "effects" of layoff are somehow distinct. In Conejo Valley Unified School District (1984) PERB Decision No. 376, at p. 8, footnote 2, the Board stated:

> . . . we reject CSEA's claim on exceptions that layoff procedures are something separate and distinct from layoff effects. PERB has developed the notion of a broad negotiable area we have generally referred to as "implementation and effects of layoff"

> or, more briefly, "layoff effects." By these terms we have meant to signify a grouping of all subjects within the scope of representation which may appropriately be negotiated in connection with a managerial decision to lay off. Layoff procedures (or "implementation" issues) have been treated as being within the broad area of "effects bargaining." See, e.g., South San Francisco Unified School District (9/2/83) PERB Decision No. 343. As we said in Mt. Diablo Unified School District (12/30/83) PERB Decision No. 373:
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> > We do not wish to imply that "implementation of layoff" is a separate subject of bargaining from "effects of layoff;" rather, the former is, broadly speaking, a sub-category of the latter.

Board decisions have also firmly established that, once the parties agree to a comprehensive layoff policy in the contract, the district is under no obligation to renegotiate the subject when it implements a layoff. For example, in Kern Community College District (1983) PERB Decision No. 337, the Board stated, at p. 13:

> Of course, where a public school employer and an exclusive representative have agreed in advance on a comprehensive policy to be implemented in the event of a layoff decision, the parties are not obligated to renegotiate those matters each time the District announces a decision to lay off. This is so even where such agreement is inferred from an existing, established or past practice. See Placer Hills Union School District (11/30/82) PERB Decision No. 262.

Similarly, in San Mateo City School District (1984) PERB Decision No. 383, the Board addressed the issue of the district's obligation to negotiate a layoff article during the course of

the contract negotiations. The Board characterized the union's proposals as addressing issues related to the implementation of layoffs, including the circumstances, timing and notice of layoffs, seniority, options in lieu of layoff, bumping and reemployment rights, and voluntary demotions or reductions in hours. The Board also reiterated its rule that, in addition to the impact on employees laid off, a layoff "may concurrently impact upon those employees who remain," citing Newman-Crows Landing Unified School District (1982) PERB Decision No. 223. The Board stated, at pp. 21-22:

> In Mt. Diablo [Decision No. 373], we also found that, where the parties had already negotiated and included in their collective bargaining agreement provisions covering layoff effects, the Association waived its right to renegotiate the issue when a layoff was announced. Mt. Diablo, supra, pp. 46, 62.
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> In the instant case, CSEA properly sought to negotiate the effects of layoff "before the fact, when such dialogue can potentially be of the greatest value." Newark, supra, p. 6. Negotiations at such time not only avoid the heated emotions and crisis atmosphere engendered by impending layoffs, they also avoid the statutory time constraints which arise once the decision to lay off has been firmly made. Indeed, successful negotiations over the effects of layoff during regular contract negotiations avoid any danger of the concern alluded to by the District, that its ability to lay off would be compromised by requiring it to negotiate through impasse on layoff effects. For these reasons, negotiations over the effects of layoff during normal contract negotiations serve a salutory purpose and are viewed favorably by the Board. (Emphasis added.)

Further, in Solano County Community College District (1982) PERB Decision No. 219, the Board found that the district did not violate the Act when it implemented a layoff in a manner consistent with the terms of the collective bargaining agreement, and found that no further negotiations were required. The Board stated, at pp. 7-8:

> The layoff was carried out in accord with the relevant provisions of the collective bargaining agreement which the parties had negotiated and was therefore lawful under the Act. The Board determined in Healdsburg Union High School District (6/19/80) PERB Decision No. 132, that the decision to initiate a layoff is within the managerial prerogative of a district and that bilateral negotiations are required as to the effects and implementation of the district's operational decision.
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> The evidence discloses that the District and the Association did meet and negotiate concerning the effects and implementation of the layoff decision. They did reach agreement through bilateral negotiations concerning the procedure for layoffs. In fact, on June 15, 1978, they modified Article XIX of their agreement to reflect the results of their contract reopener discussion concerning these additional layoff procedures. The decision to institute a layoff was within the District's managerial rights. Their legal obligation to discuss the effects and implementation of that decision was the subject of these reopener discussions between the parties.

In Newark Unified School District, Board of Education (1982) PERB Decision No. 225, the Board stated, at p. 5:

> Thus, while an employer is free to determine that a layoff is required, it may not, in the absence of agreement or the completion of negotiations, unilaterally implement in-scope effects that are inconsistent with

existing laws, contract provisions, policies, or established practices. (Emphasis added.)

In South San Francisco Unified School District (1983) PERB Decision No. 343, the district was not required to negotiate the effects of a layoff, since the contract between the parties contained a management rights clause that provided that the contract would prevail over the district's existing practices, procedures and personnel commission rules, and that, in the absence of contract provisions, such policies were discretionary with the district. The contract also contained a zipper clause. The Board found that the district had no duty to negotiate the layoff or its effects, since the parties had already negotiated layoffs and, thus, the district had the right to lay off in a manner consistent with the contract and the personnel commission rules. Further, the union contractually agreed that the provisions of the personnel commission rules would be the controlling procedures for the term of the agreement. Consequently, it was not entitled to a second opportunity to negotiate the subject when the district decided to lay off employees. While the Board found that the zipper clause also evidenced a waiver, the decision does not primarily rely on that for its conclusion.

Federal law likewise does not support the majority opinion. First, section 8(d) of the National Labor Relations Act (29

U.S.C.A. section 158(d))[2] specifically allows a party to refuse to negotiate over a subject included in the contract during the term of the agreement. Second, the case cited in the majority opinion, NLRB v. Jacobs Mfg. Co. (2d Cir. 1952) 196 F.2d 680 [30 LRRM 2098], does not stand for the proposition that, "[i]n the absence of some form of waiver, the duty to bargain continues during the term of a collective agreement." (Majority opinion, at pp. 4-5.) Indeed, in the context of negotiations pursuant to a contractual reopener, the court was asked to determine whether an employer had an obligation to negotiate as to "subjects which were neither discussed nor embodied in any of the terms and conditions of the contract." (30 LRRM at 2100). The court specifically did not pass on the NLRB's holding below that the employer has no duty to negotiate a subject that was discussed during the contract negotiations, but not included in the agreement, where the reopener language did not include that topic. The board had relied on section 8(d) to find that the employer did not have an obligation to bargain that subject during the term of the contract.

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[2]Section 8(d) provides, in part, that the duty to bargain collectively:

> . . . shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. . . .

Further, in Mead Corporation v. NLRB (11th Cir. 1983) 697 F.2d .1013 [112 LRRM 2797, 2802], the court stated:

> Thus section 8(d) of the Act relieves the parties of the duty during the term of a labor agreement to bargain over subjects that are specifically included in the terms and conditions of the contract. NL Indus., Inc. v. NLRB (8th Cir. 1976) 536 F.2d 786, 787 [92 LRRM 2937]; NLRB v. Jacobs Mfg. Co., 196 F.2d 680, 684 [30 LRRM 2098].

In the present case, the parties negotiated the implementation and effects of layoff during the course of their regular negotiations. The fact that there may have been other possible proposals or effects they did not negotiate does not give CSEA the right to tie up the layoff by demanding to renegotiate the layoff article to add to those effects already included in the contract. Such a conclusion would encourage an employer to refuse to negotiate a layoff article into the contract, knowing that it had to turn around and negotiate the subject again before it could proceed to implement a layoff. This would contradict the expressed policy of encouraging the parties to resolve such issues prior to the time at which a layoff is imminent. Further, the absence of a zipper clause in this case does not compel a different conclusion. Where, as here, the parties have included a comprehensive layoff article in their agreement, the District has satisfied its obligation to negotiate the effects of the layoff. For that reason, I dissent.

APPENDIX

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

After a hearing in Unfair Practice Case No. LA-CE-1602, California School Employees Association and Its Placentia Chapter #293 v. Placentia Unified School District, it has been found that the Placentia Unified School District violated California Government Code section 3543.5(a), (b), and (c) by refusing to bargain regarding the impact of layoffs and the decision to reduce the hours of work of employees in June and September of 1982.

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 exclusive representative of the District's certificated employees by taking unilateral action on matters within the scope of representation, as defined in section 3543.2, specifically, the impact of layoffs and the decision to reduce the hours of work of employees.

2. Denying the California School Employees Association and its Placentia Chapter #293 their right to represent unit members by failing and refusing to meet and negotiate about matters within the scope of representation.

3. Interfering with employees' right to select an exclusive representative to meet and confer with the employer on their behalf by unilaterally changing matters within the scope of representation without first providing the exclusive representative with notice and the opportunity to meet and confer.

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

1. Upon request of the Association, rescind the decision to reduce the hours of work of the teachers' aides and the account clerk effectuated in June and September 1982. The three employees whose hours were reduced shall be made whole for any loss of economic benefits suffered as a result of the

District's reduction in hours, with interest at the rate of 7 percent per annum until: (1) the date the parties reach agreement; (2) completion of the statutory impasse procedures; (3) the failure of CSEA to request bargaining within 10 days after this Decision is no longer subject to reconsideration or (4) the subsequent failure of CSEA to bargain in good faith. However, if subsequent to the District's unlawful action the parties have, on their own initiative, reached agreement or negotiated through the completion of statutory impasse procedures concerning reduction in hours, then monetary liability shall terminate at that time and the status quo ante shall not be restored.

2. Beginning 10 days from the date this Decision is no longer subject to reconsideration, pay the employees who were laid off in June and September 1982 their salary and benefits at the rate being paid prior to their layoff until: (1) the date the District bargains to agreement with CSEA regarding the impact of its decision to layoff the concerned employees; or (2) the date the District and CSEA bargain to a bona fide impasse; or (3) the failure of CSEA to request bargaining within 10 days after this Decision is no longer subject to reconsideration or to commence negotiations within five working days of the District's notice of its desire to bargain; or (4) the subsequent failure of CSEA to bargain in good faith. However, in no event shall the sum paid to these employees exceed the amount they would have earned in wages and benefits from the date of their layoff in either June or September 1982 to the time they secured or refused equivalent employment elsewhere, provided, however, that in no event shall they be paid less than they would have earned for a two-week period at their normal rate of pay and benefits when last in the District's employ. The District shall be entitled to offset from any amounts owed pursuant to this Order the value of wages and benefits secured from alternative employment during the period of liability.

Dated: _____ PLACENTIA 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.

PUBLIC EMPLOYMENT RELATIONS BOARD
OF THE STATE OF CALIFORNIA

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS PLACENTIA CHAPTER #293,	)	
Charging Party,	)	Unfair Practice Case No. LA-CE-1602
v.	)	PROPOSED DECISION
PLACENTIA UNIFIED SCHOOL DISTRICT,	)	(7/25/83)
Respondent.	)	

Appearances; Greg A. Marvel, Field Representative, Thomas A. Fields, Field Director for California School Employees Association and its Placentia Chapter #293; David C. Larsen, Attorney (Rutan & Tucker) for Placentia Unified School District.

Before Barbara E. Miller, Administrative Law Judge.

PROCEDURAL HISTORY

On July 2, 1982, the California School Employees Association and its Placentia Chapter #293 (hereinafter CSEA, Association, or Charging Party) filed an unfair practice charge against the Placentia Unified School District (hereinafter District or Respondent). A complaint was issued on July 30, 1982.

The charge, which was amended on November 3, 1982, alleges that the District violated sections 3543.5(a), (b) and (c) of the Educational Employment Relations Act[1] by refusing to

[1]The Educational Employment Relations Act (EERA) is codified at Government Code, section 3540, et seq. Unless

negotiate regarding the effects of layoffs and the decision to reduce assignments.

The District answered the amended charge on December 1, 1982, and denied that an unfair practice had been committed. The District contends that it took no action on matters within the scope of representation and that its actions were consistent with past practice and the contract negotiated by the parties.

An informal conference was conducted on September 13, 1982, and when the parties were unable to resolve their differences a formal hearing was requested on November 11, 1982. That hearing was conducted on February 9, 1983, the parties filed responsive post hearing briefs and the case was submitted for decision on May 25, 1983.

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otherwise indicated, all code references will be to the California Government Code. Section 3543.5 provides, in relevant part, as follows:

> It shall be unlawful for a public school employer to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

FINDINGS OF FACT

CSEA is an employee organization and the District is a public school employer as those terms are defined in the EERA. At all times relevant hereto, CSEA has been the exclusive representative of a unit comprised of classified employees of the District which maintains a non-merit system as that phrase is defined in the California Education Code. The District and CSEA were parties to a negotiated agreement which expired on June 30, 1980, and sometime in February 1980 the parties commenced negotiations for a successor agreement which became effective on September 8, 1980, with an expiration date of June 30, 1983.[2]

Negotiations Regarding Layoffs for the 1980-1983 Contract

Prior to September 8, 1980, the collective bargaining agreement between the District and CSEA did not have a provision covering layoffs. When the District found it necessary to lay off personnel after the passage of Proposition 13 in 1978, it adhered to the provisions of the Education Code and the District's Classified Personnel Reduction Policy.

Many meetings during the 1980-83 negotiations concerned proposals for a provision governing layoffs. During those meetings the chief negotiator for the Placentia Chapter of CSEA

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[2]The parties stipulated to all the findings in this paragraph.

was Vivian Elizabeth "Liz" Stephens who had served in that capacity since 1978. Prior to that time, Stephens had spent five years as the CSEA chapter president at Chaffey Union High School and approximately eight years as a state-wide representative for CSEA. Larry Clem, the District's Director of Classified Personnel, Employer-Employee Relations, was the chief negotiator for the District and had represented the District in that capacity since approximately 1978. Prior to that time, Clem was a chief negotiator for an unidentified employee organization. Over all, he had about 16 years of labor relations experience.

The initial CSEA proposal provided, in relevant part, as follows:

> A. Reason for Layoff: Layoff shall occur only for lack of work or lack of funds. Lack of funds means that the District cannot sustain a positive financial dollar balance with the payment of one further month's anticipated payroll. Per Ed. Code 45101 (g) - "Layoff for lack of funds or lack of work". Includes any reduction in hours of employment or assignment to a class or grade lower than that in which the employee, has permanence, voluntarily consented to by the employee, in order to avoid interruption of employment by layoff.
>
> B. Notice of Layoff: Any layoffs under this section shall only take place effective as of the end of an academic year. The District shall notify both C.S.E.A. and the affected employees in writing no later than April 15th of any planned layoffs. The District and C.S.E.A. shall meet no later than

May 1st following the receipt of any notices of layoff to review the proposed layoffs and determine the order of layoff within the provisions of this agreement. Any notice of layoffs shall specify the reason for layoff and identify by name and classification the employees designated for layoff. Failure to give written notice under the provisions of this section shall invalidate the layoff.

C. Reduction in Hours; Any reduction in regularly assigned time shall be considered a layoff under the provisions of this Article.

The provisions in the employer's counter-proposal were, in relevant part, as follows:

Section 19.1 Notice of Layoff;

19.1.1 The District shall notify the Association and affected employees in writing a minimum of thirty (30) days prior to the date of any layoff for lack of work or funds as determined by the District.

19.1.2 The notice to the affected employee shall specify the reason for the layoff and be given by personal delivery or by certified mail to the last known address of the employee.

19.1.3 The notice to the Association shall specify the reason for the layoff and identify by name and classification the employees designated for layoff.

In addition, the employer's counter-proposal included the following language:

19.4 Nothing herein shall be construed as a limitation on the governing board's right to determine the need

> for a reduction in services or to otherwise establish levels of service or numbers of employees.

With one exception, relevant here, the layoff provision eventually ratified by the parties was the District's proposal.[3] Article 19.4, however, was deleted and the parties agreed to a Management Rights clause which provided:

> It is understood and agreed that the District has all the customary and usual rights, powers, functions and authority to discharge its obligations. All of the rights, powers, or authority which the District had prior to the execution of this Agreement are retained except as those rights, powers, and functions or authority which [sic] are specifically abridged or modified by this Agreement.

With respect to the negotiations regarding the above-quoted provisions, Stephens testified that, as a matter of practice, she did not agree to either waiver or zipper clauses. Accordingly, she refused to agree to a layoff article which included the District's section 19.4. Stephens further testified that the layoff article was only intended to cover procedures for a layoff and not the impact of a layoff on matters within scope. She testified:

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[3] Both the Association's and the District's proposals contained other provisions pertaining to the order of layoffs, bumping rights, and employee rights relative to short term positions and the acceptance of short term or substitute assignments. They also contained a list of items pertaining to the procedures to be used in the event of a layoff. No evidence was presented regarding the negotiations on those aspects of the two proposals or as to why, to the extent they differed, the District's proposal was ultimately adopted.

> The purpose of the article was to establish a procedure so that a layoff could be orderly done. One of the objections in the waiver in the proposal from the District and the discussion that ensued, I believe that we discussed that there could be numerous things that could happen as a result of a layoff and it was not meant to cover that in the procedure. It was meant to establish a procedure for accomplishing layoff.

On direct examination, Stephens testified that during negotiations she and Clem discussed the effects of future negotiations and reached the following understanding:

> At the time of layoffs in the future we would meet to discuss and negotiate any effects of that layoff that might happen.

Upon examination by the Administrative Law Judge regarding her conversation with Clem pertaining to future negotiations on the effects of any layoffs which might occur, Stephens could not recall the specific words of the conversations during the course of negotiations; she was quite specific with respect to CSEA's intent, however and testified:

> I believe the conversation was in relationship to the section of their proposal that would have given us a waiver, have given the District a waiver not to negotiate anything further on layoffs and I would not agree to that and during that conversation, I can't recall exactly what was said, but I know that the intent was that we would discuss layoffs as they occurred as far as the effects of those layoffs. This was only meant to be a procedure.

With respect to the Management Rights Clause, Stephens did note that she considered it quite limited. She understood it

and agreed to it as a reservation of rights to the District that were not expressly included in the contract, "except in those instances that are controlled by law." Based upon all of her testimony, it is concluded that at no time did Stephens believe any of the agreed-upon language changes compromised CSEA's rights pursuant to the EERA.

Clem's description of the negotiations regarding the layoff provision was distinctly different from that of Stephens. With respect to layoffs, and the CSEA proposal for meetings subsequent to the notice of layoff, Clem testified:

> Well, again we were getting towards the end of our negotiations and basically we said, if your intent is that we negotiate every layoff that we do, that we wouldn't agree to have this article in the contract. If it is your intent to have the article in the contract, then that couldn't stay.

Clem expressly denied the Association ever stated that it intended to negotiate each time the District proposed to lay off employees.

With respect to the District's section 19.4 and its eventual elimination from the layoff article, Clem testified that it was the District's position that, by the article, it was preserving the District's right to determine the need for a layoff. Clem testified that since he believed that the Management Rights clause accomplished the same result, he did not oppose the deletion of 19.4.

It is of significance that throughout his testimony Clem described the District's negotiating posture as that of refusing to agree to meet regarding the need for a layoff. He never testified that the District sought to avoid meeting regarding the impact of layoffs. Although there is no direct evidence in this regard, based upon his overall testimony and his responses to a variety of questions, it is concluded that at the time of negotiations, Clem did not perceive the difference between negotiations regarding the need for a layoff and negotiations regarding the effects of a layoff. It is further concluded that any language "concessions" made by CSEA were in response to the demands of the District and they only had the effect of assuring the District that it had the right to determine the need for a layoff.

With respect to the language in CSEA's initial proposal regarding a reduction in hours, Clem opposed its inclusion because it recited language from the Education Code and throughout negotiations he took the position that Code language should not be contained in the agreement. He also took the position that since a reduction in hours was defined as a layoff under the Code, language in the contract was not necessary. Moreover, the District's Classified Personnel Reduction Policy also included provision for a reduction in hours. Although there is no evidence regarding the reasons Stephens agreed to delete the language governing a reduction in

hours,[4] the Association's proposal was deleted and no reference to a reduction in hours was included in the contract.

Layoffs in 1981[5]

In October of 1981 the District gave notice to CSEA of its intention to lay off or eliminate the positions of 12.5 custodians, two laundry operators, one part-time laundry driver and one accountant. Stephens had no independent recollection of that layoff and her memory was not refreshed by reference to Respondent's exhibits such as agenda notices and Board minutes

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[4]It should be noted that the District's Personnel Reduction Policy is not consistent with the relevant provisions of the Education Code. The District's policy defines layoff as follows:

> Layoff - means the termination of an employee for lack of funds or lack of work, or any reduction in hours of employment.

By comparison, Education Code section 45101 (g) treats the subject as follows:

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

Nevertheless, the District has not argued that its policy superseded the Education Code either before or after the ratification of the contract and there is no factual or legal basis for concluding that it did so.

[5]There is evidence in the record that the District laid off employees in 1978 but there is no evidence regarding what discussions, if any, took place between CSEA and the District. Similarly, there is no evidence that any employees involuntarily suffered a reduction in hours at any time.

or questions regarding conversations with Clem. However, Clem testified that when he gave her verbal notice of the planned layoff of classified personnel, Stephens said that they should sit down and negotiate regarding the continuation of fringe benefits and severance pay. Clem testified:

> . . . and I said, uh-uh, Liz, we've exhausted that during negotiations and, you know, we agreed that we would not be negotiating every layoff. And the matter was dropped.

On November 20, 1981, the layoff of the above-mentioned employees became effective.

However, some discussions did take place regarding the impact of the layoff on the remaining custodians. On November 17, 1981, Stephens wrote a letter to Clem demanding that he negotiate on the unilateral change in hours for the remaining custodians. Although Stephens did not recall taking part in more than one meeting to discuss that subject, Clem testified that he participated in approximately five meetings where the problems were apparently resolved to CSEA's satisfaction.

Events Leading to the Filing of the Unfair Practice Charge

Greg Marvel is a field representative for CSEA who, during the spring of 1982, was assigned responsibility for the Placentia area. Sometime late in April 1982, Marvel and Chapter President Ray Castillo were meeting with Clem. Clem asked the CSEA representatives what their position would be in

the event the District found it necessary to lay off classified personnel. Since Marvel was new to this particular assignment with CSEA, he said he had to familiarize himself with the layoff provisions in the contract and accordingly, the matter was not pursued at that time.

During subsequent meetings on May 13 and May 26, however, Marvel advised Clem that CSEA's position was that the District had to bargain about the effects of any layoff and about any decision to reduce assignments. On May 27, 1982, Marvel wrote to Clem confirming their conversation of the day before and memorializing CSEA's demand that the District take no action until the parties were given an opportunity to negotiate.

Representatives from CSEA did meet with Clem on May 28, 1982. At that time, CSEA prepared a proposal and indicated to the District that it wanted to bargain on a number of items which may be summarized as follows:

1. Order of Reduction This proposal provided that no CETA or other employees not from the classified service would perform the work of laid off workers. It also provided that no work of laid off workers would be contracted out.

2. Voluntary Demotion This provision related to the circumstances under which an employee could request voluntary demotion to a position in which he/she had not served if the employee possessed the minimum qualifications for the position in question.

3. Health and Welfare Benefits This provision would require the District to continue to pay for full employee coverage for a period of 12 months following the layoff.

4. Sick Leave Benefits This section provided that employees would be credited with accrued sick leave if and when they were rehired by the district.

5. Vacation Benefits This section provided that employees would be paid all accumulated vacation benefits upon layoff and would, when rehired, be at the same vacation accrual rate.

6. Salary Placement This proposal pertained to the rate at which an employee would be hired back.

7. Salary Placement for Employees Exercising Displacement Rights This section provided that salaries would remain the same for lateral displacement and that for displacement to a lower position, the salary step selected would be that closest to what the employee previously earned.

8. Severance Pay This section required a minimum of two months of pay.

9. Paid Leave This section provided that persons on a paid leave would continue in that status even if their position was eliminated.

10. Work Load This section provided that no employee remaining in the bargaining unit would be subject to an increased work load.

11. Reduction in Assignments This section provided that the District could not reduce any assignments and that if there was a lack of work or lack of funds, the remedy was to eliminate positions.

Although discussions did take place regarding CSEA's proposals, and CSEA dropped item number two because it was already covered by the contract. Clem made it clear that the District did not intend to negotiate regarding the effects of layoffs or the decision to reduce assignments because CSEA had contractually waived any right it had to bargain about such matters.

Following the meeting on May 28, 1982, the Board of Trustees took action to approve the layoff of certain personnel and the reduction of hours of two teachers' aides from seven hours per day to three and three-quarter hours per day. Clem wrote to Castillo and explained the Board's action and expressed his willingness to discuss matters with Castillo if he thought the Board's actions were inconsistent with the contract.[6]

On June 2, 1982, Marvel wrote to the Board of Trustees of the District outlining CSEA's position and urging the Board to rescind its action until the District and CSEA had had an

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[6]At the PERB hearing, CSEA stipulated that it was not alleging any violation of the collective bargaining contract with respect to the action taken by the District in laying off employees and reducing employees in hours.

opportunity to negotiate. Marvel's letter was followed by a presentation to the Board at its meeting on June 14, 1982. According to Marvel, the Board never formally responded to CSEA's request, but Clem did communicate with him indicating that if CSEA wanted resolution of the dispute, it would have to go to PERB. The employees in question were laid off or reduced in hours, effective June 30, 1982.

In late July, CSEA was again advised that the Board intended to layoff two cooks and reduce the work year of an Account Clerk I. Again Marvel was advised by Clem that the District would not bargain regarding either the effects of the layoffs or the decision to reduce the work year of the Account Clerk. Those personnel actions became effective on September 8, 1982.

ISSUES

1. Is a public school employer required to negotiate with an exclusive representative regarding the effects of a layoff?

2. Is the decision to reduce hours of employment or the length of the work year a matter within the scope of representation[7] in a non-merit school district covered by Education Code section 45101(g)?

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[7]Section 3543.2(a) defines the scope of representation as follows:

> The scope of representation shall be limited to matters relating to wages, hours of

3. Did CSEA waive its right to bargain about the impact of layoffs or the decision to reduce hours?

CONCLUSIONS OF LAW

Scope of Representation-Effects of Layoffs

The District takes the position that matters concerning the effects of a layoff are outside the scope of representation and accordingly, its refusal to bargain with CSEA was not unlawful. CSEA, relying, in part, upon Newman-Crows Landing Unified School District (6/30/82) PERB Decision No. 223 maintains that the effects or the impact of a layoff are a mandatory subject of negotiations.

In Newman-Crows Landing, the PERB noted that although the decision to lay off employees is clearly a management right,

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> employment, and other terms and conditions of employment. "Terms and conditions of employment" leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to section 3546, procedures for processing grievances pursuant to sections 3548.5, 3548.6, 3548.7, and 3548.8, and the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code. . . . All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating, provided that nothing herein may be construed to limit the right of the public school employer to consult with any employees or employee organization on any matter outside the scope of representation.

since "[t]he layoff of employees unquestionably impacts on their wages, hours, and other conditions of employment" a school district is obliged to give the exclusive representative an opportunity to negotiate regarding the effects of the layoff on matters within the scope of representation.[8]

In reaching that conclusion, the PERB applied the standards it had developed in Anaheim Union High School District (10/28/81) PERB Decision No. 177 for determining whether matters fall within the scope of representation when they are not specifically enumerated in section 3543.2(a). The Anaheim test provides:

> [A] subject is negotiable even though not specifically enumerated if (1) it is logically and reasonably related to hours, wages or an enumerated term and condition of employment, (2) the subject is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict, and (3) the employer's obligation to negotiate would not significantly abridge his freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the district's mission.

Since the formal hearing in the instant case, the California Supreme Court decided the case of San Mateo City School District v. Public Employment Relations Board (1983)

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[8]In Newman-Crows Landing the PERB found no violation of the Act, however, because it found the union had only made a demand to bargain about the layoff itself.

33 Cal.3d 850. In that case, the Court approved the use of PERB's Anaheim test to determine whether a matter is negotiable. Therefore, based upon PERB precedent and application of the Anaheim test, an employer cannot refuse to bargain with the exclusive representative regarding the impact of layoffs on matters within the scope of representation.[9]

Scope of Representation-Decision to Reduce Hours

The District takes the position that since the decision to lay off employees is non-negotiable and since the decision to reduce hours of work for employees is, as a matter of law, the same as a decision to layoff, that decision is also outside the scope of representation. That argument, which is based upon the definitional language set forth in Education Code section 45101 (g), was recently considered by the PERB and rejected. In Pittsburg Unified School District (6/10/83) PERB Decision No. 318 the Board held that even in a non-merit school district decisions regarding a reduction in hours of work or length of the work year must be negotiated.

In Pittsburg, the PERB interpreted Education Code section 45101 (g) and the Court of Appeal's decision in CSEA v.

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[9]Unlike the union in Newman-Crows Landing, supra, in the instant case CSEA made an appropriate demand. The evidence established that CSEA never challenged or sought to negotiate the decision to lay off. Most of the proposals related to workload, fringe benefits, and wages, matters directly related or reasonably related to enumerated subjects within the scope of representation.

Pasadena Unified School District (1977) 41 Cal. App.3d 318, a case involving the application of that section, and noted:

> In our view, the Pasadena decision stands only for the obvious proposition that, when faced with a bona fide lack of funds or lack of work, an employer may offer to employees the option of accepting a reduction in their hours in lieu of layoff, so long as it selects those to whom it tenders such offers by the same manner prescribed in the Education Code for selection for layoff. It does not expressly or impliedly hold that the Education Code enables school employers to reduce the hours of employees in lieu of layoff without their consent, nor does it hold that an involuntary reduction in hours is the equivalent of a layoff by Education Code definition. Pittsburg at p. 15.

In the instant case, there is no evidence that the District received or even sought the consent of the employees who were reduced in hours and the employee whose work year was shortened. Thus, in failing to comply with the provisions of the Education Code, the District cannot use it as a shield in this proceeding.

Moreover, even had the District complied with the provisions of the Education Code, the decision to reduce hours would still be negotiable. The mere fact that the terms layoff and reduction in hours are treated the same under certain limited circumstances in the Education Code does not compel the same interpretation of those words in the EERA. "Hours" is a specifically enumerated subject of bargaining under the EERA, "layoff" is not. As the Board noted in Pittsburg, supra:

> [T]he right of public school employers to unilaterally decide to layoff is a limited exception to the principle that all decisions affecting wages and hours must be negotiated. Id. at p. 19.

See also, North Sacramento School District (12/31/81) PERB Decision No. 193. Thus, absent some viable defense, the District's refusal to bargain with CSEA regarding the decision to reduce hours and the length of the school year for certain employees constitutes a violation of section 3543.5 (c).

The Waiver Defense

The District alleges that CSEA waived whatever rights it might have to bargain regarding the impact of layoffs and the decision to reduce hours. That waiver, the District alleges, is evidenced by the bargaining history and the contract language ultimately ratified by CSEA and by virtue of the fact that CSEA abandoned its alleged right to bargain regarding the impact of layoffs in October 1981.

CSEA takes the position that it never waived its right to bargain about the aforementioned subjects. It is alleged that Stephens specifically refused to agree to a "waiver" clause in the layoff section of the contract and that the Management Rights clause is too general to constitute a waiver of specific statutory rights. CSEA further argues that even if its failure to pursue a demand to negotiate regarding all the effects of the layoff in 1981 constitutes a waiver of its rights with respect to layoffs, there was no reduction in hours in 1981

and, accordingly, no waiver can be found with respect to the District's duty to bargain about its decision to reduce hours and the length of the work year.

It is well settled that in order to find a waiver PERB requires clear and unmistakable evidence that a party has relinquished its right to bargain. Amador Valley Joint Union High School District (10/2/78) PERB Decision No. 74.

With respect to contract terms serving as evidence of a waiver, in Los Angeles Community College District (10/18/82) PERB Decision No. 252, the Board held:

> [C]ontract terms will not justify a unilateral management act on a mandatory subject of bargaining unless the contract expressly or by necessary implication confers such right. New York Mirror (1965) 151 NLRB 834, [58 LRRM 1456, 1457].

Here, the contract between CSEA and the District does not justify unilateral action. There is no waiver, either express or implied in the layoff section itself. The Management Rights clause is, as Stephens correctly characterized it, "quite limited." The District retained the right to do that which it had a right to do prior to the execution of the contract. Since the District did not have the right to refuse to bargain regarding the effects of the layoff on matters within the scope of representation and the decision to reduce hours of work prior to execution of the contract, the Management Rights clause did not confer that right.

In Los Angeles Community College District, supra, the PERB also addressed the use of bargaining history as evidence of a waiver of a statutory right. Citing cases decided in the private sector,[10] the Board held:

> Under the National Labor Relations Act (NLRA or Act), union conduct in negotiations will make out a waiver only if a subject was "fully discussed" or "consciously explored" and the union "consciously yielded" its interest in the matter. Press Co. (1958) 121 NLRB 976. . . . The fact that a union drops a contract proposal during the course of negotiations does not mean it has waived its bargaining rights and ceded the matter to management prerogative. Beacon Piece Dyeing and Finishing Co (1958) 121 NLRB 953. Where, during negotiations, a union attempts to improve upon or, as in this case, to codify the status quo in the contract and fails to do so, the status quo remains as it was before the proposal was offered. The union has lost its opportunity to codify the matter, it has failed to make the matter subject to the contract's enforcement procedures or to gain any other benefit that might have accrued to it if its effort had succeeded. . . . But the union has not relinquished its statutory right to reject a management attempt to unilaterally change the status quo without first negotiating with the union. In a sentence, by dropping its demand, the union loses what it sought to gain, but it does not thereby grant management the right to subsequently institute any unilateral change it chooses. A contrary rule would both discourage a

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[10]It is appropriate for the Board to take guidance from federal labor law precedent when applicable to public sector labor relations issues. Fire Fighters Union, Local 1186 v. City of Vallejo (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507]; Los Angeles County Civil Service Commission v. Superior Court (1978) 23 Cal.3d 65 [151 Cal.Rptr. 547].

> union from making proposals and management from agreeing to any proposals made, seriously impeding the collective bargaining process. Beacon Piece, supra. Id at pp. 12-13.

In the instant case, through bargaining, CSEA attempted to codify some of the rights it had under the EERA and some of the protections its members had pursuant to the Education Code. As noted in the paragraph quoted above, in abandoning that effort CSEA did not give up its statutory rights.[11] Accordingly, no waiver is found in either the contract or the bargaining history.

The only remaining defense advanced by the District is that the inaction of CSEA when it received notice of a proposed layoff in 1981 constitutes either a waiver of the right to bargain regarding the effects of layoffs in 1982 or constitutes an admission by CSEA that it had waived its right to bargain regarding layoffs. No matter how this aspect of the defense is characterized, it cannot be sustained.

It is true Clem testified that when Stephens requested negotiations in 1981 and Clem responded the matter had been exhausted at the table, Stephens did not take any further

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[11]Respondent's reliance on Nevada Cement Co. (1970) 181 NLRB 738 is misplaced. In that case the Board found that a union had waived its right to bargain about continued employer contributions to a Supplemental Income Plan (SIP). But there, unlike here, the contract was not silent. It specifically addressed SIP contributions and the extent of the employer's obligation to make them.

action with respect to the matters of fringe benefits and severance pay. Discussions and meetings did take place, however, regarding the impact of the 1981 layoff on the work load and hours of the remaining work force. Respondent has not cited any authority for the proposition that CSEA abandoned its statutory right to bargain about the effects of layoffs on matters within the scope of representation because on a single occasion it did not choose to exercise the full scope of its right. The mere fact Stephens did not pursue all aspects of her request to negotiate is simply not a sufficient basis to conclude that she was acknowledging or agreeing to that CSEA had waived its right to negotiate in the course of contract negotiations the year before.

Obviously, since the District did not attempt to involuntarily reduce the working hours of employees in 1981, the District's allegation of waiver by inaction can have no application to CSEA's 1982 bargaining demand on that subject.

Based upon the foregoing, it is found that the District violated section 3543.5(c) in failing to give CSEA an opportunity to meet and negotiate regarding the effects of layoffs on matters within the scope of representation and on the decision to reduce the length of the workday and the length of the work year. In taking action in violation of section 3543.5(c), the District concurrently violated sections

3543.5(a) and (b). San Francisco Community College District (10/12/79) PERB Decision No. 105.

REMEDY

In a case in which the employer has taken unilateral action, it is appropriate to order that employer to restore the status quo ante. In the instant case, the Charging Party has requested an order restoring the status quo and making the affected employees whole for any loss of wages or other benefits arising from the unlawful unilateral action.

Such a remedy is appropriate with respect to those employees who suffered an involuntary reduction in hours or length of the school year because the District was obligated to bargain about the decision itself. Accordingly, upon request by CSEA, the two teacher's aides and the Account Clerk I shall be reinstated to their full hours of employment prior to June and September, respectively. The three employees whose hours were reduced shall be made whole for any loss of economic benefits suffered as a result of the District's reduction in hours, with interest at the rate of 7 percent per annum until: (1) the date the parties reach agreement; (2) completion of the statutory impasse procedures; (3) the failure of CSEA to request bargaining within 10 days following service of this decision; or (4) the subsequent failure of CSEA to bargain in good faith. North Sacramento School District (12/31/81) PERB

Decision No. 193; Alum Rock Unified Elementary School District (6/27/83) PERB Decision No. 322.

The restoration of the status quo and a make whole remedy are not appropriate with respect to those employees who were laid off. That is because there is no dispute that the District had the authority to unilaterally decide to lay off employees. See Newark Unified School District, Board of Education (6/30/82) PERB Decision No. 225; South Bay Union School District Board of Trustees (8/19/82) PERB Decision No. 207a. Nevertheless, the duty to bargain arises before a layoff is effectuated and a mere bargaining order will not restore CSEA to the bargaining position it had prior to the layoff.

The question of the appropriate remedy for an employer refusal to bargain over the effects of a decision when the decision itself is a management right is one which has been considered by the NLRB, federal courts, and the California Supreme Court. In Highland Ranch v. Agricultural Labor Relations Board (1981) 29 Cal.3d 848, the Supreme Court approved the concept of a limited back-pay award in a case where the employer had refused to bargain over the effects of selling its ranch. Quoting extensively from the NLRB's decision in Transmarine Navigation Corp. (1968) 170 NLRB 389, the Court held:

> It is apparent that, as a result of the [employer's] unlawful failure to bargain

about [the] effects [of its termination of employment], the [employees] were denied an opportunity to bargain through their . . . representative at a time prior to the shutdown when such bargaining would have been meaningful in easing the hardship on employees whose jobs are being terminated . . . . Under the circumstances of this case . . . it is impossible to reestablish a situation equivalent to that which would have prevailed had the [employer] more timely fulfilled its statutory bargaining obligation. In fashioning an appropriate remedy, we must be guided by the principle that the wrongdoer, rather than the victims of the wrongdoing, should bear the consequences of his unlawful conduct, and that the remedy should 'be adapted to the situation that calls for redress.'" (170 N.L.R.B at p. 389 (quoting Labor Board v. Mackay Co. (1938) 304 U.S. 333, 348 [82 L.Ed. 1381, 1391, 58 S.Ct. 904]).)

Applying these principles to the instant case, we deem it necessary, in order to effectuate the purposes of the Act, to require the [employer] to bargain with the Union concerning the effects of the shutdown on its [former employees]. Under the present circumstances, however, a bargaining order alone cannot serve as an adequate remedy for the unfair labor practices committed by the [employer]. As we recently pointed out in Royal Plating and Polishing Co., Inc. [(1966) 160 N.E.R.B. 990, 997]: 'The Act required more than pro forma bargaining, but pro forma bargaining is all that is likely to result unless the Union can now bargain under conditions essentially similar to those that would have obtained, had [the employer] bargained at the time the Act required it to do so. If the Union must bargain devoid of all economic strength, we would perpetuate the situation created by [the employer's] deliberate concealment of relevant facts from the Union which prevented the Union from meaningful bargaining.'" (Id., at p. 390.) 29 Cal.3d at 863.

For the reasons set forth in Highland Ranch the remedy approved in that case is appropriate in the instant case. Accordingly, beginning 10 days from service of the final decision in this case, the employer will be required to pay the laid-off employees their salary and benefits at the rate being paid just prior to their lay off until: (1) the date the District bargains to agreement with CSEA regarding the impact of its decision to lay off the concerned employees; or (2) the date the District and CSEA bargain to a bona fide impasse; or (3) the failure of CSEA to request bargaining within 10 days after service of this decision or to commence negotiations within 5 working days of the District's notice of its desire to bargain; or (4) the subsequent failure of CSEA to bargain in good faith.

It is also appropriate to order the District to cease and desist from refusing to bargain with the CSEA regarding the impact of layoffs on matters within the scope of representation and its decisions to reduce assignments. Additionally, the District will be required to post a notice incorporating the terms of the order. The notice should be subscribed by an authorized agent of the District indicating that it will comply with the terms thereof. The notice shall not be reduced in size, defaced, altered or covered by any material. Posting such a notice will inform employees that the District has acted in an unlawful manner and is being required to cease and desist

from this activity. It effectuates the purposes of the EERA that employees be informed of the resolution of the controversy and will announce the District's readiness to comply with the ordered remedy. See Placerville Union School District (9/18/78) PERB Decision No. 69. In Pandol and Sons v. ALRB and UFW (1979) 98 Cal.App.3d 589, 587, the California District Court of Appeal approved a posting requirement. The U.S. Supreme Court approved a similar posting requirement in NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

PROPOSED ORDER

Upon the foregoing findings of fact and 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 Placentia Unified School, its governing Board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with the exclusive representative of its certificated employees by taking unilateral action on matters within the scope of representation, as defined in section 3543.2 specifically with reference to the impact of layoffs and the decision to reduce the hours of work of employees.

2. Denying the California School Employees Association and its Placentia Chapter #293 their right to

represent unit members by failing and refusing to meet and negotiate about matters within the scope of representation.

3. Interfering with employees because of their exercise of their right to select an exclusive representative to meet and confer with the employer on their behalf by unilaterally changing matters within the scope of representation without first providing notice and the opportunity to meet and confer to the exclusive representative.

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

1. Upon request of the Association, rescind the decision to reduce hours of work of the teacher's aides and the account clerk effectuated in June and September 1982. The three employees whose hours were reduced shall be made whole for any loss of economic benefits suffered as a result of the District's reduction in hours with interest at the rate of 7 percent per annum until: (1) the date the parties reach agreement; (2) completion of the statutory impasse procedures; (3) the failure of CSEA to request bargaining within 10 days following service of this decision; or (4) the subsequent failure of CSEA to bargain in good faith.

2. Beginning 10 days from service of the final decision herein, pay the employees who were laid off in June and September their salary and benefits at the rate being paid prior to their layoff until: (1) the date the District

bargains to agreement with CSEA regarding the impact of its decision to lay off the concerned employees; or (2) the date the District and CSEA bargain to a bona fide impasse; or (3) the failure of CSEA to request bargaining within 10 days from service after issuance of the final decision or to commence negotiations within 5 working days of the District's notice of its desire to bargain; or (4) the subsequent failure of CSEA to bargain in good faith.

3. Within five (5) days after this decision becomes final, prepare and post copies of the NOTICE TO EMPLOYEES attached as an appendix hereto, for at least 30 consecutive workdays at its headquarters office and in conspicuous places at the locations were notices to classified employees are customarily posted. It must not be reduced in size and reasonable steps and should be taken to see that it is not defaced, altered or covered by any material;

4. Within 20 workdays from service of the final decision herein give written notification to the Los Angeles Regional Director of the Public Employment Relations Board of the actions taken to comply with this order. Continue to report in writing to the regional director thereafter as directed. All reports to the regional director shall be concurrently served on the Charging Party herein.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall

become final on August 15, 1983, unless a party files a timely statement of exceptions. In accordance with the rules, the statement of exceptions should identify by page citation or exhibit number the portions of the record relied upon for such exceptions. See California Administrative Code, title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the Public Employment Relations Board itself at the headquarters office in Sacramento before the close of business (5:00 p.m.) on August 15, 1983, or sent by telegraph or certified United States mail, postmarked not later than the last day for filing in order to be timely filed. See California Administrative Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, part III, section 32300 and 32305.

Dated: July 25, 1983

Barbara E. Miller
Administrative Law Judge