STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION & ITS CALEXICO CHAPTER NO. 399,	)	
Charging Party,	)	Case No. LA-CE-2417
v.	)	PERB Decision No. 754
CALEXICO UNIFIED SCHOOL DISTRICT,	)	July 17, 1989
Respondent.	)	

Appearances: Madalyn J. Frazzini, Attorney, for California School Employees Association & its Calexico Chapter No. 399; Atkinson, Anderson, Loya, Ruud & Romo by Karen E. Gilyard and James C. Romo, Attorneys, for Calexico Unified School District.

Before Porter, Craib and Shank, Members.

DECISION

CRAIB, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Calexico Unified School District (District) to the attached proposed decision of a PERB administrative law judge (ALJ) finding that the District violated section 3543.5, subdivisions (a), (b) and (c), of the Educational Employment Relations Act (EERA).[1] Specifically, the ALJ found that the District

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.5 states, in pertinent part:

> 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

unlawfully adopted and implemented a policy of contracting out certain transportation services to private carriers and transferred other work out of the bargaining unit by assigning nonunit employees to transport students to extracurricular activities.

We have reviewed the entire record in this case, including the District's exceptions and the response thereto. Except as noted below, we find the ALJ's findings of fact to be free of prejudicial error and adopt them as the findings of the Board itself. We also affirm and adopt the ALJ's conclusions of law concerning the District's contracting out of transportation services.[2] As discussed below, we reverse the proposed decision insofar as it finds that the District unlawfully transferred work out of the unit. Additionally, we find that the remedy must be modified to cover only that period beginning six months prior to the filing of the unfair practice charge.

> 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.

[2]The District's exceptions to the contracting out violation are based on arguments also made to the ALJ. As the ALJ fully addressed and properly rejected those arguments, there is no need to address them again in this Decision.

DISCUSSION

Transfer of Work

Prior to 1984, bus drivers, in addition to their normal routes driving full-size District buses, would sometimes be assigned to transport students to various events in District minibuses. Periodically, nonunit employees (coaches and teachers) would also transport students to events using their private vehicles. Sometime during the 1985-86 school year, the District purchased a van for teachers and coaches to use in transporting students. Prior to that time, the District would occasionally rent a van for the coaches or teachers to drive. During the 1986-87 school year, the District purchased a second van. The bus drivers have not been assigned to drive the vans.

The decision to transfer work to nonunit employees is negotiable as long as it has an impact on subjects within the scope of representation. (Rialto Unified School District (1982) PERB Decision No. 209.) In Eureka City School District (1985) PERB Decision No. 481, at page 15, the Board set out the following test for the evaluation of unlawful transfer of work claims:

> In our view, in order to prevail on a unilateral transfer of work theory, the charging party must establish, as a threshold matter, that duties were, in fact, transferred out of the unit; that is, that unit employees ceased to perform work which they had previously performed or that nonunit employees began to perform duties previously performed exclusively by unit employees. However, where, as here, unit and nonunit employees have traditionally had overlapping duties, an employer does not violate its duty

> to negotiate in good faith merely by increasing the quantity of work which nonunit employees perform and decreasing the quantity of work which unit employees perform.

(Footnote omitted. Emphasis in original.)

Concluding that the bus drivers and teachers/coaches had overlapping duties in the transport of students to extracurricular activities, the ALJ noted that, in accordance with Eureka, merely increasing the nonunit employees' share of such duties would not be unlawful. Finding that the purchase of vans for use by nonunit employees represented "a significantly different degree of commitment and kind of transferring out of bargaining unit work," the ALJ nonetheless found a violation, citing Oakland Unified School District (1983) PERB Decision No. 367.

The District, in its exceptions, argues that Oakland is factually distinguishable and has no application to the present controversy. We agree. In Oakland, supra, at page 24, the Board concluded that a ten-fold increase in the amount of subcontracting was an unlawful unilateral change in past practice. In the present case, though the purchase of vans caused some increase in the assignment of transportation duties to nonunit employees, it is unclear how significant that increase was. There is certainly no evidence that the increase was of the magnitude found in Oakland. Moreover, Oakland is of little relevance in transfer of work cases, where the Board has clearly stated in Eureka that a mere increase in the relative amount of overlapping duties assigned to nonunit employees is not

unlawful.[3] Therefore, we find Eureka to be controlling in this case and reverse the ALJ's finding that the District unlawfully transferred work out of the unit.[4]

Remedy

The ALJ ordered the District to compensate the bus drivers for the loss of overtime caused by the District's unlawful contracting out, beginning in 1984. The charging party argued that the remedial period should begin in 1984, citing Montebello Rose Co. v. Agricultural Labor Relations Board (1981) 119 Cal. App.3d 1, where the court affirmed an award of back pay ante-dating the six-month statute of limitations period in a surface bargaining case to cover the period when the unlawful conduct had been concealed from the charging party. Acknowledging that the facts in the instant case are distinguishable from those in Montebello. the ALJ found that the District had waived the right to rely on the statute of limitations by failing to raise the issue in its answer to the complaint or thereafter.[5] He,

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[3]The Board has yet to deal with a situation where there is a severe redistribution of overlapping duties from unit to nonunit employees. Given the dearth of evidence in this case as to the magnitude of the reassignment of overlapping transportation duties, it is unnecessary to address that issue in this case.

[4]Unlike the ALJ, we find no significance in the fact that the District purchased vans for the use of nonunit employees, rather than renting vans as it had done in the past. While this may have precipitated an increase in nonunit employees' share of overlapping duties, as discussed above, such an increase is lawful.

[5]EERA section 3541.5, subdivision (a) states, in pertinent part:

> Any employee, employee organization, or employer shall have the right to file an

therefore, found it appropriate to begin the remedial period in 1984, the time of the first known instance of improper contracting out.

In its exceptions, the District asserts that it did raise the statute of limitations as soon as conduct pre-dating the limitations period became an issue, and reiterated that argument in its post-hearing brief. The District also argues that EERA section 3541.5, subdivision (a)(l), sets forth a jurisdictional prerequisite which, if not complied with, results in denial of access to the statutory process. We find that the District is correct on both counts.

The charge and complaint both describe the allegedly unlawful act as a memo, dated February 26, 1986, that stated the District's intent to contract out all "out of valley trips." It was not until the hearing, when the charging party moved to amend the complaint, that contracting out prior to February 1986 became an issue in the case. The District objected to the amendment on statute of limitations grounds and reiterated that argument in its post-hearing brief. Thus, the District raised the statute of limitations issue as soon as it was made aware that conduct more than six months prior to the filing of the charge was at issue. Consequently, assuming arguendo that the statute of limitations

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> unfair practice charge, except that the board shall not do either of the following: (1) issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge; . . .

may be waived, under these circumstances, the District could not have waived its right to assert such a defense.

At the time the ALJ issued his proposed decision, Board precedent treated the statute of limitations contained in EERA section 3541.5, subdivision (a)(l), as an affirmative defense that may be waived by a failure to assert it in a timely fashion. (See Walnut Valley Unified School District (1983) PERB Decision No. 289.) Recently, in California State University, San Diego (1989) PERB Decision No.718-H, the Board overruled Walnut Valley and its progeny, holding that the statute of limitations contained in EERA section 3541.5 (as well as identical provisions in the other two statutes administered by PERB) is jurisdictional in nature and, thus, cannot be waived. Accordingly, we find that the remedial period proposed by the ALJ must be modified to begin six months prior to the filing of the unfair practice charge, which the record shows was filed on August 14, 1986.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, and pursuant to section 3541.5, subdivision (c), of the Government Code, it is hereby ORDERED that the Calexico Unified School District (District), its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with the California School Employees Association and its Calexico Chapter No. 399 (CSEA) as the exclusive representative of a unit of its employees by unilaterally contracting out bus driver work, thereby reducing the opportunity for overtime pay, a matter within the scope of representation.

2. By the same conduct, denying CSEA its statutory right to represent its members.

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

1. Prior to contracting out the bus driver work found to be unlawful in the Decision above, upon the request of CSEA, meet and negotiate with CSEA over the decision and effects of contracting out such work.

2. Pay to all bus drivers in the bargaining unit an amount equal to the income lost due to the denial of overtime opportunities resulting from the unlawful contracting out of bus driver work.

3. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration pursuant to PERB Regulation 32410, post at all school sites and all other work locations where notices to employees are customarily placed, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District. Such posting shall be maintained for a period of thirty (30)

consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered by any other 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 her instructions.

Members Porter and Shank joined in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Case No. LA-CE-2417, California School Employees Association and its Calexico Chapter No. 399 v. Calexico Unified School District, in which all parties had the right to participate, it has been found that the Calexico Unified School District violated section 3543.5, subdivisions (b) and (c), by failing and refusing to meet and negotiate in good faith with the California School Employees Association and its Calexico Chapter No. 399 (CSEA) with respect to the contracting out of bus driver work.

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 CSEA as the exclusive representative of a unit of employees by unilaterally contracting out bus driver work, thereby reducing the opportunity for overtime pay, a matter within the scope of representation.

2. By the same conduct, denying CSEA its statutory right to represent its members.

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

1. Prior to contracting out the bus driver work found to be unlawful in the Decision above, upon the request of CSEA, meet and negotiate with CSEA over the decision and effects of contracting out such work.

2. Pay to all bus drivers in the bargaining unit an amount equal to the income lost due to the denial of overtime opportunities resulting from the unlawful contracting out of bus driver work.

Dated: _____ CALEXICO 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.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION & ITS CALEXICO CHAPTER NO. 399	)	Unfair Practice
Charging Party,	)	Case No. LA-CE-2417
v.	)	
CALEXICO UNIFIED SCHOOL DISTRICT,	)	PROPOSED DECISION (11/20/87)
Respondent.	)	

Appearances; Madalyn J. Frazzini, California School Employees Association, for California School Employees Association and its Chapter No. 399; Atkinson, Anderson, Loya, Ruud & Romo by James C. Romo for Calexico Unified School District.

Before Gary Gallery, Administrative Law Judge.

PROCEDURAL HISTORY

This case commenced on August 14, 1986, with the filing of an unfair practice charge against the Calexico Unified School District (District) by the California School Employees Association and its Calexico Chapter No. 399 (CSEA). The unfair practice charge was incorporated into a complaint issued by the general counsel of the Public Employment Relations Board (PERB or Board) on October 30, 1986. As incorporated, the complaint charges the District with violation of the Educational Employment Relations Act (EERA or Act), sections 3543.5(a), (b) and (c).[1]

[1]EERA begins at section 3540 of the Government Code. All references are to the Government Code unless otherwise noted.

In essence the charge is that the District violated a contract provision relating to contracting out of bargaining unit work as it relates to transportation of students.

The District filed its answer on November 18, 1986, admitting and denying factual allegations, denying violations of EERA and raising affirmative defenses that will be considered elsewhere in this proposed decision. An informal settlement conference was held but no resolution of the dispute resulted. Formal hearing was held on May 11, 12 and 27, 1987, at Calexico, California. At the commencement of the hearing, CSEA moved to amend the complaint to include the charge that the District has, since approximately September 1984, unilaterally transferred the unit work of bus drivers to employees of the District not in the bargaining unit. The amendment was granted and the complaint was amended to include this new charge. Post-hearing briefs were filed and the matter submitted on September 21, 1987.

Sections 3543.5(a), (b) and (c) provide that it is unlawful for the 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

The District is a public school employer within the meaning of section 3540.l(k). CSEA is the exclusive representative, within the meaning of section 3540.l(e), of the classified employees of the District.

At all times relevant, Gerald Dadey has been the District superintendent. James Romo, an attorney, has been the District's negotiator since 1982. Jack Goad has been assistant superintendent for business services since 1984. At all times relevant, CSEA's bargaining team has included Frances Felix, chairperson, and Olivia Valenzuela, vice-chairperson.

The District employs bus drivers to provide home/school pupil transportation. Currently, the District has four regular bus drivers, whose classification is 50 percent bus driver and 50 percent warehouse delivery man. In addition to those four, the District also has a mechanic/bus driver, who serves primarily as a mechanic but is also licensed to drive a school bus. Another employee is classified as a food services/bus driver.[2] These two serve as bus drivers on an "as needed" basis.

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[2]Since 1981, by attrition, the number of bus drivers has dropped from eight to four full-time regular drivers. It does not appear, however, that the District ever utilized eight bus drivers for regular routes at a given time. Some of the bus drivers were foremen or other types of leadmen.

The incumbent drivers are 40-hour employees. They work eight hours a day, five days a week. In addition to four regular school runs, there is a mid-day kindergarten run and a mid-afternoon to 5 p.m. Regional Occupational Program run. Recently the District has started a special education route. As the normal workday is approximately 7 a.m. to 4 p.m., that part of the ROP run that extends from 4 p.m. to 5 p.m. is overtime work. For a time during the 1986-87 school year, the District had a part-time driver to drive the ROP run. He resigned, however, and since then the regular bus drivers have been rotating the assignment and receiving overtime compensation for the run.

There have been times when the District has used fewer than four drivers to cover the four regular routes. According to Frank Herrera, manager of the transportation department, this occurred when drivers were ill or when one had to make a field trip. Bus driver Frank Martinez testified that the District assigns the mechanic/bus driver to fill in when a regular bus driver has to take on out-of-town trip. When there is a shortage of drivers, the District gets complaints from parents if their children arrive late at a stop. Herrera conceded that the District gets complaints even when there is a full complement of drivers but a bus is a few minutes late.

State law precludes drivers from driving more than ten hours in a sixteen-hour period. Thus, for some trips, such as those to Los Angeles, the driver will have to stay overnight

before returning students to Calexico. This same rule pertains to drivers of buses secured by chartered contract.

Prior to 1984, The District ordinarily assigned its own bus drivers to drive district-owned buses for field trips. These trips could be for athletic events, to take band members to parades at other towns or for academic trips.

The timing of field trips varies. Some are on Saturday and do not interfere with regular driver responsibilities. Some occur entirely within the regular workday or nearly so, such as when the trip begins at 6:00 a.m. and ends at 5:00 p.m. Some begin at noon and end at 11:00 p.m.

In 1984, the District began chartering buses for out-of-town trips. Prior to that time, whenever the District used a private bus for an out-of-town trip, the cost of the bus was paid by booster clubs for, for example, trips to divisional athletic games. Also contracted out were buses for "Grad Night", a trip to Disneyland. This and other such trips were paid for with funds raised by students.

The District has two mini-buses with 16 seats. Prior to 1984, the District assigned unit member bus drivers to drive those vehicles to events such as basketball and tennis events. After 1984, however, coaches with vans and teachers, using their own private vehicles, would transport students.

Prior to 1986, one coach had a van. On occasion, the District would rent an additional van. In 1985-86, the

District purchased a van, and the next year it purchased a second van. Teachers and other employees of the District, but not bus drivers, were and are assigned to drive the vans. Since the District purchased the vans there has been a sizeable increase in requests for their use. For example, in the last school year preceding the formal hearing (since August of 1986), there were over 50 requests for the vans — mostly by coaches.

As a result of the increase in both the contracting out for transportation services and the assignment of teachers to use the vans, the unit members have suffered a drop in overtime income. Frank Martinez's overtime pay dropped from $500 to $600 per month (for a three-month average) to around $100 per month. (He received $117 in overtime pay for the month immediately preceding the hearing.) As recently as spring of 1986, Martinez had two out-of-town trips scheduled (in fact he was in his bus at the assigned school) only to be told that the students had already been transported by chartered buses hired by the District.

The District submitted documentary evidence that shows that from 1980 to the present, except 1983 and 1984, there has been a rather consistent pattern of overtime earnings for individual bus drivers. In 1981, Mr. Martinez earned $3,229 overtime. In 1982, he earned $2,862. In 1985, he earned $2,850 and in 1986 his overtime earnings were $2,134.

This documentary evidence does not rebut Martinez's contention about loss of overtime, however. The District figures, although showing relatively constant annual overtime earnings, are obscured by the fact that the drivers have received an eight-percent increase in salary for each of the last three years.

There has been no reduction in the regular hours or regular salary of the bus drivers as a result of the District's use of outside charter companies or assignment of other District employees to drive the District-owned vans.

The Collective Bargaining Agreement and Bargaining History

In the fall of 1983, CSEA advanced a package proposal for a one-year agreement that included a provision on contracting out.

The provision was a ban on contracting out work "which has been customarily and routinely performed or is performable by employees in the bargaining unit . . ." unless specifically permitted by the Education Code. The proposal further contained a ten-day notice requirement to CSEA before any contract could be let "for services which might affect employees in the bargaining unit."

The parties met on December 7, 1983, and discussed CSEA's proposal.

Romo conveyed a counterproposal that added to the first paragraph, dealing with the restriction on contracting out, the following:

> This section shall not be interpreted as prohibiting the District from contracting out work under this section if such work can not be performed by unit members because of current departmental work demands or because of the compelling nature of the situation. The District shall notify CSEA of this decision as soon as administratively possible.

In response to the notice provision offered by CSEA, the District countered:

> No contract for services which might affect employees in the bargaining unit in the way of wages and/or hours shall be let until CSEA has been given notice of the District's proposed action no less than 20 days in advance. After notice has been given, the Association shall immediately present any demand to bargain over this decision and its effect.

Doyle Newell, CSEA bargaining specialist, was advising the CSEA in these negotiations. He countered Romo's hand-written draft with additional language. He added, "or other terms and conditions of employment" to Romo's first sentence. He further added at the end of the District's proposal the following:

> After notice has been given, CSEA shall, as soon as administratively possible, present any demand to bargain over this decision and its effect.[3] This section shall be subject to the provisions of the grievance

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[3]The precise source of this sentence cannot be established from the record. Romo's handwritten draft as reflected in District's Exhibit 7, and purportedly presented at the table on December 7, contains the sentence. Yet CSEA's Exhibit 3, the same document but with Newell's handwritten modifications, does not contain the sentence in Romo's handwriting, but rather in Newell's handwriting.

procedures, set forth in the Personnel Commission Rules and Regulations. Nothing in this section shall be constructed as a waiver of the Association's right to pursue rights set forth in section (Sic) 10.7 of the Government Code (SB 160).

As revised by Newell's counterproposal, the Romo proposal was agreed to by the parties on. December 7, 1983, Thus, the parties agreed to the following language:

Section 9

A. During the term of this agreement the District agrees that it will not contract out work which has been customarily and routinely performed or is performable by employees in the bargaining unit covered by this agreement unless the contracting proposed is specifically permitted by the Education Code. This section shall not be interpreted as prohibiting the District from contracting out work under this section if such work cannot be performed by unit members because of current departmental work demands or because of the compelling nature of the situation. The District shall notify C.S.E.A. of this decision as soon as administratively possible.

B. Notice to C.S.E.A. - No contract for services which might affect employees in the bargaining unit in the way of wages, hours, or other terms and conditions of employment shall be let until C.S.E.A. has been given notice of the District's proposed action no less than twenty (20) days in advance. After notice has been given, C.S.E.A. shall as soon as administratively possible present any demand to bargain over this decision and its effects. This section shall be subject to the provision of the grievance procedure, set forth in the Personnel Commission Rules and Regulations. Nothing in this section shall be construed as a waiver by C.S.E.A. to pursue rights set forth in section 10.7 of the Government Code (SB 160).

This provision has not been modified since agreed to on December 7, 1983, despite annual reopeners and new collective bargaining agreements.

At the December 7 meeting, in conjunction with his counter-proposal, Romo explained to the CSEA bargaining team representatives that the contracting out provision was to meet an overload situation due to an emergency or when, because of the circumstances, needed work could not be performed by the current complement of employees. The intent was not to allow the District to contract out work in order to reduce the hours of employees. Romo told the CSEA bargaining team that when the decision would impact upon wages or hours the District would have to negotiate the decision and the impact with CSEA.

Romo's understanding was that Section 9A was designed to allow the District flexibility to contract out either where departmental work demands would not allow for the current complement of employees to perform the project in a timely fashion, or in an emergency situation.

On the notice provision, the District was concerned about what CSEA meant by "might effect employees in the bargaining unit". For that reason the District proposed, "No contract for services which might affect employees in the bargaining unit in the way of wages and hours shall be let until CSEA had been given notice of the District's proposed action."

Because of CSEA's concern about monitoring how the District would implement section 9A, it proposed and the District agreed

to place the notice and monitoring provision within the contractual grievance machinery.

CSEA negotiating committee vice-chairperson Valenzuela testified that at the December 7 bargaining session the parties discussed what was to be considered an emergency. The term was defined as a threat to the health or safety of students or staff. The discussion of department needs as used in Section 9A was focused on maintenance and grounds such as paving of the basketball court, setting up fences or pruning trees.

CSEA was also concerned about field trips. It felt the new language would protect the staff from having duties withdrawn from them. Prior to the dispute's arising, the staff always performed those duties. Valenzuela testified that extra trips were mentioned. CSEA's big concern was to protect the members of the bargaining unit. They were afraid of the elimination of positions because of the District's contracting out for services. They were aware of such events happening in other school districts. Reduction of hours was discussed but, according to Valenzuela, there was no specific reference to "regular" hours. Rather, just "hours" were mentioned.

Newell said the December 7 negotiating session discussion centered on limiting the District's ability to contract out for any service which would adversely impact upon the employees in the unit. They also discussed avoiding impediments to the District's right to contract out matters when necessary for the District to conduct its business. There was a general

discussion of other District's contracting out, pursuant to the Education Code and about CSEA's concern about elimination of positions.

Newell's understanding was that section 9B was a specific limit on anything that would impact on wages, hours and other conditions of employment. CSEA wanted available both the grievance mechanism to check any District contracting out and the right to file an unfair practice charge.

Based upon the foregoing testimony, and in particular the unrebutted testimony of Valenzuela, that the parties did not talk about "regular" hours, as opposed to hours in general, it is found that the parties did not discuss the impact of section 9B upon overtime hours.

The 1983-1987 collective bargaining agreement (the parties originally signed a three year agreement and it has been extended each subsequent year) contained a provision on overtime (Section 5). It provided for assignment of overtime on a rotation based on seniority, but the provision applied only to maintenance and operation employees, not bus drivers.

In 1984, for the 1984-85 school year, the parties negotiated an amendment to the overtime provision, adding transportation employees, meaning bus drivers.

In negotiations for the 1986-87 school year, CSEA proposed, among others, a provision on overtime. The proposal was as follows:

> When overtime work is required in any classification, the regular employees

> working within that classification shall be given the option to work overtime instead of hiring temporary help.

Romo understood the proposal as a guarantee of overtime. He originally testified that CSEA was trying, by this proposal, to get transportation employees into the contractual overtime provision providing for assignment by rotation based on seniority. However, Romo later conceded the 1984 amendment had already achieved that result. What prompted CSEA's 1986 proposal on overtime were complaints by clerks that the District was going to reduce their overtime opportunities by hiring temporary help.

The parties met on July 22 and 23, 1986 and language was finally agreed upon. A rewording of the existing contract language, without substantive change, and the following addition became the new provision on overtime. Sections 5B and C were added to read:

> B. Nothing in this section shall be interpreted as guaranteeing any employee or group of employees the assignment of overtime as a condition of their employment. Nor shall this section be interpreted as prohibiting the District from assigning extra time to employees on a seniority basis within that class whose last evaluation was satisfactory or better who are not in working status or hiring temporary help when it is necessary to complete a project that a unit member could not complete during the unit member's normal workday.
>
> C. During the school year the District may hire extra help using the eligibility list.

Romo testified that he had discussed with Felix, in conversations at the conclusion of the July 22 meeting but not in the presence of other CSEA bargaining team members, the impact of the no-guarantee provision on bus drivers.. He told her that it was the District's position that there was no guarantee of overtime in the District and that the next day he was going to present a proposal that addressed that issue and that it would "naturally impact upon some other things that they were talking about beforehand relative to the bus driver situation." The impact upon bus drivers was not ever discussed at the bargaining table, however.

Oftentimes, he and Felix, have stepped out of negotiating sessions and have worked out issues that were holding up the process.

The District's Contracting Out of Transportation Services

Sometime in late spring of 1984, in response to a request from Goad, her supervisor, Valenzuela undertook a cost analysis of all contracted services, including leases, rents, et cetera. She discovered that the District had spent over $5,000 that school year to rent vans and charter buses. She told Goad that the District was not complying with the contract.[4] Goad said he would look into it.

[4]Valenzuela was under the impression that the contracting out provision was not to be operative until the 1984-85 school year. Romo also testified to that belief. There is no language in the contractual provision setting forth such a beginning date, however.

In the fall of 1984, Valenzuela noticed purchase orders for vehicle rentals had increased in number and frequency. She again spoke to Goad who again said he would look into it.

In January of 1985 Valenzuela noted the problem was still occurring. At a negotiating session on March 25, 1985, she spoke to Romo about it, who said he would speak to Superintendent Dadey.

Neither Valenzuela nor CSEA heard anything from the District. In the fall of 1985, she again noticed purchase agreement orders to rent buses and vans. She spoke with Felix, and a meeting was arranged with Dadey in November of 1985. At the meeting, Felix asked Dadey about the District's contracting out chartered buses or vans to transport students out of the valley. Felix told Dadey that the District was in violation of the contract. Dadey told her that he had been thinking of having part-time drivers to alleviate the problem. No indication was provided how soon the drivers would be hired.

There was no further contact or comment on the subject from Dadey.

Valenzuela was aware that teachers were driving vans as she was processing the purchase order invoices. Margarita Matus, a bargaining team member, processed over 50 requests for coaches or teachers to drive the vans in the 1986-87 school year.

On February 26, 1986, Goad wrote to CSEA on the subject of outside transportation. "Pursuant to section 9 of the . . .

contract," wrote Goad, "the . . . District proposes that . . . [it] . . . be allowed to contract with private carriers and/or rent vans for the purpose of transporting students out of Imperial County." Goad noted that it was cheaper to use outside carriers than District vehicles and staff, and further, that the District was "short-handed in relationship to the number of licensed drivers for the home-to-school trips."

Goad told Romo of the letter. Romo did not feel the District was obligated to negotiate contracting out. He suggested, however, that the District meet with CSEA.

Meanwhile, in early spring of 1986, Valenzuela noticed a series of invoices for chartered buses for athletic events scheduled in March.[5] She took the invoices to Goad and described the problem. Goad's secretary returned the invoices later, with directions to Valenzuela to cancel the trips. The secretary told Valenzuela that Goad did not want to violate the collective bargaining agreement. Valenzuela cancelled the orders.

A week later Valenzuela was told to reinstate the orders and that if she had a problem, she was to see Dadey.[6]

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[5]Valenzuela is an account clerk in the accounts payable department.

[6]One effect of the reinstatement was that, as noted above, Martinez drove a bus to school and waited. After a while he was told that a chartered bus had already taken the students on a trip. Another bus driver also lost an out-of-town trip as a result of this reinstatement.

A meeting was held in April with Dadey. He was charged by CSEA with violating the contract. He replied, "I know it - so what." He told CSEA that he had the comfort of the children in mind and that if the trip was out of the valley, then he wanted the children to go in comfort.

CSEA offered to take three of the five trips remaining. Dadey said no. CSEA said it would file an unfair practice charge. Dadey invited CSEA to sue him.

Thus, Goad's letter of February 26 and Dadey's notice to CSEA that out-of-valley trips were to be contracted out is the first CSEA knew of the District's plan for a systematic contracting out on the basis of the "out-of-valley" criteria.

A meeting between Romo and CSEA's bargaining team was held on April 23, 1986, where the parties discussed the District's plans to use outside carriers to transport students to athletic events remaining for the 1985-86 school year. The parties discussed the possibility of the District's contracting out for three of the five remaining trips for the school year. No agreement was reached at that session. In response to a request from Felix at the conclusion of the meeting, Romo wrote to Felix on April 30, 1986, regarding "a written proposal from the District regarding transportation of student/athletes for the 1986-87 school year." The proposal was that the District could contract out up to three trips for each major sport event, with major sport defined. Romo also stated that the

current practice of contracting out transportation for playoffs competition was to continue.[7]

By letter dated May 9, 1986, Felix demanded of Dadey "officially . . . to negotiate the decision to contract out any and all transportation trips as well as the effects of such decision, if any." Felix noted the District's failure to give CSEA 20 days' notice per the collective bargaining agreement and announced CSEA's intention to file an unfair practice charge (no later than May 14, 1986) on the District's contracting out transportation from September of 1985.

On May 14, 1986, Romo wrote to Valenzuela, confirming a conversation wherein he had informed her of the District's interest in discussing the contracting out of transportation services. He confirmed his understanding that CSEA would delay legal action pending their discussions. This lead to a meeting on May 23,1986.

On May 23, 1986, the parties met and CSEA made proposals that were unacceptable to the District. CSEA had apparently offered to give up half of the trips to charter. CSEA announced its intention to file an unfair practice charge.

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[7]The only evidence on past practice with respect to chartering transportation for divisional or championship games was the testimony of Martinez. He said that prior to 1984 the chartering of buses for games was paid for by the booster club. After 1984, he said, the District began paying for the chartering of buses for these games.

On May 23, Felix requested from Goad, in writing, copies of all purchase orders or pay vouchers reflecting District-paid chartered buses or vehicles from September 1985, "to resolve the issue of contracting out."

Felix also wrote the board president complaining that the negotiating session of May 23 was "most unsatisfactory." Felix charged that the District was in "direct" violation of the agreement and that "Dadey refuses to compensate our employees affected by the District's illegal activities."

While the parties met during the summer on other issues, no discussion of contracting out took place until the following September. The unfair practice charge was filed on August 14, 1986.

In advance of a meeting set for September 12, 1986, the District submitted a schedule to CSEA for trips by District buses and by chartered buses for the 1986-87 school year. Planned were some 49 trips by District buses and 27 trips by chartered buses.[8] Listed by sports, the schedule planned chartered buses through May of 1987.[9] No such schedule had been transmitted to CSEA by the District before.

[8]In a memo dated September 5, 1986 to Dadey, Principal John Anderson stated that the use of chartered buses were for "out-of-valley travels."

[9]Romo conceded, while testifying at the formal hearing, that the District could not anticipate emergency conditions or departmental demands that far in advance.

At the September 12 meeting, CSEA proposed to allow one trip per sport to be chartered. CSEA would not agree to the use of District vans to transport students/athletes unless the vehicle was driven by a District bus driver.

Romo wrote to Felix on September 22, 1986, characterizing the September 5 (the 1986-87 schedule) memo as the "District's proposal" and stating that CSEA had rejected the proposal.

ISSUES

The issues in this case are whether the District violated sections 3543.5(a), (b) or (c) by:

1. Contracting with private charter companies for the transportation of students, or

2. Transferring to nonunit District employees the transportation of students.

CONCLUSIONS OF LAW

A public school employer is obligated to meet and negotiate with the exclusive representative, upon request, with regard to matters within the scope of representation. See section 3543.3. Under section 3543.5(c), it is expressly unlawful for the employer to refuse or fail to meet and negotiate in good faith with the exclusive representative. In Modesto City Schools and High School District (1984) PERB Decision No. 414, PERB stated:

> An employer violates its duty to negotiate in good faith when it unilaterally changes an established policy affecting a matter within the scope of negotiations without affording notice and an opportunity to

> negotiate to the exclusive representative. Grant Joint Union High School District (1982) PERB Decision No. 196; Pajaro Valley Unified School District (5/22/78) PERB Decision No. 51; NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177].
>
> Established policy may be reflected in a collective agreement, Grant, supra, or where the agreement is vague or ambiguous, it may be determined by examining the past practice or relevant bargaining history, Rio Hondo Community College District (12/31/82) PERB Decision No. 279; Pajaro Valley, supra.

PERB precedent makes it clear that both decisions, and the effects of decisions, to contract out services performed by bargaining unit members are matters within the scope of representation. Arcohe Union School District (1983) PERB Decision No. 360. The unilateral decision to implement subcontracting as a means to maintain a certain level of services is a per se refusal to negotiate in good faith. San Francisco Community College District (1979) PERB Decision No. 105.

Likewise, numerous PERB cases have held that the decision to transfer work out of the bargaining unit is negotiable so long as it impacts upon a subject within the scope of representation. Rialto Unified School District (1982) PERB Decision No. 209; Solano County Community College District (1982) PERB Decision No. 219. Absent a valid defense, the District violates section 3543.5(c) when it unilaterally transfers unit work to employees outside the unit without first negotiating with the exclusive representative for the unit

employees. Goleta Union School District (1984) PERB Decision No. 391.

Here the contracting out and the transfer of field trip assignments affected the overtime earnings of unit employees. The diminution of overtime opportunity constitutes a change in wages, an enumerated scope item, and is subject to negotiations. State of California (Dept. of Transportation) (1983) PERB Decision No. 333-S.

The District advances essentially three arguments in its defense to the charge.[10] It urges that the CSEA has

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[10]Two additional affirmative defenses were raised in the answer. One defense is that PERB lacks jurisdiction over the matter in that Charging Party is attempting to enforce the terms of a contract. In Grant Joint Union High School District (1982) PERB Decision No. 196, the Board held that the statutory prohibition against PERB's enforcement of contracts (section 3541.5(b)) does not preclude a finding of an unfair practice where the District's conduct amounts to a change in established policy, whether embodied in an agreement or past practice, and the change has a generalized effect or continuing impact upon terms and conditions of bargaining unit members. This case meets both criteria. The practice was to allow unit member bus drivers to make field trips. The District agreed not to contract out services except for the provisions of section 9. The change in policy, to contract out for out-of-valley trips, had generalized impact on the overtime opportunities of bus drivers.

The other affirmative defense raised in the answer is that the charging party has failed to exhaust the internal complaint procedures contained within the bargaining agreement. This is in the nature of a deferral. PERB regulation section 32646, (Cal. Admin. Code, title 8, part III, section 32646) requires the respondent to "move to dismiss the complaint, specifying fully the legal and factual reasons for its motion." The respondent did not so move, either before or during the hearing. In addition, no such argument was advanced in its post-hearing brief. It is concluded that the respondent has abandoned this claim.

contractually waived its right to negotiate the contracting out of transportation services and, separately, that CSEA acquiesced in the District's action. It also urges that the District did in fact comply with the notice provisions and did meet and negotiate with CSEA to the extent required by the collective bargaining agreement.

At the outset of these conclusions, it must be observed that the contracting out provisions do not apply to transfer of work from unit employees to other employees of the District. Goleta Union School District (1984) PERB Decision No. 391. Thus, whatever authority the District had under section 9 of the agreement, that authority does not give the District the right to transfer bargaining unit work to District-employed teachers or coaches. This will be discussed infra.

Waiver by Contract

The District finds "clear and unmistakable waiver" by CSEA of the right to negotiate in the following three respects: the District is not obliged to negotiate with CSEA when its contracting of services is to meet an emergency (Section 9A); secondly, when the work demands of the unit employees are such that they cannot meet the District's transportation needs (Section 9A); third, and in effect an umbrella waiver, is claimed whenever the contracting out will have no effect on the "regular" hours of the unit employees (Section 9B.)

This interpretation, contends the District, is based on the

history of bargaining of section 9. Section 9 was negotiated at CSEA's insistence, in an effort to prevent loss of bargaining unit positions. At that time, the District raised its concern for the need to respond to emergency conditions or a situation in which the current staff could not meet the District needs. The intent of the language was to prevent impacts upon "regular" hours of unit employees. CSEA failed to protect overtime hours, argues the District, and by "negative inference" hours other than regular hours did not fall within the protection of section 9B.

In order to demonstrate that CSEA waived its right to negotiate, the District must show either clear and unmistakable language or demonstrable behavior waiving a reasonable opportunity to bargain over a decision not already firmly made by the employer. Amador Valley Joint Union High School District (1978) PERB Decision No. 74. San Mateo County Community College District (1979) PERB Decision No. 94. In Los Angeles Community College District (1982) PERB Decision No. 252, the Board adopted the policy of the National Labor Relations Board, as follows:

> 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. Moreover, where a provision would normally be implied in an agreement by operation of the Act itself, a waiver should be express, and a mere inference, no matter

> how strong, should be insufficient. NLRB v. Perkins Machine (1st Cir. 1964) 326 F.2d 488, [55 LRRM 2204]; and see American Telephone and Telegraph Co. (1980) 250 NLRB 47.

Here the evidence does not justify a conclusion that CSEA has "consciously yielded" its limitation on the District's right to contract to only the "regular" hours of the employees workday. Section 9B was originally a notice provision offered by CSEA to check the District's contracting out in either of the authorized circumstances of section 9A. The District added the language affecting hour or wages. It provided no evidence that the parties discussed that language to mean only "regular" hours or wages. There was no discussion of whether the parties were talking about regular hours or all hours of the unit employees. It cannot be concluded that the impact of the provision was fully discussed by the parties. PERB will not infer a waiver of the statutory right to negotiate a matter within scope. Palo Verde Unified School District (1983) PERB Decision No. 321. The District's contention that a "negative" inference should serve as a basis for finding CSEA has waived its right to bargain contracting out when it affects overtime hours by its agreement to section 9B is rejected.

Next, the District argues that CSEA waived its right to negotiate when it agreed to contractual language, which gave the District the right to contract out unit work when the departmental work demands did not permit the performance of

work by unit members. Section 9A provides, in pertinent part, that the District is not prohibited from contracting out unit work "if such work can not be performed by unit members because of current departmental demands . . . ." The District argues that the current daily route requirements necessitate four bus drivers. It is necessary to maintain these routes on a timely basis in order to avoid students' returning home late, thereby avoiding phone calls from anxious parents. The limitation on a driver's workday of 10 hours' driving in a 16-hour period and longer trips, such as to Los Angeles or San Diego, present additional problems. Further, on occasion, the District had had more than one driver absent due to illness, injury or vacation. Thus contends the District, when department work demands preclude use of the District drivers, it has no duty to bargain with CSEA.

The provision clearly contemplates exceptions on a trip-by-trip basis (because of "current" departmental work demands) and does not constitute a blanket authorization to develop a policy that all out-of-valley trips would be by private carrier.

The District's contention makes sense only if one were to apply the argument to specific instances of contracting out where a determination was made that the departmental work demands were such that unit members could not provide the additional trips desired by the District. The record presented

in this case was not that the District made individual assessments that student transportation could not be met by the unit members because of the unit members' regular duties. Rather, the evidence shows that the District made a policy, unilaterally, without notice to CSEA (or the opportunity to negotiate that policy) that all out-of-valley bus trips were to be handled through contracted services. This decision was made and implemented without regard to whether departmental needs precluded use of the unit members for the out-of-town trips. In the spring of 1986, the District was proposing to schedule a number of trips by chartered transportation. During meetings on this proposal there was no discussion of the needs of the transportation department that would preclude unit members from driving a school bus for the trips. This is also demonstrated by the proposed schedule for the 1986-87 school year, for contracting services for the whole year, predicated upon the sole criteria that trips out of the valley would be contracted out. As of the time that schedule was promulgated, there was no manner in which the District could foresee, through the whole school year, whether departmental demands precluded use of unit members.

There may have been instances where the District could establish, during the 1985-86 school year, that departmental demands were such that it could not use unit members for the trips otherwise serviced by private carriers. There is no

evidence, however, that the District otherwise complied with the contract provision requiring that it give CSEA notice as soon as administratively possible.

Goad's letter of February 26, 1986, did not cite specific planned trips that required contracted services because the work demands of the unit precluded use of unit members. Nor were the planned trips unavailable to members because of the department's requirements. In March 1986 Goad cancelled all private charter purchase orders, presumably because the District's bus drivers could handle the assigned trips. There was no issue of departmental needs raised by Goad. At the time, Romo's position was that the District did not need to negotiate with CSEA because Section 9B authorized contracting out whenever such contracting out did not effect the regular hours of the unit members. The proposal made by the District at the May 23 meeting was for a standard policy of up to three trips per sport, as defined, to be made by chartered buses. There was no stated connection to the work demands of the unit employees. Dadey's basis for refusing to cease using the chartered buses was because he had the comfort of the children in mind for trips out of the valley.

Finally, the District did not have just four bus drivers, but rather it had six drivers. The assistant mechanic held a bus driver license and was assigned bus driving duties when needed. The food services/bus driver was also available to

accept bus driving duties. The District had used the mechanic/bus driver to take the place of the regular bus driver when the latter was transporting students on a field trip. The evidence also shows that the District was not precise in its determination that unit members could not accommodate the added busing needs. On two occasions, during the 1985-86 school year, Mr. Martinez was assigned to cover extra driving assignments. He appeared with the bus at the location to commence a trip. Obviously, the department had determined that its own needs did not preclude Martinez from driving the added assignment. Yet, for unexplained reasons, the District chartered a private carrier for the trip and cancelled Martinez's assignment.

Thus, the District's contention that it was justified in making the contracts for bus services on the basis of work demands of the unit members is rejected.

The District next contends that the negotiated overtime provision constitutes a waiver of CSEA's bargaining rights. Article III, section 5 contains a provision requiring rotation of overtime based upon seniority. According to the District, the language "Nothing in this section shall be interpreted as guaranteeing any employee or group of employees the assignment of overtime as a condition of their employment," means precisely that the bus drivers do not have a guarantee of overtime. Because Romo told Felix that this provision would

have an impact on bus drivers, it is the District's contention that CSEA has negotiated away its rights to negotiate the impact of the contracting out provision on overtime opportunities.

This argument is rejected. Romo did tell Felix, outside of the presence of the other bargaining team members, on July 22 that he intended to submit a proposal on overtime to the team on the next day (July 23) that would "naturally impact upon some other things that they were talking about beforehand relative to the bus driver situation." Such information, addressed to a single bargaining team member, is not a discussion of the impacts of the proposal, nor does it evidence concurrence by Felix in whatever impacts there were to be. There was no discussion of those impacts when the proposal was made the next day. Such evidence does not constitute full discussion or conscious exploration of the matter so as to justify finding a waiver of the right to bargain the impact of contracting out upon unit members' wages and hours. Los Angeles Community College District, supra.

The proposal to modify the contractual provision on overtime was initiated by CSEA to resolve the clerks' concerns about the District's hiring temporary help and therefore denying the clerks overtime opportunities. It is highly unlikely that CSEA would have agreed to a provision which would allow the District to cease its practice of using unit members for field trips.

Finally, as CSEA argues, the contractual overtime provision does not contradict the practice of the District. What CSEA seeks is not a guarantee of overtime, but only that when field trips are undertaken, the District respect the contractual rights of bargaining unit members. There is no contention that the District must undertake the field trips.

The District argues that it cannot have committed an unfair practice in this case because it complied with the negotiated contracting out procedures. The argument is as follows: Section 9 creates a procedure that requires the District to give notice of intent to contract out. The CSEA is then to demand to negotiate. The District gave notice on February 26 that the District wanted to contract out. The parties met on April 23 and May 23 and were unable to reach agreement. The parties met in September to review the 1986-87 proposal and the CSEA presented its last and final offer. Since the contract requires only notice and negotiation by the parties, and does not require that the parties bargain to impasse, all the contracts after September of 1986 were lawful.

This contention, if it has any merit at all, does not apply to the activities of the District where it did not provide CSEA with notice of its actions. Valenzuela observed contracts for services in 1984-85 school year, in the fall of 1985 and again in March of 1986, where the District was contracting out for transportation services and no notice was given to CSEA.

It was not until February that the District gave CSEA indication of its intended action. Thus contracting out prior to the time the parties attempted to reach agreement was not justified by the provisions of Section 9B. Nor does the evidence justify construction of section 9B in the manner the District attributes to it.

There was no testimony offered at the hearing as to the precise scope of bargaining that was intended by the language "After notice has been given, CSEA shall as soon as administratively possible present any demand to bargain over this decision and its effect." The documentary evidence is imprecise as to which of the parties drafted the bargaining provision. If the provision were the District's proposal as suggested by District Exhibit No. 7 (see footnote 3), then the District should have made clear the limited notion of bargaining it contends should be read into the provision. There is no evidence offered by the District to support this limited nature of bargaining. Apparently, the parties did not even discuss the scope of bargaining that was required by the language. If it were CSEA's proposal, it is unreasonable to attach an interpretation to a CSEA proposal for a contractual right that would provide it with less than the EERA guarantees, the right to bargain on any matter within scope to impasse and through the statutory impasse procedures, before the District may take action. See Modesto City Schools (1983) PERB Decision No. 291. CSEA was concerned about preserving its unit members'

positions. In the absence of express language to the contrary, it is not reasonable to believe that CSEA would have agreed to allow the District an unlimited right to contract out unit work with only a right to notice and a meeting. It is therefore concluded that the District's construction of the provision is not justified by the evidence.

The District contends that CSEA acquiesced to the District's practice and thus waived any right to negotiate the District's action, relying on San Mateo County Community College District (1979) PERB Decision No. 94. (1979) PERB Decision No. 94. The Association, it insists, was required to demand to negotiate and failed to do so. Newman-Cross Landing Unified School District (1982) PERB Decision No. 223. Further, the District contends, long periods of acquiescence constitute waiver, citing Modesto City School District (1983) PERB Decision No. 347 and Oakland Unified School District (1983) PERB Decision No. 367. Finally, CSEA's "mere protest" was not sufficient, relying on Citizens National Bank of Wiltmar. 245 NLRB 47 [102 LRRM 1467]; American Bus Lines. Inc.. 164 NLRB No. 136 [65 LRRM 1245]. CSEA did not formally demand to negotiate until May of 1986, two years after it knew of the actions. This, urges the District, indicates that it did not believe it had demanded to bargain before that time.

I do not find sufficient acquiescence to constitute waiver in CSEA's conduct. Valenzuela contacted Goad on different

occasions throughout the period from early 1984 to fall of 1986 when she suspected the District was not conforming to the contract. He assured her he would look into it. When confronted by Felix, Dadey offered a solution that assuaged CSEA for the moment. Romo told the bargaining team members that he would look into the matter. Thus, if anything, CSEA was being lead astray by representations made by the District. It was not until February of 1986 that the District put CSEA on notice of its desire to have a policy on contracting transportation services for out-of-valley trips. This new criteria was confirmed in April when Dadey told the CSEA representatives that he intended to contract out any time a trip was out of the valley. Thus, It was not until 1986 that CSEA was alerted to a new criteria for trips when contracted transportation would be used. Moreover, this was a significant change in the District's position. In the spring of 1986, the District was attempting to contract out all of the out-of-valley trips. Likewise, for the 1986-87 school year, the schedule for the entire year anticipated contracting out for all out-of-valley field trips. This is a significant change from the District's past practice, i.e., allowing the booster clubs to finance private transportation for divisional games. The change was an increase in magnitude evidencing a change in the quantity and kind of subcontracting that constitutes a change in established policy. Oakland Unified School District (1983) PERB Decision No. 367. Even then the

District was taking the position that it did not have to negotiate the matter.

CSEA had a right to insist that the District not contract out unit work, save for the circumstances set forth in section 9 of the collective bargaining agreement. The restrictions were that the District contract out only when there was an emergency, or when the work demands of the unit members was such that they could not perform the needed service, or that the wages and/or hours of the unit members would not otherwise be affected. Valenzuela and Felix reminded the District of its obligation to notify CSEA. They did not have to demand to bargain at that time. Once the District did give notice of its intention to contract out transportation services, CSEA did demand to negotiate. Their formal demand to negotiate followed a meeting in April with Dadey, who refused to consider a proposal by CSEA to resolve the issue. Goad had cancelled a number of trips in March at Valenzuela's request. These circumstances show that CSEA was concerned about the District's action and was not acquiescing in the District's practice of contracting out. See Goleta Unified School District, supra.

These facts are similar to those presented in Victor Valley Community College District (1986) PERB Decision No. 570. The charge in that case was that the district was construing a contractual provision in a manner inconsistent with the

agreement of the parties. PERB held that the limitations period began from the time the association is deemed to have knowledge of the district's intent to implement the provision in a manner inconsistent with the association's construction of such provision.[11] This case does not involve the statute of limitations (the District did not raise the limitations period in its answer or at any time during the hearing or in its post-hearing brief); however, the contention of acquiescence is essentially the same. CSEA could not have acquiesced in a policy that was not pronounced by the District until the spring of 1986.

It is concluded that the District violated section 3543.5(c) by adopting and implementing a policy of contracting transportation services to private charter companies for all out-of-valley bus trips.[12] This is concurrently a violation of section 3543.5(a) and (b). San Francisco Community College District (1979) PERB Decision No. 105.

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[11]See also Fairfield-Suisun Unified School District (1985) PERB Decision No. 547. The statute of limitations does not begin to run until the charging party has actual or constructive notice of the act alleged to be unlawful.

[12]An exception to this finding is contracting out that is consistent with past practice. The evidence suggest that with respect to divisional or championship games, the trips have been contracted out to charter companies paid for either by the booster club or by the District. If so, then that contracting out would not be violative of the Act. The District did not present any substantive evidence of the extent of the past practice, however, nor did it argue this point in its post-hearing brief.

The Transfer of Bargaining Unit Work to Other District Employees

The evidence shows that prior to 1984, coaches and/or teachers would drive students to events in their private vehicles. Occasionally after 1984, the District would rent a van for either a coach or teacher to drive. Then, in 1986, the District purchased a van and used nonunit personnel to drive the van for transportation of students. Finally, in 1986-87 school year, the District purchased a second van and again assigned nonunit personnel to drive the van for the purpose of transportation of students. In the last school year, the District has received over 50 requests for transportation of students with the vans. The District does not assign unit members to drive the vans.

As noted, the decision to transfer work to other employees, but not members of the unit, is bargainable as long as it affects terms and conditions of employment. Rialto, supra. In Eureka City School District (1985) PERB Decision No. 481, the Board held that where unit and nonunit employees have traditionally had overlapping duties, an employer does not violate its duty to negotiate in good faith merely by increasing the quantity of work which nonunit employees perform and decreasing the quantity of work which unit employees perform.

Here, it is found that prior to 1984, coaches and teachers would use their private vehicles to transport students. Thus,

it would not be unlawful for the District to increase such practice at the expense of unit members. In this case, however, the District did not continue that practice to a greater degree; rather, it purchased a van with the intention of assigning nonunit members to drive and then, the following year, it purchased a second van for nonunit members to drive to transport students. This was a significantly different degree of commitment and kind of transferring out of bargaining unit work. Oakland Unified School District, supra. Thus, it is concluded that the District violated its duty to bargain in good faith when it commenced assigning bargaining unit work to other employees of the District, to be performed by driving District-owned vehicles.

REMEDY

Section 3541.5(C) provides:

> The Board shall have the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

It is appropriate to order the District to cease and desist from taking unilateral action on matters within the scope of representation without first notifying the exclusive representative and providing an opportunity to negotiate. It is also generally appropriate, in unilateral conduct cases to require the restoration of the status quo. Rio Hondo Community

College District (1983) PERB Decision No. 292. In addition, it is appropriate to order the employer to make affected employees whole for any wages or other benefits lost as a result of the unlawful unilateral change, with interest, from the date of the unilateral change until the status quo is restored or the parties reach agreement or exhaust the statutory impasse procedures. Rio Hondo Community College District, supra. This remedy has been ordered in unilateral subcontracting cases; see for example, Oakland Unified School District (1983) PERB Decision No. 367. A similar remedy is ordered where the employer has transferred work out of the unit. Rialto Unified School District (1982) PERB Decision No. 209. Lincoln Unified School District (1984) PERB Decision No. 465.

CSEA contends that a remedy in this case should provide back pay for affected employees prior to the six-month period before the unfair practice charge was filed, based upon Montebello Rose Co. v. Agricultural Labor Relations Board (1981) 119 Cal.App.3d 1. In that case, the ALRB had granted a back-pay order antedating the six month period preceding the filing of the unfair practice charge. The appellate court sustained that order on the ground that the employer's bad faith bargaining precluded the employee organization from discovering the violation any time earlier than it did. The District argues that Montebello is not appropriate to this case because here the employees have known about the District's

practices since 1984. The District further argues that PERB cannot award a remedy in excess of six months prior to the time the charge was filed.

The gravamen of the District's wrong is twofold. First, the District contracted out transportation services without regard to whether an emergency existed or whether departmental demands precluded use of unit members for such trips. The District never notified CSEA, as required by the contract, that it had made administrative decisions to that effect. The District further did not determine that chartered transportation services would have no effect on overtime hours or overtime wages of unit members. Secondly, the District transferred bargaining unit work to other employees when it purchased vans and assigned nonunit employees to drive such vans for student transportation purposes. As noted, the contract provisions on contracting out do not pertain to transferring out bargaining unit work.

CSEA did establish that beginning in the spring of 1984, Valenzuela, a bargaining team member, was aware of and complained to the District about contracting transportation services out to private carriers. Thus, as the District argues, the facts in this case are different from Montebello. On the other hand, the District's reliance on the statute of limitation is disposed of by its failure to raise the defense of the statute of limitations. It argues that because of the

operation of the limitation, conduct prior to the six month period cannot be the basis of an unfair practice charge[13] and it logically follows that such conduct cannot be the basis for a remedy. The statute of limitations, however, is a defense that must be asserted, or it is waived. Walnut Valley Unified School District (1983) PERB Decision No. 289. PERB regulation 32646 provides that if the respondent believes the charge is untimely, it "shall assert such a defense in its answer and shall move to dismiss the complaint . . . ." Absent an assertion of the statute-of-limitations defense, conduct antedating the six-month period may be the basis of a PERB-issued complaint. Likewise, remedies covering periods beyond the limitations period may be issued in the absence of the defense. Here the District did not raise the statute of limitations as a defense. It has waived the defense as to both the parameters of the charge, and of any remedy.

Thus, the District should be ordered to compensate regular bus drivers, who are unit members, that amount of overtime wages lost as a result of the District's contracting out of transportation services. Trips that were chartered through private transportation companies on the basis of an emergency, or as a result of a specific determination that the departmental demands precluded the use of a regular bus driver,

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[13]Section 3541.5(a)(l) provides in part that the board shall not, "issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge."

or that would not have affected overtime hours or wages shall not be included in computing the overtime entitlements ordered here. In addition, overtime loss as the result of assignment of other District employees to drive District-owned vans should be reimbursed. All such sums shall be augmented by interest at the rate of 10 percent.

PROPOSED ORDER

Pursuant to section 3541.5(c) of the Government Code, it is hereby ORDERED that the District, its governing board and its representatives shall:

1. CEASE AND DESIST FROM:

(a) Failing and refusing to meet and negotiate in good faith with the California School Employees Association and its Calexico Chapter No. 399 as the exclusive representative of its employees by unilaterally contracting out or transferring bus driver work out of the unit and thereby reducing the opportunity for overtime pay, a matter within the scope of representation.

(b) By the same conduct, denying the California School Employees Association and its Calexico Chapter No. 399 rights guaranteed by the Educational Employment Relations Act, including the right to represent its members.

(c) By the same conduct, interfering with employees in the exercise of rights guaranteed by the Educational Employment Relations Act, including the right to be represented by their chosen representative.

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

(a) Upon request of CSEA, meet and negotiate with CSEA over the decision and the effects thereof of contracting out and transferring bus driver work out of the classified employee unit.

(b) Pay to all bus drivers in the unit income lost due to the District's unlawful contracting out or transferring of bus driver work with interest at the rate of 10 percent per annum.

(c) Within 35 days following the date this Decision becomes final, post at all school sites and all other work locations where notices to employees are customarily placed, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that the District will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the Notice is not reduced in size, altered, defaced or covered by any other material.

(d) 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.

Dated: November 20, 1987

Gary M. Gallery
Administrative Law Judge