STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS EASTSIDE CHAPTER NO. 779,	)	
Charging Party,	)	Case No. LA-CE-3101
v.	)	PERB Decision No. 937
EASTSIDE UNION SCHOOL DISTRICT,	)	June 2, 1992
Respondent.	)	

Appearances; Harry J. Gibbons, Staff Attorney, for California School Employees Association and its Eastside Chapter No. 779; Wagner, Sisneros & Wagner by John J. Wagner, Attorney, for Eastside Union School District.

Before Hesse, Chairperson, Camilli and Carlyle, Members.

DECISION

HESSE, Chairperson: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Eastside Union School District (District) to a PERB administrative law judge's (ALJ) proposed decision (attached) finding that the District violated section 3543.5(b) and (c) of the Educational Employment Relations Act (EERA or Act).[1] While

[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 provides, in pertinent part:

> It shall be unlawful for a public school employer to do any of the following:
>
> (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.

the ALJ found that the District's decision to contract out the satellite food service at the Tierra Bonita School was not a unilateral change in established policy, the ALJ found that the District was obligated to meet and negotiate with the California School Employees Association and its Eastside Chapter No. 779 (CSEA or Association) about the contracting out of the unit work as soon as CSEA demanded to negotiate.

The Board has reviewed the entire record in this case, including the transcript, exhibits, proposed decision, District's exceptions and the Association's responses thereto. The Board finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and adopts them as the decision of the Board itself consistent with the following discussion.

DISCUSSION

The District's exceptions focus on the interpretation of certain provisions of the collective bargaining agreement (CBA). The District disagrees with the ALJ's finding that subcontracting of bargaining unit work is not covered by the CBA.

The preface to Article XIX, District Rights, clearly states that:

> [a]11 matters not specifically enumerated as within the scope of negotiations [representation] in Government Code Section 3543.2 are reserved to the District.

This language is not ambiguous, but clearly states that only out-of-scope matters are reserved to the District. PERB has held that subcontracting of bargaining unit work is a negotiable subject, within the scope of representation. (Oakland Unified

School District (1983) PERB Decision No. 367; State of California (Dept. of Personnel Administration) (1986) PERB Decision No. 574-S; and Beverly Hills Unified School District (1990) PERB Decision No. 789.) As subcontracting of bargaining unit work is a negotiable subject, the provisions in Article XIX do not apply.[2]

Although section 19.4 states that the District may subcontract services, including "education, support, construction, maintenance, and repair services," this section is limited by the introductory language in section 19.0. Therefore, this section must only refer to the subcontracting of services not within the scope of representation.

The District also disagrees with the ALJ's interpretation of the zipper clause in Article XXIV. The explicit, unambiguous language of the zipper clause limits the parties' waiver of the right to meet and negotiate over only the subject matter covered by the CBA. As the subcontracting of bargaining unit work is not covered by the CBA, the zipper clause is inapplicable.

Finally, the District asserts that the ALJ exceeded his authority when he found a violation based on the District's refusal to negotiate the subcontracting of bargaining unit work upon CSEA's demand. This argument is without merit. Both the unfair practice charge and complaint include an allegation that the District refused to negotiate the decision to implement the

[2]There is also testimony by the CSEA negotiator that CSEA did not intend that the District be able to unilaterally change matters within the scope of representation.

subcontracting of the satellite food service program and the effects of this decision. Specifically, the unfair practice charge states:

> Respondent violated Government Code Section 3543.5(c) when it failed to meet and negotiate with the exclusive representative the decision and the impacts of the decision to contract out the work of food service for the Tierra Bonita facility.

Paragraphs 3, 4 and 5 of the complaint state:

> 3. Before June 17, 1991, Respondent's policy concerning food service work was that all such work was performed by Respondent's own classified employees.
>
> 4. On or about June 17, 1991, Respondent changed this policy by contracting out food service work at Tierra Bonita Elementary School.
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> 5. Respondent engaged in the conduct described in paragraph 4 without prior notice to Charging Party and without having afforded Charging Party an opportunity to negotiate the decision to implement the change in policy and/or the effects of the change in policy.

Clearly, the District was put on notice that its refusal to negotiate the decision and effects of its subcontracting of the satellite food service program was to be litigated in the PERB hearing. In its opening statement, the CSEA representative stated that it would show that "the District acted unilaterally when it failed to negotiate on a mandatory subject of bargaining, specifically, the contracting out of bargaining unit work." (Vol. I, p. 4.) Further, during its opening statement and in response to the ALJ, CSEA stated that its requested remedy included a cease and desist order to prevent the District from

contracting out bargaining unit work until the parties had an opportunity to meet and negotiate as well as an order that the District actually meet and negotiate. (Vol. I, p. 3.) There was also testimony regarding CSEA's demand to negotiate, and the lack of any District response. (Vol. I, pp. 55, 118, 133 and 135.) As the unfair practice charge, complaint and testimony put the District on notice that its refusal to meet and negotiate concerning the contracting out of the satellite food service program could constitute a violation of section 3543.5(c) of EERA, the District's exception is rejected.

ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, the Board finds that the Eastside Union School District violated section 3543.5(c) of the Educational Employment Relations Act. The District violated the Act by refusing to meet and negotiate with the exclusive representative about the contracting out of unit work, a matter within the scope of representation. Because the action had the additional effect of interfering with the right of the California School Employees Association and its Eastside Chapter No. 779 to represent its members, the refusal to negotiate also was a violation of section 3543.5(b).

The allegation that the District's conduct violated section 3543.5(a) is hereby DISMISSED.

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

A. CEASE AND DESIST FROM:

1. Refusing to meet and negotiate upon proper request of the exclusive representative about the contracting out of unit work, a matter within the scope of representation.

2. By the same conduct, interfering with the right of CSEA to represent its members.

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

1. Effective immediately upon service of a final decision in this matter, meet and negotiate upon request of the California School Employees Association and its Eastside Chapter No. 779 about the subject of contracting out of unit work.

2. Within thirty five (35) days following the date this Decision is no longer subject to reconsideration, post at all work locations where notices to classified employees customarily are posted, 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 ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

3. 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 accord with the director's instructions.

Members Camilli and Carlyle 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-3101, California School Employees Association and its Eastside Chapter No. 779 v. Eastside Union School District, in which all parties had the right to participate, it has been found that the Eastside Union School District (District) has violated section 3543.5(b) and (c) of the Educational Employment Relations Act (Act). The District violated the Act by refusing to meet and negotiate upon proper request of the California School Employees Association and its Eastside Chapter No. 779 (CSEA) about the subcontracting of unit work, a matter within the scope of representation.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Refusing to meet and negotiate upon proper request of the exclusive representative about the contracting out of unit work, a matter within the scope of representation.

2. By the same conduct, interfering with the right of CSEA to represent its members.

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

1. Effective immediately upon service of a final decision in this matter, meet and negotiate upon request of the California School Employees Association and its Eastside Chapter No. 779 about the subject of contracting out of unit work.

Dated: EASTSIDE UNION SCHOOL DISTRICT

By: _____
Authorized Representative

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 and its EASTSIDE CHAPTER No. 779,	)	
Charging Party,	)	Unfair Practice Case No. LA-CE-3101
v.	)	
EASTSIDE UNION SCHOOL DISTRICT,	)	**PROPOSED DECISION (1/10/92)**
Respondent.	)	

Appearances: Jim Walker, Senior Field Representative, for the California School Employees Association and its Eastside Chapter No. 779; Wagner, Sisneros & Wagner by John J. Wagner, Attorney, for the Eastside Union School District.

Before Ronald E. Blubaugh, Administrative Law Judge.

PROCEDURAL HISTORY

A union representing a unit of classified employees here challenges a school district's decision to contract out the food service program at a new school site. The union contends that the employer was obligated to bargain with the union prior to making the decision to contract out the work. The school district replies that contracting out the food service program was consistent with past practice and permissible under the agreement between the parties.

The California School Employees Association and its Eastside Chapter No. 779 (CSEA or Union) commenced this action on July 1, 1991, by filing an unfair practice charge against the Eastside Union School District (District). The general counsel of the Public Employment Relations Board (PERB or Board) followed on August 9 with a complaint against the District.

The complaint alleges that under the past practice all food service work was performed by District employees. The complaint, alleges that on or about June 17, 1991, the District changed this practice by contracting out the food service operation at the Tierra Bonita School. This action was alleged to be in violation of Educational Employment Relations Act (EERA) section 3543.5(c) and (a) and (b).[1]

The District answered the complaint on August 15, 1991, denying any wrong-doing. A hearing was conducted in Van Nuys on October 30, 1991. With the filing of briefs, the matter was submitted for decision on December 26, 1991.

FINDINGS OF FACT

The District is a public school employer under the EERA. CSEA, since its certification on June 4, 1990, has been the exclusive representative of a comprehensive unit of the

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[1]Unless otherwise indicated, all statutory references are to the Government Code. The EERA is codified at Government Code section 3540 et seq. In relevant part, section 3543.5 provides as follows:

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

District's classified employees. The parties currently are working under an initial agreement which extends from July 1, 1990, through June 30, 1993.[2]

There are three schools in the District, the Eastside Elementary School and the Gifford C. Cole Middle School which are on one campus (Eastside), and the Tierra Bonita School which is on a site approximately seven miles away. Until the fall of 1991, all three schools were located on the Eastside campus.

For many years, the District has operated a full service cafeteria at the Eastside campus. Food is both prepared and served at the facility. When all three schools were located at the same site, all District students were served by the cafeteria. In recent years, the District has employed six food service workers at Eastside. There continue to be six food service workers at the Eastside cafeteria during the 1991-92 school year.[3]

On August 26, 1991, the Tierra Bonita School was opened in temporary buildings at the more distant site. The temporary buildings have no kitchen or food preparation facilities.

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[2]The effective date of the agreement was retroactive and it is not clear from the record on which date the initial agreement actually was entered. One page of the agreement is signed and dated November 1, 1990. Two other pages are signed and dated in March of 1991.

[3]One food service worker was laid off at the end of the 1990-91 school year as part of a budgetary problem apparently unrelated to the contracting out at the Tierra Bonita School. However, the worker was rehired in the fall of 1991 and, as of the date of the hearing, continued to be employed at the Eastside cafeteria.

Students are served in a multi-purpose room where the only food-related facilities are a chest to keep milk cool and a hot line to keep food warm. A permanent facility for the Tierra Bonita School is currently under construction on the same site as the temporary buildings. The permanent facility is scheduled for completion by the fall of 1992.

The first public discussion of the possible contracting out of food services took place at a May 13, 1991, meeting of the District school board. A representative of the Antelope Valley Union High School District appeared and described the services it could provide in food preparation. After the presentation, CSEA chapter President Judy Liebling told the school board that contracting out food service would violate the agreement between the District and CSEA. She asked that the subject be tabled so CSEA could negotiate with the District about the issue. Her request was declined by the president of the school board who told her that CSEA could file a grievance if it believed the District was violating the contract.

On May 17, 1991, District Superintendent Robert Wakeling assembled the six cafeteria workers for a meeting. Kathy Schwartz, a cafeteria worker who attended the meeting, quoted the superintendent as telling them that they would be given the opportunity "to prove" themselves by providing food service on a trial basis for students at the relocated Tierra Bonita School between August and December. Ms. Schwartz said the superintendent said that "if we could prove that we could run

both schools, that we would have Tierra Bonita." In order to prove themselves, she said, they would have to serve food to both schools on a self-supporting basis.

However, on or about June 5, 1991, Ms. Schwartz saw and gave to CSEA field representative Donna Lehto a newspaper article which suggested that food service for Tierra Bonita might be subcontracted, after all. The article stated that the District was examining the possibility of contracting out the work to the Antelope Valley Union High School District. On June 7, the superintendent again met with the food service workers and confirmed what was in the article, telling them that food service for Tierra Bonita would be provided by the high school district.

On June 13, Ms. Lehto wrote a letter to Superintendent Wakeling repeating CSEA's demand to negotiate about "the decision and the impact" of contracting out food service for the Tierra Bonita School. She asked that the proposed vote on the issue, scheduled for June 17, be tabled until after negotiations. Ms. Lehto received no response from the District. She repeated her demand at a school board meeting on June 17. The school board, however, rejected her request and voted to enter a contract with the Antelope Valley District for food service at Tierra Bonita.

Under the contract between the Eastside District and Antelope Valley, Antelope Valley is paid a fixed price for providing food service to students at the Tierra Bonita School. Antelope Valley employees prepare the food at an Antelope Valley

kitchen and transport the food in Antelope Valley food containers carried on Antelope Valley vehicles. Employees of Antelope Valley serve the food to the students at Tierra Bonita.

Leland Doughty, a member of the school board, testified that the District contracted with Antelope Valley to avoid "tremendous additional expenses." He said the District had never operated a satellite food service program and did not have the vehicles or equipment needed to deliver food to Tierra Bonita. He testified that vehicles used for food delivery must contain expensive containers to keep food sanitary and at a proper temperature. Mr. Doughty testified that the school board concluded that the expense of purchasing and equipping delivery vehicles was prohibitive. For this reason, he said, the school board voted to contract out with Antelope Valley which already had the vehicles and equipment to operate a satellite food program.

The contracting out of classified employee work is not an unprecedented event in the District. Mr. Doughty testified that the District long has subcontracted certain types of work. Typically, he said, the District has contracted out work overloads beyond the ability of the existing staff to complete in a timely manner, work that was beyond the skill level of the staff, and work that would require equipment the District did not possess.

He cited automotive repair work as an example of work that is regularly contracted out at times of work overload. He said that while District mechanics regularly repair vehicles,

including engines, this work will be contracted out if several vehicles need major repairs at the same time. He said that certain repairs are too important to wait until District mechanics have time to perform them.

While District mechanics repair grass mowers and other maintenance equipment, repair of these machines also is contracted out if beyond the ability of mechanics. Similarly, while District employees can do certain types of electrical work, any substantial wiring or electrical jobs are routinely contracted out. District employees perform minor repairs on air conditioners but the District contracts out major repairs.

Work contracted out because of a lack of District equipment has included the trimming of tall trees, large asphalt repair jobs and deep trenching work. Mr. Doughty testified that the District does not possess the lifts and saws needed for high tree trimming. Nor does it have asphalt paving machines or trenchers. He said the amount of use the District could give such equipment does not justify the cost of a purchase.

Student transportation was contracted out long prior to the time CSEA became the exclusive representative of classified employees. In 1984, the District contracted with the Antelope Valley Transportation Agency to transport its students. The District retained several mini-vans to transport students for certain purposes, but the bulk of all student transportation continues to be provided by the transportation agency.

The contract between the parties contains a reference to subcontracting in the District Rights article.[4] The article is composed of a preface followed by a series of specific clauses. The preface and relevant clause read as follows:

> 19.0 All matters not specifically enumerated as within the scope of negotiations in Government Code Section 3543.2 are reserved to the District. It is agreed that such reserved rights include, but are not limited to, the exclusive right and power to determine, implement, supplement, change, modify, or discontinue in whole or in part, temporarily or permanently, any of the following:
>
> . . . . . .
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> 19.4 All services to be rendered to the public and to District personnel in support of the services rendered to the public, the nature, methods, quality, quantity, frequency, and standards of service, and the personnel, facilities, vendors, supplies, materials, vehicles, equipment, and tools to be used in connection with such services, the subcontracting of services to be rendered and functions to be performed, including education, support, construction, maintenance, and repair services.

The contract was negotiated by CSEA field representative Carol Finck and school board member Doughty.[5] Both testified and both agree about the origin of the District rights article. When it was time for the parties to discuss District rights, Mr. Doughty discovered that he had forgotten to bring his proposal. He asked Ms. Finck if she happened to have with her a

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[4]Article XIX.

[5]Mr. Doughty had been superintendent of the District from 1978 through 1981 and had previously negotiated labor agreements both at Eastside and other Southern California school districts.

copy of CSEA's contract with the Antelope Valley Union High School District. She retrieved the contract from her automobile and gave it to Mr. Doughty. He copied the relevant language and submitted it as the District proposal.

Negotiating table discussion about the District rights article was not lengthy. Ms. Finck testified that she noted the reference to subcontracting and emphasized to Mr. Doughty that it referred only to matters outside the scope of representation. She quoted Mr. Doughty as saying the District had no intention of subcontracting unit work. Mr. Doughty recalled that he read through the District rights provision and asked Ms. Finck if she had any questions about it. He quoted her as saying that she was familiar with the Antelope Valley language and was comfortable with it.

One other relevant provision is the entire agreement clause of the contract.[6] That clause reads as follows:

> 24.0 This Agreement shall supersede any rules, regulations or practices of the District which shall be contrary or inconsistent with its terms. The provisions of the Agreement, shall be considered part of the established policies of the District.
>
> 24.1 This Agreement shall constitute the full and complete commitment between both parties and shall supersede and cancel all previous agreements, both oral and written. This Agreement may be altered, changed, added to, deleted from, or modified only through the voluntary, mutual consent of the parties, in a written and signed amendment to this Agreement.

[6]Article XXIV.

> 24.2 It is agreed that during the term of this Agreement, the parties waive and relinquish the right to meet and negotiate over the subject matter covered by this Agreement. Nothing herein shall preclude the parties from mutually agreeing to reopen negotiations on any of these matters.

LEGAL ISSUE

Did the District unilaterally change the past practice regarding the subcontracting of unit work and thereby fail to meet and negotiate in good faith?

CONCLUSIONS OF LAW

It is well settled that an employer that makes a pre-impasse unilateral change in an established, negotiable practice violates its duty to meet and negotiate in good faith. (NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177].) Such unilateral changes are inherently destructive of employee rights and are a failure per se of the duty to negotiate in good faith. (Davis Unified School District, et al. (1980) PERB Decision No. 116; State of California (Department of Transportation) (1983) PERB Decision No. 361-S.)

An established negotiable practice may be reflected in a collective bargaining agreement (Grant Joint Union High School District (1982) PERB Decision No. 196) or where the agreement is vague or ambiguous, it may be determined by an examination of bargaining history (Colusa Unified School District (1983) PERB Decision Nos. 296 and 296(a)) or the past practice (Rio Hondo Community College District (1982) PERB Decision No. 279; Pajaro Valley Unified School District (1978) PERB Decision No. 51).

An employer makes no unilateral change, however, where an action the employer takes does not alter the status quo. "[T]he 'status quo' against which an employer's conduct is evaluated must take into account the regular and consistent past patterns of changes in the conditions of employment." (Pajaro Valley Unified School District, supra, PERB Decision No. 51.) Thus, where an employer's action was consistent with the past practice, no violation was found in a change that did not affect the status quo. (Oak Grove School District (1985) PERB Decision No. 503.)

The subject of this dispute, the contracting out of unit work, has several times been found by the PERB to be a negotiable subject.[7] Where there has been a past practice of contracting out, a challenged action will constitute a failure to negotiate in good faith only if it "evinces a change in the quantity and kind of subcontracting . . . and [thereby] constitutes a unilateral change in established policy." (Oakland Unified School District, supra, PERB Decision No. 367.)

The Union argues that the District changed the past practice. Previously, the Union argues, all food served in the District was prepared by District employees. The Union argues that the subcontracting of food service at Tierra Bonita was a change in this status quo. The Union argues that its representatives made three separate demands to meet and negotiate

[7]See Oakland Unified School District (1983) PERB Decision No. 367; State of California (Department of Personnel Administration) (1986) PERB Decision No. 574-S; Beverly Hills Unified School District (1990) PERB Decision No. 789.

about the change but were rebuffed on each occasion. Because the District refused to negotiate, the Union concludes that the District therefore failed to negotiate in good faith.

The District argues that the contracting out of food service is permitted both by specific contract language and by the past practice. The District rights article, which contains the applicable contract language, authorizes the subcontracting of certain specified activities "including education, support, construction, maintenance and repair services." The past practice, as the District sees it, permits the contracting out of work District employees are unable to perform and work which would require expensive equipment purchases. In the District's view, this would include the satellite food service program.

Contrary to the District's argument, I do not find that the negotiated agreement either prohibits or permits the contracting out of unit work. The only contractual reference to contracting out is in the District rights provision. This section, by its introductory language, reserves to the District only those "matters not specifically enumerated as within the scope of negotiations in Government Code Section 3543.2." Since contracting out of unit work is by PERB decision a negotiable subject, the contractual reference to subcontracting must be read as a reservation of District rights to subcontract non-unit work. The language that follows is a recitation of various examples of out-of-scope, non-unit work that would ordinarily be reserved to an employer, supporting the limited interpretation of the clause.

Similarly unhelpful is the entire agreement clause. This section provides that specific contract provisions "shall supersede any rules, regulations or practices of the District which shall be contrary or inconsistent with its terms." But since the contract contains no provision which establishes new rules regarding the contracting out of unit work, the contract cannot supersede the past practice.

Because the contract is silent on the issue of the contracting out of unit work, the past practice here exists only in the prior conduct in the District. The prior conduct in this District is that the employer has contracted out work which would require the purchase of expensive equipment if performed by District employees.

The District had never previously operated a satellite food service program. To begin one, the District would have been required to purchase a vehicle and expensive equipment required to keep food sanitary and at the proper temperature for transport. The school board concluded that such an expense was not justified. This decision was consistent with past District practice to subcontract limited amounts of work to avoid substantial capital outlays. The contracting out of the satellite food service program resulted in no reduction in the number of food service workers employed by the District.

The subcontracting of the satellite food service program did not, therefore, constitute "a change in the quantity and kind of subcontracting." For this reason, I conclude that the District's

decision to contract out the satellite food service to the Tierra Bonita School was not a unilateral change in established policy. Accordingly, no violation can be found on the theory that the District made a unilateral change when it subcontracted the satellite food service program.[8]

However, the conclusion that the District did not change the past practice does not fully resolve the issues at dispute. It is quite clear that the Union made three explicit demands to negotiate about the subcontracting of unit work. Ordinarily, an employer is relieved from the obligation to negotiate during the contract term by an appropriately drawn zipper or entire agreement clause. Although a zipper clause will not allow an employer to make unilateral changes, "it may provide the privilege of maintaining existing policies for the term of the contract." (Placentia Unified School District (1986) PERB Decision No. 595.) Such a clause can even protect the employer from the obligation to negotiate about matters not discussed in bargaining.[9]

But in order to insulate an employer from negotiations about matters not discussed, a zipper clause must explicitly or by implication waive the right to negotiate about all bargainable

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[8]This conclusion is based solely on the operation of a satellite food service program at Tierra Bonita. It should not be read as applicable to the subcontracting of food service at any other District school or to the operation of any kitchen constructed at Tierra Bonita as part of the permanent building.

[9]See Morris, The Developing Labor Law, 1983, Vol. 1, p. 674.

subjects.[10] Plainly, it must do more than waive the right, as here, "to meet and negotiate over the subject matter covered by this Agreement." On its face, the clause in the contract between these parties blocks mid-term negotiations only about matters covered by its specific provisions. As noted above, the subcontracting of unit work is not such a subject.

Accordingly, I conclude that the District was obligated to meet and negotiate with the Union about the contracting out of unit work as soon as the Union raised that demand. Because the District refused, it failed to negotiate in good faith and thereby violated EERA section 3543.5(c). The District's failure to negotiate in good faith also had the effect of denying the Union the right to represent its members in violation of EERA section 3543.5(b). In the absence of a showing that the failure to negotiate somehow impacted an individual unit member, the alleged violation of section 3543.5(a) must be dismissed.

REMEDY

The PERB in section 3541.5(c) is given:

> . . . 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

[10]See, for example, the zipper clause at issue in American League of Professional Baseball Clubs (1978) Case No. 4-CA-9586 [99 LRRM 1724] discussed in Morris at p. 764. That zipper clause provided:

> The parties agree that they have bargained fully with respect to all proper subjects of collective bargaining and have settled all such matters as set forth in this agreement.

with or without back pay, as will effectuate the policies of this chapter.

This case presents unusual facts. The theory of the case contained in the complaint and underlying unfair practice charge is that of a unilateral change. In keeping with that theory, the Union seeks an order that the District cease and desist the subcontracting of the satellite food operation at the Tierra Bonita School. But such an order is inappropriate because, as found above, the District in subcontracting the satellite food operation did not change the past practice. The District retains the right to continue the past practice until such time as it may be changed through agreement between the parties or the parties complete the impasse resolution procedure.

Instead of a unilateral change, the violation is an unusual finding that the employer failed to negotiate during the contract term about the contracting out of unit work, a matter within the scope of representation. A comprehensive zipper clause would have excused the District from negotiating about the issue during the life of the agreement. However, the zipper clause to which these parties agreed does not preclude the exclusive representative from demanding to negotiate about any negotiable subject not covered by the agreement.

Accordingly, it is appropriate that the District be required to meet and negotiate about the contracting out of unit work if the Union requests it. During the course of the negotiations, the past practice on the subcontracting of unit work will remain in effect.

It is further appropriate that the District be directed to post a notice incorporating the terms of the order. Posting of such a notice, signed by an authorized agent of the District, will provide employees with notice that the District has acted in an unlawful manner, is being required to cease and desist from this activity, and will comply with the order. It effectuates the purposes of the EERA that employees be informed of the resolution of this controversy and the District's readiness to comply with the ordered remedy. (Placerville Union School District (1978) PERB Decision No. 69.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in the case, it is found that the Eastside Union School District violated section 3543.5(c) of the Educational Employment Relations Act. The District violated the Act by refusing to meet and negotiate with the exclusive representative about the contracting out of unit work, a matter within the scope of representation. Because the action had the additional effect of interfering with the right of the California School Employees Association and its Eastside Chapter No. 779 to represent its members, the refusal to negotiate also was a violation of section 3543.5(b). The allegation that the District's conduct violated section 3543.5(a) is hereby DISMISSED.

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

A. CEASE AND DESIST FROM:

1. Refusing to meet and negotiate upon proper request of the exclusive representative about the contracting out of unit work, a matter within the scope of representation.

2. By the same conduct, interfering with the right of the Union to represent its members.

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

1. Effective immediately upon service of a final decision in this matter, meet and negotiate upon request of the California School Employees Association and its Eastside Chapter No. 779 about the subject of contracting out of unit work.

2. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to classified employees customarily are posted, 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 ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

3. Upon issuance of a final decision, make written notification of the actions, taken to comply with the Order to the Los Angeles Regional Director of the Public Employment Relations Board in accord with the director's instructions.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (See Cal. Code of Regs., tit. 8, sec. 32300.) A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing ". . .or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . ." (See Cal. Code of Regs., tit. 8, sec. 32135; Code Civ. Proc. sec. 1013 shall apply.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code of Regs., tit. 8, secs. 32300, 32305 and 32140.)

Dated: January 10, 1992

Ronald E. Blubaugh
Administrative Law Judge