**STATE OF CALIFORNIA**
**DECISION OF THE**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

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| CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS WEST COVINA CHAPTER #91, | ) | |
| Charging Party, | ) | Case No. LA-CE-3113 |
| v. | ) | PERB Decision No. 973 |
| WEST COVINA UNIFIED SCHOOL DISTRICT, | ) | February 9, 1993 |
| Respondent. | ) | |

Appearances: Harry J. Gibbons, Attorney, for California School Employees Association and its West Covina Chapter #91; Atkinson, Andelson, Loya, Ruud & Romo by Robert L. Sammis, Attorney, for West Covina Unified School District.

Before Hesse, Chairperson; Caffrey and Carlyle, Members.

DECISION

CAFFREY, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the West Covina Unified School District (District) to a PERB administrative law judge's (ALJ) proposed decision. The ALJ found that the District violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA)[1] when it

[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, that a public school employer shall not:

> (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.

unilaterally implemented a decision to eliminate the practice of allowing its maintenance and operations leadworkers to commute to and from work in District vehicles without providing the California School Employees Association and its West Covina Chapter #91 (CSEA) an opportunity to negotiate the decision.

The Board has reviewed the entire record in this case, including the proposed decision, transcript, exhibits, the District's exceptions and CSEA's responses thereto. The Board finds the ALJ's findings of fact to be free of prejudicial error. The Board affirms the ALJ's conclusion that the District violated EERA section 3543.5(a), (b) and (c) in accord with the discussion below.

## FINDINGS OF FACT

The District is a public school employer under the EERA. CSEA is the exclusive representative of a unit of classified employees which includes employees in the District's Maintenance, Operations and Transportation Division (MOT).

A. Home - garaging

The uncontroverted evidence established that at least as early as 1967, the District began a practice of allowing MOT leadworkers to commute to and from work in District vehicles. Although no written directives were issued in conjunction with the keys to the vehicles, the recipients of the benefit

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(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.

understood that the vehicles were provided to employees in the leadworker positions who were on 24-hour call-out status and the vehicles were available only for District-related activities.

Richard Sandoval (Sandoval) has been employed by the District for approximately 19 years. Approximately ten years ago, he was advanced to a combined position of painter and lead person. At that time, although some management and quasi-supervisory employees in the maintenance division commuted in District-owned vehicles, Sandoval did not. Then, approximately three years ago, after a study of his position, his lead responsibilities became full-time and his manager advised him "Richard, we're giving you a truck of your own and you're not going to be a painter." Since that time, until the actions complained of herein, Sandoval was on 24-hour call and home-garaged the District's vehicle.[2] It has always been his understanding that the vehicle went along with the position of leadworker who was on call on a 24-hour basis. When he learned he could no longer home-garage a District vehicle, he purchased a new vehicle.

Lonnie Stearns (Stearns) is currently the District's operations lead person. He has been an employee of the District for approximately 25 years. Stearns assumed his present position

[2]There was a brief period of time after he became a full-time leadworker when Sandoval did not home-garage a vehicle. Sandoval explained that the vehicle assigned to him at the time had some front-end problems and was not freeway safe. He indicated that was the only reason he did not drive the truck home immediately following his "reassignment."

in July of 1988 and was given a District vehicle in conjunction with his promotion to operations leadworker. His predecessor, Richard Harshaw, also was given a vehicle as part of his leadworker assignment. Stearns understood that the vehicle was part of his promotion since that had been the District's practice since his initial employment in 1967. Moreover, Stearns noted that there was a financial benefit attached to the vehicle because it constituted a savings with respect to household expenses and transportation. Stearns always understood that use of the vehicle was necessary and appropriate given the fact that he was on call to the District at all times.

The District presented one witness. Mike Popoff (Popoff) is the District's Administrator of Human Resources and Development and its Personnel Director. Popoff has been in his current assignment since April 1990. He testified that he had never personally seen a policy or a directive which would authorize the home-garaging of District vehicles, nor had he heard any discussion about such a policy. Popoff also indicated, however, that he was not thoroughly familiar with the policies and procedures of the MOT. Popoff did not controvert testimony proffered by Sandoval to the effect that when he was assigned a vehicle, he was assured that the superintendent, business manager and governing board were all aware of the home-garaging practice.

B. The District Changes its Practice

According to Popoff, the impetus to eliminate the District's practice of allowing home-garaging came from the new

superintendent who joined the District on or about March 1, 1991. Popoff believes the decision which gave rise to the instant proceeding was made by the governing board during an executive session which he did not attend.

On July 1, 1991, Phil K. Urabe, Assistant Superintendent for Business Services, sent a memorandum to Karl Vacenovsky (Vacenovsky), the MOT manager, which set forth two fundamental changes. The first item stated that the hours of work were being changed. The second item provided as follows:

> 2. Effective July 9, 1991, District vehicles will no longer be used for home to work transportation by any MOT employee.

Neither a copy of the document or any other form of notice was provided by the District to CSEA. On or about July 1 or July 2, a copy of the above-quoted memorandum was given to Sandoval who spoke to his job steward, Bill Trunnell.

Thereafter, on July 2, pursuant to CSEA's request, a meeting was held to discuss contracting out and the matters set forth in the July 1 memorandum. The meeting was attended by Joan Williams (Williams), who was then president of the concerned CSEA chapter, Richard Mullins (Mullins), CSEA Field Representative, Popoff and Steven Andelson (Andelson), the District's legal counsel.

The parties dispute what was said at the meeting. Williams testified that after some discussion, Andelson asked if CSEA wanted to negotiate regarding the matters in the July 1 memorandum and that Mullins responded "yes." According to Williams, a date for another meeting was not selected because

attorney Andelson indicated that he had just received the memorandum himself and needed an opportunity to study the situation before providing a date. Popoff testified that he did not recall any demand from CSEA to negotiate the matters under discussion at the July 2 meeting. In response to questioning by CSEA, however, Popoff testified that, to his knowledge, at no time has the District been willing to negotiate its action of July 9.

On or about July 11, 1991, after implementation of the action complained of herein, Popoff received a letter from Mullins, dated July 8, 1991, in which Mullins indicated that he was confirming the meeting of July 2, 1991 and demanding to negotiate. A meeting was arranged for July 19 at which time CSEA repeated its demand to negotiate. The District found the manner in which the demand was made offensive and left the meeting. Thereafter, this action was commenced.

ALJ'S PROPOSED DECISION

The ALJ applied the three-prong test established by the Board in Anaheim Union High School District (1981) PERB Decision No. 177 (Anaheim), to determine whether the practice of home-garaging District vehicles is a matter within the scope of representation. Applying the Anaheim test, the ALJ first determined that use of a District vehicle had a tangible dollar value to the effected employees and thus was reasonably related to wages. Second, in reliance on decisions of the National Labor Relations Board (NLRB), the ALJ decided that matters relating to

compensation "are precisely the kind of dispute conducive to resolution through the collective bargaining process." Finally, the ALJ concluded there was no managerial prerogative "unduly infringed by requiring bargaining over the question of whether employees are assigned cars as part of their employment." The ALJ concluded that the subject of home-garaging vehicles satisfied the three prongs of the Anaheim test, thus the matter is negotiable.

The ALJ then considered whether the District was relieved of its obligation to negotiate because it provided notice of the proposed change and CSEA failed to make a timely demand to negotiate. Based on credibility determinations, the ALJ concluded that CSEA did demand to bargain the matter at the July 2 meeting and thus CSEA had not waived its right to negotiate the matter.

In addition to a cease and desist order, the ALJ ordered the District to restore the home-garaging practice and make Sandoval and Stearns whole for the reasonable losses in compensation they incurred. In a footnote, the ALJ implied that the District may be responsible for some additional compensation to Sandoval because he purchased a vehicle to use in his commute to work after the decision was implemented.

## DISTRICT'S EXCEPTIONS

In its statement of exceptions, the District contends the superintendent and the governing board had no knowledge of the home-garaging privilege granted to the two leadworkers. Because

the vehicle use was never expressly authorized by the governing board, the District argues it never became part of the employees' compensation. The District also asserts the ALJ erred when she relied on decisions of the NLRB which held that the use of company vehicles is related to compensation. The District argues these decisions are inapplicable to public school districts. Finally, assuming it acted unlawfully, the District objects to the proposed remedy, contending that at most, the employees are entitled only to an order restoring the home-garaging privilege.

DISCUSSION

EERA section 3543.5(c) requires an employer to meet and negotiate in good faith with an exclusive representative. A pre-impasse unilateral change in a matter within the scope of representation is a per se refusal to negotiate. (NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177]; Pajaro Valley Unified School District (1978) PERB Decision No. 51; San Mateo County Community College District (1979) PERB Decision No. 94.)

An established policy may be embodied in the terms of a collective bargaining agreement (Grant Joint Union High School District (1982) PERB Decision No. 196); or, where a contract is silent or ambiguous, it may be determined from past practice or bargaining history (Rio Hondo Community College District (1982) PERB Decision No. 279).

In its statement of exceptions the District contends the governing board never expressly authorized the home-garaging practice, therefore it can not be construed as compensation for

the leadworkers. The record supports the claim that the District has since at least 1967 assigned District vehicles to employees in the MOT leadworker positions who are on-call on a 24-hour basis, thereby permitting them to commute to and from work in those vehicles. Vacenovsky assigned District vehicles to Sandoval and Stearns and authorized home-garaging of these vehicles, requiring them to be on-call to the District 24-hours a day. While this practice may not have been expressly adopted by the governing board, by allowing the practice to continue for approximately 25 years, the District has firmly established it as District policy. The District is not excused from a long-established practice merely because it did not formally adopt the policy. This exception is therefore rejected.

To the extent that the District has altered this practice, an unlawful unilateral change may have occurred. However, it must first be determined whether the practice of permitting the two MOT leadworkers to home-garage District vehicles is, in this case, a subject within the scope of representation under EERA section 3543.2.[3]

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[3]EERA section 3543.2(a) states, in pertinent part:

> (a) The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, procedures for processing grievances

In Anaheim, the Board established a three-prong test to determine whether matters not specifically enumerated under EERA section 3543.2 are negotiable. Under the Anaheim test, the Board determined a matter is within the scope of representation if:

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

The California Supreme Court approved this test in San Mateo City School District v. Public Employment Relations Board (1983) 33 Cal.3d 850 [191 Cal.Rptr. 800].

In this case, the use of District vehicles by Sandoval and

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> pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8, the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code, and alternative compensation or benefits for employees adversely affected by pension limitations pursuant to Section 22515 of the Education Code, to the extent deemed reasonable and without violating the intent and purposes of Section 415 of the Internal Revenue Code. . . . All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating, provided that nothing herein may be construed to limit the right of the public school employer to consult with any employees or employee organization on any matter outside the scope of representation.

Stearns is reasonably related to wages and compensation. The authorization to use the vehicles to commute to and from work had a tangible dollar value to these employees, saving them the maintenance and commuting costs for their own vehicles. By specifically providing each of them with a vehicle when they assumed the leadworker positions and the responsibility to be available on a 24-hour basis, the District included the value of the use of the vehicle as part of their compensation.

Further, although PERB's only decision in this area was vacated based upon a settlement (Office of the Santa Clara County Superintendent of Schools (1982) PERB Decision No. 233), the issue of the negotiability of the use of company vehicles has previously been considered by the NLRB. Under the National Labor Relations Act (NLRA), the NLRB has found that use of a company car for purposes of commuting to and from work is an emolument of employment. Where the scope language of the NLRA is similar to that of the EERA, the Board has viewed the decisions of the NLRB as persuasive.

In Seafarers. Local 777 v. NLRB (D.C. Cir. 1978) 603 F.2d 862 [99 LRRM 2903] enforced in part by 229 NLRB 1329 [95 LRRM 1249], the court upheld the NLRB's finding that the employer's unilateral imposition of a $10 fee on cab drivers who wished to take their cab home at night violated its duty to negotiate since the matter was a mandatory subject of bargaining. In Wil-Kil Pest Control Company (1970) 181 NLRB 749 [73 LRRM 1556], enforced (7th Cir. 1971) 440 F.2d 371 [76 LRRM 2735], the NLRB found a

seven-year use of company vehicles to be a "valuable term and condition of employment" and the NLRB ordered a return to the status quo ante and a make-whole remedy.

The facts in this case clearly establish that the District has converted the home-garaging practice into an element of compensation for the two leadworker positions. This satisfies the first prong of the Anaheim test. Further, matters relating to wages or compensation are precisely the kind of dispute conducive to resolution through the collective bargaining process, meeting the second prong of the Anaheim test.

The District contends the NLRB decisions are inapplicable to public school districts. The District argues that the same "unique statutory and constitutional issues" governing public school districts do not apply to private companies and thus the ALJ erred in relying on the decisions of the NLRB. In fact, the District received some benefit from having the leadworkers available to respond promptly to emergencies on a 24-hour basis. Similarly in the decisions of the NLRB, the private companies receive a benefit from their employees having immediate access to company owned vehicles. The District provides no further explanation to overcome the similarity of the use of company cars from district-owned vehicles as an aspect of compensation. Thus, this exception is rejected.

Finally, the facts of this case establish that the District has sanctioned the practice of allowing the leadworkers to home-garage District vehicles for approximately 25 years. Maintaining

the practice for this extended period of time suggests the obligation to negotiate any change in the practice. That obligation would not significantly abridge the District's management prerogative with regard to the assignment of District vehicles to MOT Division leadworkers. Thus, in this case, the third prong of the Anaheim test is satisfied and the home-garaging of District vehicles is found to be a negotiable subject. This determination does not prohibit change in the home-garaging practice. It merely requires the District to provide the exclusive representative with notice and the opportunity to negotiate any proposed changes to the practice.

The Board emphasizes in this decision, however, that a policy governing the assignment of school district vehicles may not in all cases constitute a negotiable subject. We find it appropriate to decide the issue on a case-by-case basis. There may well be circumstances where vehicle assignment represents a clear management prerogative. However, no evidence is presented in the case before the Board on which to base such a finding.

Prior to implementing a proposed change in a negotiable subject, an employer must provide notice to the exclusive representative sufficiently in advance of a firm decision to allow a reasonable amount of time to decide whether to make a demand to negotiate. (Victor Valley Union High School District (1986) PERB Decision No. 565.) An exclusive representative can be found to have waived the right to bargain where the employer shows that the exclusive representative failed to demand to

negotiate, despite having received sufficient notice of the proposed change. (Cloverdale Unified School District (1991) PERB Decision No. 911.)

Based on credibility determinations, the ALJ found that CSEA did make a demand to bargain at the meeting between the District and CSEA representatives on July 2, 1991. Joan Williams testified that the attorney for the District asked CSEA's representatives if they wanted to negotiate the matters covered in the July 1 memorandum and they said "yes."

Assuming arguendo that negotiations were not discussed on July 2, we find that CSEA made a timely demand to negotiate. Following the July 2 meeting, CSEA Field Representative Mullins wrote a letter dated July 8, formalizing the demand to negotiate. The letter was written before implementation of the change in the home-garaging practice on July 9, but it was not received by the District until July 11. Nevertheless, the District was on notice that CSEA was concerned with the proposed change. Further, the District arguably did not provide reasonable notice of a change of this magnitude. Indeed, there was no evidence regarding how much time elapsed from the time the District made its decision and the time it communicated it to the employees.

CSEA, through its members, obtained notice on or about July 2 and attended a meeting late that afternoon. Thursday, July 4 was a holiday. July 6 and July 7 fell on a weekend and the change was implemented the following Tuesday. This means CSEA had, at best, three working days. Alleged failure to

communicate a demand under those circumstances would not constitute a waiver of the right to bargain.

Based upon the findings of fact and conclusions of law and all the evidence in the record, we find that the District violated EERA section 3543.5(a), (b) and (c) when it unilaterally implemented a decision to eliminate the benefit previously granted to its maintenance and operations leadworkers, allowing them to home-garage District vehicles. The practice of home-garaging was eliminated without first giving adequate notice and a reasonable opportunity to bargain and the elimination of the practice directly impacted employees represented by CSEA.

## REMEDY

In its statement of exceptions the District objects to the ALJ's proposed remedy, contending that at most the employees are entitled only to an order restoring the home-garaging privilege. The District contends that because the employees were reimbursed for driving their own vehicles on those occasions they responded to emergency call-backs, CSEA has failed to establish any actual loss suffered by Sandoval and Stearns.

The Board is authorized to remedy violations of the EERA. Section 3541.5(c) grants the Board 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.

In this case, it has been established that home-garaging the

District vehicles provided a financial benefit to Sandoval and Stearns in the form of reduced maintenance and commuting costs for their own vehicles. Therefore, the decision to eliminate home-garaging resulted in a loss of compensation to the two leadworkers. Accordingly, it is appropriate to require the District to restore the home-garaging privilege and make the employees whole for the reasonable losses they incurred. However, the Board finds that the District's make whole obligation does not include the duty to compensate Sandoval for the new vehicle he acquired to use in his commute to work.

It is also appropriate that the District be ordered to cease and desist from such conduct and it is appropriate that the District be required to post a notice incorporating the terms of this order. The notice should be subscribed by an authorized agent of the employer indicating that it will comply with the terms thereof. The notice shall not be reduced in size, defaced, altered or covered by any other material. Posting such a notice will provide employees with notice that the employer has acted in an unlawful manner and is being required to cease and desist from this activity. It effectuates the purposes of the EERA that employees be informed of the resolution of the controversy and will announce the employer's readiness to comply with the ordered remedy. (See Placerville Union School District (1978) PERB Decision No. 69.) In Pandol and Sons v. Agricultural Labor Relations Board (1979) 98 Cal.App.3d 580, 587 [159 Cal.Rptr. 584], the California District Court of Appeal approved a similar

posting requirement. (NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].)

## ORDER

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

A. CEASE AND DESIST FROM:

1. Unilaterally eliminating benefits logically and reasonably related to wages without first giving the California School Employees Association and its West Covina Chapter #91 (CSEA) notice and an opportunity to negotiate.

2. Denying to CSEA rights guaranteed by the EERA, including its right to represent its members.

3. Denying to employees the right to be represented by an exclusive representative before making significant changes in compensation.

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

1. Restore the status quo ante by granting Richard Sandoval and Lonnie Stearns, or whoever occupies the positions of maintenance leadworker and operations leadworker, District vehicles to use in their commute to and from work or when recalled to the District outside their normal workday, and continue such benefit until the parties reach agreement or

exhaust the impasse provisions set forth in the EERA.

2. Compensate Richard Sandoval and Lonnie Stearns for the losses reasonably incurred as a result of the District's unlawful action.

3. 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 are customarily 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.

4. Make written notification of the actions taken to comply with this Order to the Los Angeles Regional Director of the Public Employment Relations Board in accord with the director's instructions.

Chairperson Hesse and Member 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-3113, California School Employees Association and its West Covina Chapter #91 v. West Covina Unified School District in which all the parties had the right to participate, it has been found that West Covina Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b) and (c).

As a result of this conduct, we have been ordered to post this Notice and will abide by the following. We will:

A. CEASE AND DESIST FROM:

1. Unilaterally eliminating benefits logically and reasonably related to wages without first giving the California School Employees Association and its West Covina Chapter #91 (CSEA) notice and an opportunity to negotiate.

2. Denying to CSEA rights guaranteed by the EERA, including its right to represent its members.

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2. Compensate Richard Sandoval and Lonnie Stearns for the losses reasonably incurred as a result of the District's unlawful action.

Dated: _____ WEST COVINA 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.