STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ASSOCIATION OF ROWLAND EDUCATORS, Charging Party,	)	Case No. LA-CE-3235
v.	)	PERB Decision No. 1053
ROWLAND UNIFIED SCHOOL DISTRICT, Respondent.	)	September 1, 1994

Appearances: California Teachers Association by Charles R. Gustafson, Attorney, for Association of Rowland Educators; Breon, O'Donnell, Miller, Brown & Dannis by David G. Miller, Attorney, for Rowland Unified School District.

Before Blair, Chair; Carlyle and Garcia, Members.

DECISION

BLAIR, Chair: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Rowland 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:

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

refused the Association of Rowland Educators' (Association) demand to negotiate all of the Association's proposals following the District's implementation of its last, best and final offer.

The Board has reviewed the entire record in this case, including the proposed decision, the District's exceptions, the Association's response thereto and the stipulated record. The Board finds, in accordance with the following discussion, that the District violated EERA section 3543.5(a), (b) and (c).

PROCEDURAL HISTORY

On September 16, 1992, the Association filed an unfair practice charge with PERB. The PERB general counsel's office issued a complaint on March 23, 1993, alleging that the District violated EERA section 3543.5 when, upon completion of impasse, it implemented a limitation on the number of subjects the Association could propose for meeting and negotiating in the 1992-93 school year.

The parties failed to reach a voluntary settlement during a telephonic informal conference held on April 13, 1993. On August 16, 1993, the parties waived their right to an evidentiary hearing and submitted the case to a PERB ALJ on a stipulated set of facts and a series of exhibits.[2]

(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 following documents were submitted by the parties as part of the evidentiary record in this case:

FACTUAL SUMMARY

The Association is the exclusive representative for a unit of classroom teachers employed by the District. The Association and the District were parties to a collective bargaining agreement which expired on August 31, 1991. The parties initiated negotiations for a successor agreement in April 1991, meeting and negotiating until April 1992 when they declared impasse. The parties participated in two mediation sessions, following which the mediator certified the matter for factfinding.

A factfinding panel convened and heard the parties on July 8, 1992 and, thereafter, issued its report of findings and recommendations on August 5, 1992. The Association and District representatives to the factfinding panel each wrote a partial dissent which was attached to the factfinding report.

The District and the Association considered the factfinding report in good faith and held four post-factfinding negotiating

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A. Rowland Unified School District document titled "Last, Best, and Final Offer," dated April 22, 1992;

B. Factfinding Report and Recommendations including dissents, dated August 5, 19 92;

C. Letter from Ron Leon, Assistant Superintendent Personnel, to Association of Rowland Educators with recommendation for adoption attached, dated August 27, 1992;

D. Board of Education agenda for August 31, 1992 including AB 1200 disclosure statement and recommended Last, Best and Final Offer, dated August 26, 1992; and

E. Comprehensive copy of Procedures and Policies Regulating Terms and Conditions of Employment as adopted by the Board of Education on August 31, 1992.

sessions. A second impasse was reached on or about August 26, 1992. On August 27, 1992, the District notified the Association of its intent to adopt terms and conditions of employment contemplated by the District's last, best and final offer. At its meeting of August 31, 1992, the District's governing board unilaterally adopted terms and conditions of employment, which included the following:

> Except where otherwise specifically indicated, the terms and conditions of employment shall be effective July 1, 1992 through August 31, 1993, and from year to year thereafter unless and until modified pursuant to the provisions of the Educational Employment Relations Act (EERA). This implementation resolves negotiations affecting the 1992-93 school year except as follows: [The Association] and the District may select up to two subjects for meeting and negotiating in connection with the 1992-93 school year.

The parties do not dispute the lawfulness of the District's adoption of terms and conditions of employment except for one issue which they submitted to the ALJ:

> Did the District violate the Educational Employment Relations Act, as amended, by adopting terms and conditions of employment covering the period September 1, 1992 through August 31, 1993 thereby limiting the Association to two negotiation reopeners for the 1992-93 contract year?

Following the District's unilateral adoption, the Association submitted its initial proposals for the 1992-93 school year covering a large number of contractual items. Through an exchange of correspondence, the parties agreed to limit themselves to two reopener items each for 1992-93. The

agreement was arrived at with the express understanding that such agreement did not constitute a waiver of any of the Association's factual and/or legal contentions in connection with this case. It was agreed and understood that the Association was free to pursue its contentions in the instant unfair practice case.

ALJ'S DECISION

The ALJ found that after completion of the impasse procedures the District was entitled to implement provisions contained within its last, best and final offer. The ALJ then determined that the combination of the District's adopted terms and conditions of employment and the Association's initial proposals for the 1992-93 school year constituted changed circumstances thereby reviving the District's duty to negotiate "any and all prospective terms and conditions of employment." When the District refused to meet this obligation, the ALJ found that it violated EERA.

DISTRICT'S EXCEPTIONS

The District contends the ALJ erred by finding that it had a duty to negotiate after it lawfully implemented terms and conditions of employment which included a provision establishing the "duration of agreement." The District asserts that EERA section 3549[3] permits the District, upon good faith completion of

[3]EERA section 3549 states, in pertinent part:

> The enactment of this chapter . . . shall not be construed as prohibiting a public school employer from making the final decision with regard to all matters specified in Section 3543.2.

the impasse procedures, to make and implement the final decision with regard to matters within the scope of representation. Since the duration of an agreement is a matter within the scope of representation, the District contends that the duty to meet and negotiate is ended for the period adopted by the District. In this case, the District implemented a provision which provided that the terms and conditions of employment would be effective from July 1, 1992 through August 31, 1993, with the exception that each party could select up to two subjects to negotiate during that period.

The District also asserts the ALJ erred in finding that the Association's 1992-93 proposals substantially changed the parties' bargaining positions because the proposals were not made part of the evidentiary record. Without the proposals before him, the District argues that the ALJ could not determine whether they resulted in changed circumstances.

DISCUSSION

EERA provides a comprehensive impasse procedure[4] which is exhausted only when a factfinder's report has been completed and considered in good faith. (Modesto City Schools (1983) PERB Decision No. 291 (Modesto); Charter Oak Unified School District (1991) PERB Decision No. 873.) At that point, impasse under EERA is identical to impasse under the National Labor Relations Act (NLRA). (Modesto; Covina-Valley Unified School District (1993) PERB Decision No. 968.)

[4]EERA sections 3548 through 3548.8.

Once impasse is reached either party may refuse to negotiate further and the employer is free to implement changes reasonably comprehended within its last, best and final offer. However, impasse suspends the parties' obligation to bargain only until changed circumstances indicate that an agreement may be possible. (Modesto; Hi-Way Billboards. Inc. (1973) 206 NLRB 22 [84 LRRM 1161]; Providence Medical Center (1979) 243 NLRB 714 [102 LRRM 1099].)

In Public Employment Relations Bd. v. Modesto City Schools District (1982) 136 Cal.App.3d 881 [186 Cal.Rptr. 634], the court refuted the claim that an employer's duty to bargain permanently ceases after exhaustion of the statutory impasse procedures. The duty to bargain revives when one party proposes a concession from its earlier bargaining position which indicates that agreement may be possible. (Id.; NLRB v. Sharon Hats, Inc. (5th Cir. 1961) 289 F.2d 628 [48 LRRM 2098] enforcing (1960) 127 NLRB 947 [46 LRRM 1128].)

In the present case, the parties stipulated that impasse procedures were completed in good faith. At this point, the parties' obligation to bargain was suspended and the District was permitted to implement terms and conditions of employment which were reasonably comprehended within its last, best and final offer to the Association.[5] According to the stipulated record,

[5]As discussed below, not all terms and conditions contained within a last, best and final offer may lawfully be implemented by an employer.

the District adopted certain terms and conditions which were contained within its final offer.

Following the District's unilateral adoption of terms and conditions of employment for the 1992-93 school year, which included a limitation on the parties' right to seek negotiations on more than two subjects, the Association submitted numerous initial proposals for 1992-93. The District, however, disputed the Association's right to negotiate more than two subjects, claiming the Association was limited to "two negotiation reopeners."

The District's duty to resume negotiations following good faith completion of impasse arises only if the Association's proposals contained a concession from its earlier position which demonstrates that circumstances have changed and agreement may be possible. However, the Association's proposals were not made part of the stipulated record and there is nothing in the record to indicate the nature of these proposals. Since there is no evidence that the Association's proposals contained concessions from its earlier bargaining position, there is no indication that changed circumstances existed which would reestablish the District's duty to negotiate. Accordingly, the Board reverses the determination of the ALJ and finds that the District did not violate EERA under a changed circumstances theory when it refused to negotiate all of the Association's proposals.

We now consider whether the District's adoption of terms and conditions of employment was lawful. The parties to a collective

bargaining agreement may agree to contractual language specifically waiving or limiting the right to bargain about particular matters. In State of California (Department of Forestry and Fire Protection) (1993) PERB Decision No. 999-S, the Board stated that:

> A waiver clause typically provides that there is no further duty to bargain specified negotiable subjects during the term of the agreement. The purpose of such a clause is to lend stability to the bargaining relationship by limiting the possibility of continuous negotiations.

A waiver must be an intentional relinquishment of a union's rights under EERA. (San Francisco Community College District (1979) PERB Decision No. 105; Los Angeles Community College District (1982) PERB Decision No. 252.) Furthermore, waiver must be expressed in clear and unmistakable terms, particularly where the waiver of a statutory right is asserted. (Amador Valley Joint Union High School District (1978) PERB Decision No. 74.)

At its meeting of August 31, 1992, the District's governing board unilaterally adopted terms and conditions of employment, which included the following:

> Except where otherwise specifically indicated, the terms and conditions of employment shall be effective July l, 1992 through August 31, 1993, and from year to year thereafter unless and until modified pursuant to the provisions of the Educational Employment Relations Act (EERA). This implementation resolves negotiations affecting the 1992-93 school year except as follows: [The Association] and the District may select up to two subjects for meeting and negotiating in connection with the 1992-93 school year.

The right to bargain to reach agreement on terms and conditions of employment is the very essence of collective bargaining under EERA. Any attempt to limit or waive this statutory right must be mutually agreed to by the parties and expressed in clear and unmistakable terms.

The Board has previously determined that an employer cannot insist to impasse on a proposal that an exclusive representative waive its right to file a grievance in its own name. To do so would infringe upon an exclusive representative's statutory right to represent its members. (South Bay Union School District (1990) PERB Decision No. 791; Chula Vista City School District (1990) PERB Decision No. 834.) If an employer cannot insist to impasse on the waiver/limitation of a statutory right, certainly an employer is prohibited from implementing the waiver/limitation of a statutory right following impasse. EERA gives the parties the right to collectively negotiate terms and conditions of employment. If the employer can unilaterally implement a waiver/limitation of the right to bargain it would negate the purposes of EERA. Accordingly, an employer may not, following impasse, unilaterally impose a waiver/limitation of an exclusive representative's statutory right to bargain. Such a waiver/limitation of the statutory right to bargain may only occur within the context of a mutually agreed collective bargaining agreement.

The District contends that EERA section 3549[6] permits it, upon good faith completion of impasse, to make and implement the final decision with regard to matters within the scope of representation. Since a "duration of agreement" provision is a mandatory subject of bargaining which may be unilaterally implemented upon completion of impasse, the District asserts that its duty to meet and negotiate ended for the period adopted by the District.

The duration of a collective bargaining agreement has been found to be a mandatory subject of bargaining under the NLRA. (NLRB v. Yutana Barge Lines (1963) 315 F.2d 524 [52 LRRM 2750] .) The Board, however, has not determined whether the duration of an agreement is a subject within the scope of representation under EERA. Assuming arguendo that it is a mandatory subject of bargaining, an employer may lawfully implement a provision which defines the period for which the terms and conditions would be effective. However, duration of agreement provisions do not act as a waiver/limitation clause barring all negotiations for the specified period. As stated above, a waiver/limitation of the statutory right to bargain can only be enacted when mutually agreed to by the parties. Adoption of a duration of agreement provision is not unlawful; however, it does not serve to waive the right to bargain under EERA.

In conclusion, the Board finds that the District bargained in bad faith in violation of EERA section 3543.5(c) when,

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[6]Ante, fn. 3.

following impasse, it implemented a condition of employment which limited the Association's statutory right to bargain. The act of unlawfully implementing a waiver/limitation of the statutory right to bargain, however, does not revive the District's duty to bargain following impasse. As discussed previously, upon completion of impasse the duty to bargain is renewed when one party proposes a concession from its earlier bargaining position which indicates that agreement may be possible.

The Board also finds that by unilaterally implementing a waiver/limitation of the right to bargain, the District denied the Association the right to represent its members in violation of EERA section 3543.5(b). Such conduct also denied bargaining unit employees the right to be represented by the Association in their employment relations with the District in violation of EERA section 3543.5(a).

REMEDY

The Board is authorized to remedy violations of 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 order to remedy the unfair practice of the District and to effectuate the purposes of EERA, it is appropriate to order the District to cease and desist from unlawfully implementing

terms and conditions of employment which limit the Association's statutory right to bargain.

It is also appropriate that the District be required to post a notice incorporating the terms of this order. The notice must be signed by an authorized agent of the District indicating that it will comply with the terms thereof. The notice shall not be reduced in size, defaced, altered or covered by any other material. Posting this notice will provide employees with notice that the District has acted in an unlawful manner and is being required to cease and desist from this activity. It effectuates the purposes of 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; Pandol & Sons v. Agricultural Labor Relations Bd. (1979) 98 Cal.App.3d 580, 587 [159 Cal.Rptr. 584]; NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415] .)

ORDER

Upon the foregoing findings of fact, 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 Rowland Unified School District (District), its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Unlawfully implementing terms and conditions of employment which limit the Association of Rowland Educators' (Association) statutory right to bargain.

2. Denying the Association the right to represent its members in their employment relations with the District.

3. Denying the certificated bargaining unit employees the right to be represented by the Association in their employment relations with the District.

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

1. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all 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, defaced, altered or covered with any other material.

2. 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 the director's instructions.

Member Carlyle joined in this Decision.

Member Garcia's dissent begins on page 15.

GARCIA, Member, dissenting: I dissent and would dismiss the charge because I find no evidence in the file that the Rowland Unified School District (District) committed an unfair labor practice. Since this was a stipulated case, only the facts and evidence offered by the parties are available to decide the issue.

STIPULATIONS

By agreement, the parties submitted the case on stipulated facts and a series of exhibits with accompanying briefs which comprise the only evidence in this case.[1] They include the following items [alphabetical designators are mine]:

a. Association of Rowland Educators (Association) is the exclusive bargaining representative for an appropriate bargaining unit of classroom teachers and other certificated employees employed by the District;

b. The parties agree to waive their respective rights to a full-blown hearing pursuant to Public Employment Relations Board (PERB) Regulation 32207,[2] since they are submitting the matter on the basis of a stipulated record;[3]

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[1]The parties' stipulations state that, "The stipulated record shall consist of the stipulations contained herein and the documents listed below and enclosed herewith." (Charging Party's and Respondent's Stipulations, lines 3-4, p. 2.)

[2]PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

[3]PERB Regulation 32207 reads:

> Hearings. The parties may submit stipulated facts where appropriate to the Board agent. No hearing shall be required unless the parties dispute the facts in the case.

c. The parties shall argue their respective legal contentions through written briefs submitted to the administrative law judge (ALJ);

d. There is no factual dispute at issue in this case;

e. The particular negotiations were for the purpose of arriving at an agreement to succeed the parties' prior agreement dated September 1, 1989 through August 31, 1991; the parties met and negotiated from April 1991 until April 1992 when they declared impasse; the parties participated in two mediation sessions, following which the mediator certified the matter for factfinding; a factfinding panel convened and heard the parties on July 8, 1992 and, thereafter, issued its report of findings and recommendations on August 5, 1992; the Association representative and the District representative wrote partial dissents which were attached to the panel report; the District and the Association considered the factfinding report in good faith and held four post-factfinding negotiation sessions; a second impasse was reached on or about August 26, 1992; the District's governing board unilaterally adopted terms and conditions of employment at its meeting on August 31, 1992;

f. Following the District's unilateral adoption, the Association submitted its initial proposals for 1992-93 covering a large number of contractual items; through an exchange of correspondence,[4] the parties thereafter agreed to limit themselves to two (2) reopener items each for 1992-93; the agreement was arrived at with the express understanding that such agreement did not constitute a waiver of any of the Association's factual and/or legal contentions in connection with this case; it was agreed and understood that the Association was free to pursue its contentions in the instant unfair practice case;

[4]This correspondence is not part of the file.

g. Listed documents[5] were submitted which, along with the stipulations, constitute the evidentiary record in this case; and

h. The parties do not dispute the lawfulness of the adoption except for one issue which they submit to the ALJ:

> Did the District violate [EERA], as amended, by adopting terms and conditions of employment covering the period September 1, 1992 through August 31, 1993 thereby limiting [the Association] to two negotiation reopeners[6] for the 1992-93 contract year?
>
> [Emphasis added.]

DISCUSSION

Stipulation "h" quoted above is the sole issue in this case. I agree with the majority that the ALJ erroneously analyzed this as a case involving changed circumstances. The stipulated record in this case contains no evidence of changed circumstances. Also, contrary to the statement in the majority opinion that

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[5]The listed documents were:

Exhibit A: Rowland Unified School District document titled "Last, Best, and Final Offer" dated April 22, 1992

Exhibit B: Factfinding Report and Recommendations including dissents dated August 5, 1992

Exhibit C: Letter dated August 17, 1992 from Leon to Association, with attachment

Exhibit D: Board of Education agenda for August 31, 1992

Exhibit E: Procedures and Policies Regulating Terms and Conditions of Employment as adopted by the Board of Education on August 31, 1992

[6]As the ALJ correctly noted in his proposed decision, the term "reopener" assumes that there is a contract in existence. It refers to the right of the parties to "reopen" an existing contract. In this case, as there was no contract in place, the term is a misnomer.

"[t]he District . . . disputed the Association's right to negotiate more than two subjects, claiming the Association was limited to 'two negotiation reopeners'," the record contains no evidence of such a dispute.

PERB has long held that an employer's duty to bargain is triggered by an expressed demand to negotiate. (Newman-Crows Landing Unified School District (1982) PERB Decision No. 223.) I found no evidence in the stipulated record of a post-impasse demand by the Association reviving the duty to negotiate, nor did I find any evidence that the District refused to negotiate after the unilateral adoption of the limit.[7] Notably, the Association has not alleged either a demand or a refusal to negotiate during that time period. On the contrary, the record (stipulation "f") supports an inference that the parties subsequently engaged in correspondence and/or discussions making the issue in this case somewhat academic, since a limit was mutually adopted.

Even if the parties had not stipulated[8] to the lawfulness of the post-impasse unilateral adoption, it is clear under PERB precedent that the adoption could not have been an unfair labor practice because no duty to negotiate existed at the time in

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[7]Although the proposed decision does not use those exact terms, the ALJ appears to identify the "demand" as the moment "when the District received the Association's initial proposals for the 1992-93 school year," which imposed "an obligation to negotiate all such proposals, and not limit them to two reopener items." (Proposed Dec, pp. 8-9, fn. omitted.) He finds the "refusal" in the conclusory statement, "As it refused to meet this obligation, it violated [EERA]." (Id. p. 9.)

[8]Charging Party's and Respondent's Stipulations, lines 1-2, page 6.

question; no revival of the duty was otherwise established; and no evidence of a refusal to negotiate was alleged or shown.

Since the adoption of the last, best and final offer was lawful, and there is no evidence of its implementation after a demand and refusal to negotiate, the Association has not shown how the District's adoption of a limit constituted an unfair labor practice. Simply put, no evidence exists in the file to support a violation of the Educational Employment Relations Act.

CONCLUSION

The majority's new theory of waiver is irrelevant to a correct decision of this case. The parties stipulated that after impasse, they reached an agreement that reserved the Association's right to pursue a single issue. The Association has done so, and fails to show evidence of an unfair labor practice. Based upon my review of the statutes, pertinent case law, regulations, and the stipulated record in this case, I would reverse the ALJ's decision and order that unfair practice charge No. LA-CE-3235 be DISMISSED WITHOUT LEAVE TO AMEND.

APPENDIX

NOTICE TO EMPLOYERS
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-3235, Association of Rowland Educators v. Rowland Unified School District, in which all parties had the right to participate, it has been found that the Rowland 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 we will:

A. CEASE AND DESIST FROM:

1. Unlawfully implementing terms and conditions of employment which limit the Association of Rowland Educators' (Association) statutory right to bargain.

2. Denying the Association the right to represent its members in their employment relations with the District.

3. Denying the certificated bargaining unit employees the right to be represented by the Association in their employment relations with the District.

Dated: _____ ROWLAND 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.